

THE HAMLYN LECTURES

Twenty-ninth Series

**THE EUROPEAN
COMMUNITIES AND
THE RULE OF LAW**

Lord Mackenzie Stuart



THE EUROPEAN COMMUNITIES AND THE RULE OF LAW

by

LORD MACKENZIE STUART

*Judge of the Court of Justice of
the European Communities*

In 1962 in their judgment on the historic case of *Van Gend en Loos* the Court of Justice of the European Communities declared that:

"The Community constitutes a new legal order . . . for the benefit of which the [Member] States have limited their Sovereign rights."

In the 1977 Hamlyn Lectures, Lord Mackenzie Stuart, a Judge of the Court of Justice of the European Communities, examines this concept and seeks to trace its origin and to analyse its nature and its novelty. In particular he discusses the part played by the European Court in sustaining that "legal order" and the extent to which characteristics of the judicial function common to the six original Member States have determined the approach of the Court.

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THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She also travelled frequently on the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

“The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.”

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The Twenty-Ninth Series of Hamlyn Lectures was delivered in April 1977 by Lord Mackenzie Stuart at the Institute of Advanced Legal Studies in London.

J. N. D. ANDERSON,
Chairman of the Trustees.

April 1977

PREFACE

ONE of the pleasures of belonging to a collegiate court is the daily exchange of ideas—by no means always related to the case in hand. This means, however, that I can seldom be sure whether an opinion which I express is a personal contribution or only a gloss on someone else's view. Where I have found a written source I have acknowledged it but my first debt of gratitude is to my colleagues collectively for their initial support and continuing help since I arrived in the Grand Duchy. It goes without saying that I alone accept any criticism for the views expressed in these lectures. Collegiality is one thing—joint and several responsibility is another.

May I particularly express my thanks to Mr. J.-P. Warner, Q.C., who willingly gave his time to reading a draft with enormous care and who, apart from many useful suggestions, eliminated a crop of Gallicisms which had insinuated themselves into the text. To my Legal Secretary, Mr. Durand, barrister, I acknowledge an immense obligation. He has not only acted as a sounding-board for my own thoughts: he has, as always, been a fruitful source of original and stimulating ideas. To Miss Ewen, my secretary, is due my deep appreciation of her patience in transcribing palimpsest on palimpsest and of her tolerance when once more a clean copy was overlaid with scribble.

My final and heartfelt tribute goes to my wife, whose involvement in and knowledge of Community law long antedated mine. To her—and via her to Professor J. D. B. Mitchell of the Centre of European Governmental Studies at the University of Edinburgh—go my warmest thanks for keeping my interest in the law of the Communities alive at a time when it seemed of remote concern to the practising lawyer in the United Kingdom. Her constant critical encouragement has

removed countless ambiguities and infelicities from these lectures. Those that remain are mine. To say this, I know, is the commonplace of many a preface. In the present case, however, it is no more than simple truth.

A. J. MACKENZIE STUART

Court of Justice of the European Communities
January 1977

CHAPTER 1

THE COMMUNITY RULE OF LAW

INTRODUCTION

FROM an observation post in the Grand Duchy of Luxembourg there is a danger that one may take too Copernican a view of Community law. Perhaps the then Lord Chancellor, Lord Dilhorne, was right when in 1962¹ he said: "I venture to suggest that the vast majority of men and women in this country will never directly feel the impact of the Community made law at all." Nonetheless, it seems to me that the impact of Community law on daily life is increasingly evident. I do not mean only the effect of the dominant themes of the Treaty of Rome²: the removal of trade barriers; the prevention of distortion of international trade, the encouragement of workers to move from one country to another in search of employment and the adoption of a common policy in agriculture. I mean more. Community law has a habit of emerging in unlikely corners. Who at first sight would have thought that an advertisement in a Belgian newspaper for players who might be interested in joining an Italian football club or the issue by French Railways of a card entitling large families to reduced fares³ could give rise to problems of Community law?

Lord Denning's powerful simile—"dazzling" was Sir Leslie Scarman's adjective—is by now well known: "The Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."⁴ As if to underline its literal truth *The Scotsman* newspaper, as these words were being written, carried the headline "EEC directive may close our holiday beaches." As to the latter proposition I offer no comment, but the draft directive in issue appears to relate to a laudable attempt to provide for certain minimum standards of sewage discharge.

This proposal, in turn, is typical of the vast amount of unspectacular but valuable work being done by the Commission.

Its Annual General Reports may not be everybody's favourite bedside reading but they demonstrate the remarkable range of current endeavour to further the objects of the Treaty of Rome which include "the economic and social progress" of the Member States and "the constant improvement of the living and working conditions of their peoples." Not, of course, that all that is proposed will necessarily be implemented, not that all is necessarily apt or well conceived, but these Reports presented to the European Parliament provide an essential antidote to the emphasis placed by the press and television on political tension, national self-interest and inability to agree. Success, unless outstandingly spectacular, is much less news-worthy than failure.

Among the unspectacular achievements of Community Institutions I would include those of the Court of Justice of the European Communities which, in its decisions, has constantly underscored the basis of legal order on which the Communities rest. The foundation stones were securely laid long before I had the privilege of becoming a member of the Court, so that I can speak in terms of approval without, I trust, being thought immodest.

It is now more than 14 years since the Court of Justice of the European Communities, in *Van Gend en Loos v. Nederlandse administratie der belastingen*, announced that: "the Community constitutes a new legal order . . . for the benefit of which the States have limited their sovereign rights."⁵ The language of that case was Dutch and the expression a "new legal order" was first used by the Commission in their written observations—"*nieuwe rechtsorde*."

It has been suggested to me that "order" here means no more than "system"; that to speak of Community law as a "legal order" may risk confusion with "law and order" and that it would be better, rather, to invoke the well-known expression "rule of law." For that reason, and against my original inclination, I have used these latter words in the title of these lectures.

I agree that to the man in the street the words "legal order" may well suggest "law and order." To most people legal order

is the right to walk unmolested down a city pavement at night or the freedom to visit a pub on a Saturday evening without being carried out dead or maimed but this is only part of the spectrum. Legal order is indivisible. The right to be protected from physical injury is one end—perhaps the end most easily comprehended—but only one end of a vast range of rights and obligations which are the bedrock of existence in a non-totalitarian environment: the right to earn your living; to enjoy your property unmolested unless the law, established in due form, imposes necessary restrictions; to know that in your dealings with the State you will be treated fairly and according to the law. In short “legal order” even in the sense of “law and order” implies that you will not be the victim of arbitrary conduct on the part of those with whom you deal, be they either citizens or public authorities.

“Order” is, however, a word of many meanings. It is, I accept, frequently interchangeable with “system”—I so use it from time to time—but it has a wider sense, a sense of a system with defined characteristics and definite tendencies, the sense of Arthur’s answer from the barge, “the old order changeth, yielding place to new.”

Accordingly it seems to me that to translate “*rechtsorde*” as “legal order” is appropriate as well as sanctioned by use. It is my contention that the European Communities do rest upon a system which has its own characteristic—a system which is founded on the principles that those who administer the Communities are themselves subject to limitations imposed by law and that those who are administered have rights in law which must be protected. The importance of that legal order and the necessity of its preservation are the theme of these lectures, a legal order which seeks to assure to the individual certain rights which may be neglected by his national system and which protects him against the arbitrary use of Community power. As and when the sphere of Community action enlarges, so the more fundamental will this concept of legal order become.

I use the words “legal order” rather than “new legal order.” As I have mentioned, it is more than 14 years since the decision in *Van Gend en Loos* and it is 22 years since the Court of

Justice, then simply the Court of Justice of the Coal and Steel Community, delivered its first judgment. In the interval it might be thought that the adjective "new" had lost some of its weight, but the concept of a "new legal order" still arouses suspicion in the minds of many.

I agree that the announcement of a new legal order recalls more the oratory of a Jacobin demagogue than the measured statement of a court of law. Taken in the abstract the words have a sinister ring. They suggest that traditional values are to be swept aside and in their place is to be put some novel, and for that reason suspect, system inspired by unknown motives and directing our lives along an uncharted path.

If explanation can ever disarm suspicion, then that also is my intention.

What, then, I would wish to do is to examine the concept of legal order within the context of the European Treaties, seeking, in the first place, an answer to the question why the Communities should ever have been conceived in terms of law and wherein, in particular, lies the novelty. Thereafter I should like to discuss what seem to me to be some of the positive achievements of the legal order and the means by which they have been obtained. This, in turn, involves saying something about the approach of the Court of Justice to its task and, indeed, something of the nature of the judicial process as applied to the law of the Communities. Thereafter, in the hope that you are prepared to accept that there has in fact been positive achievement, I should like to indicate what seem to me to be some of the obstacles to the maintenance of momentum. Finally, and perhaps rashly, I should like to look to the future in the light of the repeated contention that the existing Treaties are now inadequate in the face of current pressures. Here again, I shall seek to stress the importance of the Community legal order as a basis for all future development.

In part, at least, I must traverse ground familiar to the expert. I am unrepentant. The volume of specialist writing on Community law is already vast and daily deposits itself on my desk, thick as autumnal leaves in Vallombrosa, but, in general, it is read only by other specialists—a situation which

reminds me of the apocryphal village entirely inhabited by Chinese washerwomen who earned, as it is said, "a precarious living by taking in each other's washing." The objects of the Hamlyn Trust envisage a wider audience.

The subject-matter of these lectures must, however, be seen in its proper perspective. It is all very well to talk of an order based on law and to discuss the Court's function as the ultimate arbiter of Community legality, but this avails us little if the very existence of the Communities is threatened. I do not speak of the failure, from time to time, of Member States individually to fulfil their responsibilities or even of their collective failure to carry the existing Treaties to full fruition, real though these may be. I have in mind something more fundamental. The European Communities rest on the concept that Member States are free and democratic societies which share the belief that relations between citizen and state should rest upon the rule of law. The threat to that premise by collectivist forces, internal and external, from right and left, should be so well known as to make any mention of it superfluous but experience suggests that it cannot be stressed too often. I have no intention of turning the Hamlyn Lectures into a political tract, but I would emphasise that if these forces are not withstood the day may soon arrive when both the new legal order and the Communities themselves become irrelevant.

Conversely, and more optimistically, it must never be forgotten that the creation of the first of the Communities, the Coal and Steel Community, by eliminating some of the most enduring international tensions of that epoch, played a vital part in averting the danger of a third world conflagration. Provided that the Communities, as they now exist or as they may eventually become, can fulfil their purpose of maintaining a stable economy and improving the quality of life for their citizens, the chances of resisting the collectivist threat will be greatly enhanced.

On the other hand the full benefit of the Treaties cannot be achieved unless the Community power-house—at present the Commission and Council in combination, perhaps soon to be reinforced by a more effective Parliament—is allowed to use its

generating capacity. This in turn must be fuelled by the desire of the Member States to work together in the way which the framers of the Treaties envisaged. The Court of Justice of the European Communities is, I believe, an effective instrument for the formulation and furtherance of the existing legal order, but only in relatively narrow limits, as I shall endeavour to show, can the Court, consistently with a proper approach to the judicial function, repair legislative inaction or neglect by the Community institutions or by the Member States.

A LEGAL ORDER

The first question must of course be, why should we speak in terms of a legal order? Why should a court of justice be considered an integral part of the workings of an economic community? Might it not be said that if a group of sovereign states choose to enter into an agreement for certain defined purposes, matters should be allowed to run their course according to the traditions of classic international law; that the contracting parties should be free at any time by agreement to alter the rules of the game; and that if a dispute should arise which cannot be settled by political negotiation, then means exist of resolving it either by a reference to some permanently established tribunal, such as the International Court of Justice at The Hague, or to some ad hoc arbitral commission?

Might one not indeed say, in words attributed to General de Gaulle, that in such a situation, "There is a hierarchy of values: necessity in the first place, politics in the second, and the law only in so far as one is able to respect it"?⁶

In particular, the European Economic Community, like the Coal and Steel Community before it, is essentially a system of international integration in selected sectors of the economy. These are topics which do not come normally within the purview of a court of law. Could it not be maintained that it was only adding a further dimension of difficulty to impose a legal superstructure upon these essentially economic provisions? Why create the apparatus of a court of justice and place upon it as its fundamental task that of ensuring that "in the

interpretation and application of this Treaty the law is observed" ? 7

My friends on what I call mainland Europe would give a short reply to this question, saying that only a Briton, unused to a coherent system of administrative law, would be foolish enough to ask such a question. The basis of this counter-view, which would, I suspect, be so self-evident to the six original members of the Community as not to require saying, is that, having once created an administrative authority with power to take administrative decisions affecting individual interests, the concept of such an authority not being controlled by an independent tribunal would be sufficiently outrageous as to be positively offensive.

If, nevertheless, one is to be brash enough to persist in these questions, the fundamental reasons for the answer can only be found by a process of looking back in time.

As you know, by signing the Treaty of Accession in 1972 the United Kingdom undertook to become a member not of one Community but of three, that is to say the Coal and Steel Community established by the Treaty of Paris which came into force in July 1952, and the European Economic Community and Euratom created by the Treaties of Rome which came into force on January 1, 1958. Since the Merger Treaty of 1967 all three Communities have been administered by the same Commission, subject to the control of the same Council of Ministers, and answerable to the same Parliamentary Assembly.

I emphasise these well known facts because the Court of Justice is also an institution common to all three Communities—it is the Court of Justice of the European Communities, and I emphasise the plural. Moreover it is perhaps worth noting that the Court was the first of the institutions to become common to all three Communities.

This arose because both Treaties of Rome provided for the establishment of a Court of Justice in terms broadly similar to those which had established the Court of Justice of the Coal and Steel Community. In fact from the beginning of the negotiations in 1956 it was envisaged that for the two

projected Communities there would be but one court and this was so expressed in a Convention on certain Common Institutions annexed to the Treaties.

The same Convention, by Article 4, stated that upon taking up its duties the single Court of Justice should take the place of the Court of the Coal and Steel Community. Nevertheless the new Court was to continue to exercise the jurisdiction of the former, under the Treaty establishing the Coal and Steel Community in accordance with the provisions of that Treaty. There are many differences of detail and some of substance between the powers and duties of the Court of Justice when it is acting under the provisions of the Treaties of Rome and when it is acting under the Treaty of Paris but what is important is that one may see in the present Court a continuous history dating from 1952. Accordingly, if one is to ask why a court was regarded as essential under the later treaties the answer must be found in the thinking of those responsible for the original Treaty of Paris.

In particular it is interesting to compare Article 31 of the Treaty of Paris with Article 164 of the Treaty of Rome. Article 31 of the Treaty of Paris enacts that "the Court shall ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed." This demonstrates clearly the ancestry of Article 164, which as I mentioned a moment ago, states "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." These words provide a clear link between the present Court and the original Court of the Coal and Steel Community. That is why I say that in our search for the underlying concept of a court as an essential part of a grouping whose primary aims are economic and administrative integration we must pay heed to the approach of the "founding fathers"—to use a somewhat overworked formula—of the Coal and Steel Community. There are two sources to be considered. First, the background to the Treaty itself and secondly the tradition of legal control over administration which had been developed in each of the six original Member States.

(a) *The background to the Treaty of Paris*

There are, of course, no *travaux préparatoires* in the strict sense of preliminary documents agreed by all the contracting parties, or if they do exist they are not publicly available. The thinking behind the Treaty of Paris can only be gleaned from other sources.

The most important of all is, of course, the famous Schuman Declaration of May 9, 1950. You will remember that on that date Robert Schuman, then France's Foreign Minister, at a press conference in Paris, outlined for the first time the idea of establishing what subsequently became the Coal and Steel Community. His radical and revolutionary proposition to put the whole of French and German production of coal and steel under a common High Authority was remarkable in itself and has to be seen in the context of the then recently ended Berlin Blockade and the mounting intensity of the war in South Korea.

Of the general content of the Schuman Declaration I need say little, except perhaps once more to repeat the opening words "World peace cannot be assured except by creative effort commensurate with the dangers that threaten it" and the well known passage: "A United Europe will not arise overnight nor by means of an all-embracing constitution: it will only arise through specific projects providing a solid foundation of fact."

What in the present context is important about the Schuman Declaration is not so much the principles it enunciated but the institutions it envisaged to give those principles effective form.

As you may recall, what might broadly be called executive power was to be vested in a High Authority answerable to a European Assembly consisting of members chosen from the ranks of the national parliaments. Despite the power conferred upon the High Authority it was to be required on most matters of principle to consult with a Council of Ministers representing member governments. Finally, there was to be a court which should control the actings of the other institutions.

The picture, then, which we have from the Schuman Declaration—and astonishingly, much of it holds good today, 27 years and three major treaties later—is of the integration across

national frontiers of a vital part of the European economy, a sector administered and controlled by institutions each with its defined powers but each exerting, in theory at least, a balancing force on the others, the whole subject to the rule of law and to the final arbitrament of a court.

The emphasis on institutions is not unexpected. The co-author and principal instigator of the Schuman Declaration was M. Jean Monnet, another of the dominant European figures of that epoch, of whom it has been observed:

“ Monnet’s own faith in the power of institutions to affect the behaviour of men and in the importance of such a process for achieving political ends is witnessed by his famous quotation from the Swiss philosopher Amiel⁸:

‘ Each man’s experience has to begin afresh. Only institutions continue to become wiser, they accumulate collective experience and, from this wisdom and experience, those who are submitted to the same rules will see not only their nature change but a gradual alteration in their very behaviour.’ ”⁹

Without the necessity of your having to share to the letter Amiel’s view of the cumulative sagacity of institutions, the quotation explains the insistence on a clearly defined institutional structure. What is even more important for our purpose is the conviction expressed from the beginning that the Community institutions, however great their garnered wisdom and experience, should be subject to judicial control. As the Declaration puts it, “ Appropriate measures will assure that there are the ways of appeal which may be necessary against the decisions of the High Authority.”

This brief assertion was soon to be elaborated. M. Monnet in his *Mémoires* has described in absorbing detail the negotiations leading to the Treaty of Paris.¹⁰ A conference of the Six began work in Paris on June 20, 1950, and by August 5 agreement had been reached by the heads of the national delegations on the characteristics of each of the institutions. In particular it was agreed to establish a court very much along the lines as we know it today. According to a contemporary report,¹¹ the

Court of Justice was to be composed of persons of total independence who were not to retain any tie with their Member State. Its role was to ensure that in the interpretation and application of the Treaty the law would be respected. In short "Its essential function was to guarantee the proper functioning" of the other Community Institutions. Nonetheless the risk that the Court might usurp the functions of the latter was to be avoided. The separation of powers was to be retained, but, with this qualification, the Court might annul decisions of the High Authority or the Council, give declaratory judgments or even, in the case of breach of the Treaty, award damages.

The same emphasis on the necessity of legal control is to be found in the negotiations which preceded the Treaty of Rome. Indeed in the Report to the Foreign Ministers of the Six prepared after the Messina Conference of 1955 this is affirmed as one of the basic principles on which the Common Market should rest.¹²

These glimpses into the thinking which lies behind the role of the Court as defined by the Treaties of Paris and Rome tell only half the story. For the other half one has to go back much further into history, but not, I trust, in any mere spirit of antiquarian research. As Sir Sacheverell Sitwell once aptly said¹³—though in a very different context—"Learned opinion is always digging for origins and losing touch while doing so with the truth that nothing is original. It is not the derivation but the evolution that is the mystery."

(b) *Control of the administrative acts in the original Member States*

The mysterious evolution that I should like to mention for a moment is that of the French Conseil d'Etat during the nineteenth century and indeed to the present moment, although full justice, even were I capable of it, cannot be done to it in a few words. In any case the broad lines of that evolution will be familiar to many.

The starting point is Article 12 of the Law of August 1790—which is still in force—"Judicial functions are distinct

and will always remain separate from administrative functions. Judges in the civil courts may not . . . concern themselves in any manner whatsoever with the operation of the administration.”

This article would, at first sight, appear to license administrative tyranny but its purpose becomes intelligible when seen against the history of the *ancien régime* during which the most powerful courts, the *parlements*, and in particular the Parlement de Paris, had been the chief obstructors of administrative reform. The theoretical basis for the prohibition against the ordinary courts meddling with administration was to be found in a strict separation of administrative and judicial powers. Thus, it was reasoned, any control must come from within the executive itself, although the logic of this approach is not immediately apparent to one trained in another system. After all, the separation of powers does not always require a separation of courts.

Be that as it may, it was realised under the Consulate that there must be some check available on the unlimited power of the administrator. This came with the establishment in 1799 of the Conseil d'Etat, which was charged initially with giving advice to the government of the day on administrative problems but which was soon provided with a section, the *section contentieuse*, expressly designed to cope with disputes concerning administrative matters.

At first its jurisdiction was of an advisory nature only, the Head of State not being bound to accept the advice tendered—as indeed is the case today with the Raad van Staat in the Netherlands and, except by convention, with our Judicial Committee of the Privy Council. In addition the person who complained of maladministration had first to address himself to the ministry concerned and could only reach the Conseil d'Etat on appeal from the Minister.

The passing of the nineteenth century saw both these restrictions removed and the development of a body of case law setting forth a coherent group of rules by which the executive must regulate its affairs in the interest of good administration and for the protection of the individual, a development which continues to the present day. Indeed so successful was the

Conseil d'Etat and so great the pressure on it that in 1953 its first instance jurisdiction was transferred to approximately thirty local *tribunaux administratifs* which continue to apply the same principles.

In the words of M. Maurice Lagrange, who was one of the draftsmen of the Treaty of Paris and who as one of the first Advocates-General at the European Court was the formulator of so many classic pronouncements of Community law, these rules require that, "in each case the public interest and legitimate private interests should be balanced against each other: that, moreover, is one of the fundamental concepts of administrative law, and is without doubt the chief justification for the very existence of administrative courts."¹⁴

If my French friends and colleagues will forgive me, logic and paradox are sometimes not far apart in their system—or so it seems to an uninstructed observer—but I take confidence from the fact that my impression is shared by at least one French writer.¹⁵ Certainly it seems paradoxical, in the name of separation of powers, to confide to the executive the task of judging itself. Certainly also, in historical terms, it is paradoxical that a constitution which still provides that the courts shall have no powers over the administrative functions should subject the administration to judicial scrutiny and control as effective as any in Europe. I say "as effective as any" since I am of the view that all judicial scrutiny has certain inherent limitations but, of that, more later.

The relevance of the Conseil d'Etat, and its pre-eminent position in France, to the Court of Justice of the Communities is that the tradition whereby all administration is subject to the control of a court was second nature to those concerned with framing the Treaties of Paris and Rome. To an equal extent, or to an extent only different in degree, the distinction between public law and private law was and is part of legal thinking in the six original Member States, each of which had a system of control over administrative actings analogous to, or in some cases derived from, that exercised by the French original.

While the technique of this control varies substantially from one original Member State to another, "This diversity in fact

conceals a close relationship between the laws of the six States. From an ideological standpoint all have been powerfully influenced by the French Revolution and Empire and by the *libéralisme bourgeois* of the nineteenth century.”¹⁶

In performing its task of controlling Community administration—and this, of course, is far from its only duty—the Court of Justice is an administrative court with a function which corresponds to that of the administrative courts to be found in all the original members. Not, I hasten to add, that the approach, still less the substantive rules, of any one system form part of Community law, but in seeking materials to construct a Community solution for the case in hand the systems of the original Member States have proved a valuable inspiration.

THE “NEW” LEGAL ORDER

What then, is *new* about the legal order instituted by the Treaties?

First one must look at the nature of the Community itself as it might be described in conventional legal terms. From here on for simplicity, unless the context otherwise requires, I speak of the Community in the singular. The Community is not a “state,” at least in any traditional sense of the word. Although the Treaties give it legal personality, it lacks the principal characteristic of a state, which is the ability to act in all matters not specifically excluded. The Community legislative machinery and administration are confined to tasks specifically attributed to them.¹⁷ As Professor Dagtoglou has succinctly observed, the Community is “neither a superstate nor a quasi-state nor (and this is important) a federal state.”¹⁸ This last point is worth underlining. The Treaty of Rome is not a federal constitution, although some would like to see it so. Even if all the provisions of the Treaty were to be carried into effect, even if total observance of the Treaty should take the place of partial breach, even if the slate were to be wiped clean of the so-called Luxembourg Agreement of 1965, one would end up with something far short of a federal structure as that is commonly understood. It is true that nothing in the Treaty is

inconsistent with development towards federalism, and indeed there is much that is compatible with it. But compatibility alone cannot bring about a transmutation of substance.

On the positive side, however, the Treaty has created something far more than has ever in the past been achieved by agreement between sovereign states. The word most used to describe the process is "integration."¹⁹ But this word "integration" in turn requires explanation. There are limitations set by the aims of the Treaty itself.

The broadest statement of the purposes of the Treaty is to be found in the Preamble. After an initial reference to "an ever closer union among the peoples of Europe" and after reciting the aims, which I mentioned earlier, of ensuring "the economic and social progress of their countries by common action to eliminate the barriers which divide Europe" and "the constant improvement of the living and working conditions of their peoples," the Preamble calls "for concerted action in order to guarantee steady expansion, balanced trade and fair competition." We find a recognition of the difficulties encountered because of differences between various regions, a desire to contribute to the progressive abolition of restrictions on international trade and, lastly, a wish "to confirm the solidarity which binds Europe and the overseas countries" and "to ensure the development of their prosperity in accordance with the principles of the Charter of the United Nations."

The means by which these aims are to be achieved, while the Treaty still states them in very general terms, are more precise—the establishment of a customs union, the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital, the adoption of a common policy in the spheres of agriculture and transport—I will not weary you with the whole catalogue—but it is within these limits that integration must be understood and it is within these limits that the legal system exists to assure the rights which that integration engenders. Within these limits, nonetheless, the result, to quote Professor Nicolaysen,

"is an autonomous legal system, which is intended to give the Community the capacity to act internally and extern-

ally, which provides it with fundamental attributes of rule of law and which represents, through its general applicability and through the regular involvement of national courts, an essential element of integration.”²⁰

Underlying this generalisation are two principles which demonstrate the essential novelty of the concept of integration as defined above. The first is usually referred to as the primacy of Community law and the second is normally called “direct effect.” So much has been said about these concepts that I hesitate to add to the existing mass, but their importance in the Community legal order is paramount.

(a) *Primacy of Community law*

From time to time a national judge may find himself faced with a provision of his own law which appears not to be compatible with Community law covering the same terrain. Sometimes this event is expressed in terms of conflict, sometimes in terms of the primacy of Community law, but it is, I think, important not to overdramatise the situation. A year or two ago I wrote

“there has been much theoretical discussion of the problem of the effect to be given by a national judge to a law deliberately promulgated . . . subsequent to and in direct opposition to a Community regulation or, indeed, to the Treaty itself. I do not propose to deal with this improbable situation. If such a case arose I suspect the solution would have to be a political and not a legal one, since deliberately to legislate against Community law would demonstrate a total absence of the political will on which the Community must rest.”

I still consider that in such circumstances the solution would be achieved at a political level, without the matter being brought before the Court, since presumably the Court’s answer would be so obvious as not to demand a decision and it has been rightly said that “the political will of the Member States . . . cannot be enforced by legal action.”²¹ For the most part, however, discrepancies are the result either of inadvertence or

of the inability of the national legislative machinery to ensure that differences between Community law and older domestic law have been eliminated. It is of course for the national judge in the first place to see whether within the limits of the powers open to him his national law may be interpreted in a sense which will achieve compatibility. If in the last resort and perhaps after a reference to the Court of Justice at Luxembourg by way of the machinery provided for by Article 177, the discrepancy is unavoidable, then the Community solution must prevail. This is sometimes called the supremacy of Community law, but for my part I dislike the word "supremacy." There is a suggestion in that word of the commander giving orders, of the Austinian superior or of someone who speaks *de haut en bas*, a suggestion of a court sitting on its own particular cloud equidistant from all the Member States and some 5,000 metres above them, issuing edicts which override national traditions and ignore national susceptibilities. Nothing could be further from the truth. The reason why it is essential to adopt the Community solution is not because of any real or pretended existence of a supranational hierarchy. It arises not from any intrinsic merit of the Community rule in question, but from the very nature and aims of the Community. As was said in the famous *Costa v. ENEL* case ²²:

"The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty. . . . The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent if they could be called in question by subsequent legislative acts of the signatories."

This was well understood by M. Monnet, who in the series of drafts of his proposals to M. Schuman in 1950 excised the adjective "supranational" which had been applied to the High Authority—a word which, he says, "did not please me and never has." ²³ In its place he affirmed explicitly the necessity that the decisions of the High Authority should be obeyed in the Member States. A distinction without a difference? I

think not. It is the reason for the obedience which is of the essence, not the obedience itself. Only by uniform and simultaneous application of Community rules can the objects of the Community be achieved.

The rate at which and manner in which the Member States, old and new, have accepted this principle would take too long to narrate here. Although not all the difficulties are yet resolved, it is sufficient to say that, for the most part, the principle has been accepted without question and in the case of the United Kingdom almost without publicity. It was only by commendable assiduity that the *Common Market Law Reports* noticed the case of *Haug v. Registrar of Patent Agents*.²⁴ Herr Haug, a citizen of the Federal Republic of Germany, applied to sit the examination to become a United Kingdom patent agent. The current Patent Agent Rules, which take the form of a statutory instrument, approved by Parliament, say that only British subjects or citizens of the Republic of Ireland may be admitted to these examinations. Herr Haug's application was accordingly refused. The Assistant Comptroller of Patents, sitting in his judicial capacity to hear appeals from such a refusal, had no apparent difficulty in applying the principle against discrimination based on nationality, first to be found in Article 7 of the EEC Treaty and confirmed elsewhere. He decided in favour of Herr Haug and held that the statutory rule "is therefore to be construed as having no effect against nationals or citizens of the other seven Member States of the Communities."

(b) *The principle of "direct effect"*

The second novel and unique feature of Community law is that commonly referred to as "direct effect," that is to say the concept that Community law can in appropriate circumstances create rights in favour of individuals which national courts must protect. In the case of Regulations made under the Treaty of Rome there was no real difficulty. Article 189 provides, in terms, that a Regulation has general application. "It shall be binding in its entirety and directly applicable in all Member States." It is a relatively short step from this to

say that where a Regulation expresses a well-defined right in favour of well-defined categories of persons or where it imposes an equivalent duty it can be invoked before a national court. But what of the Treaty itself when its terms appeared to do the same? The problem first arose in the case of *Van Gend en Loos*, which I have already cited. In view of the importance of that decision may I be forgiven for spending, once again, a few minutes on it.

Article 12 of the Treaty provides that, "Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect and from increasing those which they already apply in their trade with each other."

The case concerned the importation into the Netherlands of a substance with the unlovely name of "aqueous emulsion of urea-formaldehyde." Under an earlier customs classification this product bore import duty at the rate of 3 per cent. but by a reclassification made under Dutch law after the Treaty of Rome had come into force the rate was increased to 10 per cent. The importers, Van Gend en Loos, appealed against the imposition of this increase to the *Tariefcommissie*, the Dutch customs court, invoking the standstill provisions of Article 12. In turn the *Tariefcommissie*, using the procedure of Article 177 of the Treaty, put the following question to the Court of Justice of the Communities: "Whether Article 12 of the EEC Treaty has direct application"—as it is said to do by the plaintiff in the main action—"in other words whether nationals of Member States can, on the basis of the Article in question, lay claims to individual rights which the courts must protect?"

Interest was considerable. Not only the parties to the action before the national court, and, as is normal in these proceedings, the Commission, submitted written observations, but so did the governments of the Netherlands, Belgium and the German Federal Republic. Everyone agreed that Article 12 imposed an obligation on Member States. If a Member State failed in that obligation the Commission could take proceedings against the offender under Article 169. But, said all the intervening governments, there the matter ends. The Advocate-

General, Herr Roemer, agreed. In a careful analysis of the wording of Article 12 he pointed out that the duty imposed by Article 12 is addressed to Member States, not national administrative authorities: unlike other provisions in the Treaty it does not employ words such as "prohibit" or "without effect." Even the content of the obligation by its nature was a complex one in a field where, during the transitional period, Member States retained a large measure of competence which "required them by a continuous series of measures to adapt their customs law and regulations to the development of the Common Market." A very persuasive argument, indeed, but the Court thought differently. In words which have become so well known that I hesitate to repeat them, the Court declared that:

"The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens."²⁵

Thus the Court was able to say

"The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon

individuals as well as upon the Member States and upon the institutions of the Community."

My reasons for quoting these well known words are twofold. In the first place they mark what is, at least at first sight, an extremely bold step in legal thinking and one which has enabled the Court with much less difficulty to ascribe "direct effect" to other provisions of the Treaty.

In the second place they provide an exceptionally clear example of a judicial interpretative technique which, when an appropriate occasion has arisen, the Court has not hesitated to use.

The boldness lies in the affirmation that the Treaty had created in each of six states, whose constitutional law relating to the internal effect of international obligations differed widely, rules of substantive law enforceable by private citizens. To cite a phrase which has been much used in the case law of the Court, the Treaty had created, by clear implication, rules of law "apt to confer on the individual rights which the national courts have an obligation to protect."

Moreover, said the Court in *Van Gend en Loos*, the measure of that right was the difference between the rate payable at the date when the Treaty came into force and the rate actually charged. The importer was to be placed on the same footing as if there had been full observance of the Treaty.

By the time that the United Kingdom joined the Communities this doctrine was accepted in all the original Member States and its reception by the new Member States was inevitable. Section 3 (2) of the European Communities Act requires, accordingly, that judicial notice shall be taken not only of the Treaties and subordinate Community legislation but also of "any decision or expression of opinion by the European Court" on the meaning and effect of the Treaties.

The judgment in *Van Gend en Loos* did not escape criticism at the time it was pronounced nor does it even now.

One of the most recent and most cogent comes from Professor Hamson—the mention of his name together with the adjective "cogent" is all but tautologous.²⁸

His argument, if he will allow me to summarise what is already tightly wrought, is that in *Van Gend en Loos* the Court ignored the basic framework of the Treaty which was that the objects therein stated should be filled out by subsidiary legislation, primarily, no doubt, by means of directives and regulations. Only the latter should have "direct effect," in the sense of creating enforceable rights before a national court, since only in Article 189 is there any mention of a Community norm being "directly" applicable. Unless embodied in a regulation the obligations imposed by the Treaty rest upon the Member State alone and in the event of those obligations not being observed it is for the Commission or another Member State to take appropriate action under Articles 169 and 170—involving as this does prior warning and certain extra-judicial steps.

More especially, in a case where a Member State is in breach of a Treaty obligation, the court is not entitled to proceed on the view that the obligation in question must be treated as fulfilled. Professor Hamson was kind enough to refrain from any comparison with Koko's proposition to the Mikado: "When your Majesty says 'Let a thing be done' it's as good as done—practically, it is done—because your Majesty's will is law." But he refers to the "critical step":

"It [the Court] must decide that it will deal with the situation *as if* the direction had been observed. This does not mean that the Court is suffering from a hallucination: it means that the Court has decided to sever the legal world—the world in which it operates—from the world of what are called real or actual events. There is nothing particularly shocking in such a severance—it happens frequently enough and it may even be necessary for the full flowering of a legal system."

Here I agree, although A. P. Herbert's Lord Mildew was no doubt right in observing that "There is too much of this damned deeming."

Professor Hamson, however, is prepared to accept the attitude of the Court in *Van Gend en Loos* since in the circumstances of that case the duty imposed by Article 12 was

of a negative nature and it was comparatively simple to ascertain what would have been the correct result had the Treaty obligation been fulfilled.

"In 1963 the Community was not developing as rapidly and as happily as the founders had expected. It would be a considerable encouragement if it were made manifestly to appear that at least one organ of the Community was in business and meant to do business. The Court by its action would demonstrate that the Community was in effective operation, and that in the most striking way—by giving a direct remedy to the individual in front of the courts with which he was familiar, and vindicating that remedy in the name of the Community."²⁷

Professor Hamson adds: "The decision in *Van Gend en Loos* is accordingly justifiable and may be justified by the fillip it gave to the development of the Community. But it is of no less importance that the Court should not become more royalist than the King."

I do not propose to tackle Professor Hamson head on. Apart from the danger intrinsic in such an attempt his kindly reproof is too well reasoned not to be well pondered.

Of the decision in *Van Gend en Loos*, then, I would say only this. The choice taken by the Court some 14 years ago seems justifiable by the logic of the decision itself. Indeed I would hesitate to justify it on the grounds suggested by Professor Hamson. Personal conviction is a chancy fuel for the judicial engine. It can too easily cause the bearings to run hot and seize up. That the decision was a difficult one is obvious from the division of opinion between the Advocate-General and those representing the intervening Member States, on the one hand, and the Court on the other but, however it may be justified, I remain convinced that the decision runs closer to the dialectic of the Treaty of Rome—if I may be forgiven so nebulous an expression—than the alternative.

If a Regulation, an instrument of secondary legislation, is, as all agree, capable of creating "direct effect," so much more should the primary instrument when its construction so admits. But there remains a more objective observation. It is this.

When the Treaty of Accession was being negotiated all was in the melting pot. By 1971 the concept of direct effect had been extended to approximately 10 other articles of the Treaty. If it had been felt that the Court's approach was wrong then this would have been the appropriate time to put matters right.

Treaty amendment—other than in formal detail—is, I accept, not an easy task. Nonetheless, such an opportunity came in 1972 and it appears to me that the effect of the Treaty of Accession and the European Communities Act has been to homologate, by the Member States as such and by the national law of the United Kingdom respectively, the principle that the Treaty of Rome is in appropriate circumstances capable of creating rights directly enforceable before the courts of Member States.

THE LIMITS OF JUDICIAL POWER

In affirming that there is a Community legal order and that it is designed to apply uniformly in all the Member States, preempting if necessary a contrary national rule, and in showing that it is capable of creating rights which must be recognised by national courts, it must not be thought that I also maintain that all existing ills are thereby cured and that for the future all contagion is avoided. Far from it. For example, Article 30 of the Treaty of Rome provides that "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States." The Court has frequently confirmed the direct effect of this provision but the cynic may ask with some justification whether this has in any way reduced the queue of lorries at every border crossing point. To which there can only be the cautiously optimistic answer "Not yet, perhaps, but it will." The rule that goods may move freely between Member States is itself hedged with exceptions which may be justified "on grounds of public morality, public policy or public security" and by a number of more specific reasons. National habits, national interest and the inherent conservatism of any customs organisation fasten on these exceptions. Gradually, by patient action on the part of the

Commission, order is being created out of the former confusion but it is slow work. A statement of principle by the Court cannot, for the most part, replace skilful administration at national level and wise co-operation within the framework of the Community.

I say "for the most part" because there have been occasions, as in *Van Gend en Loos*, when the Court has given an interpretation of Community law which has unblocked negotiation or prevented a Member State from maintaining its individual and isolated position.²⁸ Sometimes, however, what seem to me to be extravagant claims are made about the work of the Court as an instrument of European integration. No doubt opinions may differ but may I quote, not for the first time, Professor Mitchell's observation, "One may ask whether there is not a risk of asking or expecting too much of the European Court or of being complacent because of its existence."²⁹

The Court's task is to uphold the Community legal order but there are restrictions imposed by the nature of the judicial function itself. Neither the Court of Justice nor any other court may usurp the role of the legislature or the executive. To this topic I return. But even this qualification requires qualification.

In considering the Community legal system it is unsafe to draw too close an analogy with any one national system, particularly that of the United Kingdom. Within the Community powers are divided in a manner which does not correspond to what we know in Great Britain. Here, as Lord Devlin has recently reminded us,³⁰ the relation between the courts and the executive takes place against the knowledge that the government of the day, provided it commands a substantial majority in Parliament, can without difficulty achieve the reversal of a judge-made rule. Amendment of the Community Treaties is in a wholly different dimension, requiring the assent of not one parliament but nine.

Moreover, although we are dealing with a Community and its progressive integration, we must not forget that we are also dealing with independent Member States each with its own national interest. It is only realistic to recognise that

the Community legal order, to be effective, must also accommodate legitimate national requirements. The question must always be, what is legitimate? It is in this field, perhaps, that the work of the Court in developing Community law has been most controversial. According to some the Court goes too fast and too far; to others, not far enough. There are those who have protested vehemently and sometimes abusively on the stand taken by the Court in respect of attempts to partition the trading area of the Community by the use of trade marks and patents. On the other hand there are those who, when the Court, recognising that principles of legal certainty required that parties who had acted on the faith of contracts long since completed should not be required to reopen past transactions,³¹ accused it of compromising its integrity and not pressing the doctrine of direct effect to the ultimate of its logic. One may perhaps take comfort from the thought that if there is equally vibrant criticism from opposing quarters the correct mean has probably been achieved.

Both categories of criticism, however, overlook one important feature of the Community legal order, and it is on this that I would end this chapter. As Mr. Andrew Shonfield has shrewdly observed

“In Britain legal fact generally follows on social practice. The Community’s laws on the other hand make sense for the most part because they are seen as pieces of a larger design of common European policies, which is aimed at by member countries, but which will only become a fact at some future date.”³²

In the United Kingdom statute law has, doubtless, now become more important in many fields than the common law but even when statute innovates it does so against a common law background and reflects evolved social need. The Community, however, to quote Mr. Shonfield again, is a “political construction which emerges out of a deliberate act of will.” Accordingly the Community legal order is of a different kind. It would be untrue to say that it has no forensic history but it is a history with a difference. Essentially it is a system, which starts from a written base and it is on this base that it con-

tinues to build. The judicial techniques used in that act of construction may be familiar but they must adapt to new materials and to a new foundation.

Notes

¹ 243 H.L. Deb., No. 115, col. 420.

² To avoid unnecessary repetition I use "the Treaty of Rome" as meaning the Treaty establishing the European Economic Community. Except where it is essential I do not make a separate reference to the Euratom Treaty.

³ Case 13/76, *Gaetano Dona v. Mario Mantero* [1976] E.C.R. 1333; [1976] 2 C.M.L.R. 578 and case 32/75, *Christini v. SNCF* [1975] E.C.R. 1085; [1976] 1 C.M.L.R. 573.

⁴ *Bulmer Limited and Anor. v. Bollinger* [1974] Ch. 401; [1974] 2 C.M.L.R. 91 and also Sir Leslie Scarman himself: *English Law—The New Dimension*, 26th Hamlyn Lectures, p. 25.

⁵ Case 26/62 [1963] E.C.R. 1 at 12; [1963] C.M.L.R. 105.

⁶ I owe the quotation to my colleague, Judge Touffait, formerly Procureur général près la Cour de Cassation of France, see Dalloz, *Chronique 1976*, p. 167.

⁷ Art. 164 of the EEC Treaty.

⁸ Amiel, Henri Frédéric, Geneva, 1821–81.

⁹ David Coombes, *Politics and Bureaucracy in the European Community* (London, P.E.P., 1970), p. 21. I have translated the passages from Amiel.

¹⁰ *Mémoires* (Paris, 1976).

¹¹ *Report on the Work done at Paris by the Delegations of the Six Countries June 20–August 10, 1959* (Library of the European Parliament EP 4305).

¹² *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères* (Brussels, April 21, 1956), p. 25.

¹³ *Southern Baroque Revisited* (London, 1967).

¹⁴ Advocate-General Lagrange in Case 14/61, *Hoogovens v. High Authority* [1962] E.C.R. 253 at 283; [1963] C.M.L.R. 73.

¹⁵ See Laubadère, *Traité Elementaire de Droit administratif* (5th ed.), Vol. II, p. 346.

¹⁶ Auby et Fromont, *Les Recours contre les Actes Administratifs* (Paris, 1971), p. 449.

¹⁷ See Case 9/69, *Sayag v. Leduc* [1969] E.C.R. and especially the opinion of the Advocate-General, M. Gand at p. 342.

¹⁸ [1973] C.L.J. 259.

¹⁹ See Dagtoglou, *ibid.* p. 260.

²⁰ *Basic Problems of the European Community* (Oxford, 1975), p. 163.

²¹ Joseph H. Kaiser cited by Nicolaysen, *supra* at p. 173.

²² Case 6/64 [1964] E.C.R. 585 at 594; [1964] C.M.L.R. 425 at 455.

²³ *Mémoires*, p. 352.

²⁴ [1976] 1 C.M.L.R. 491.

²⁵ [1963] E.C.R. at 12.

²⁶ Professor C. J. Hamson, Q.C., *Methods of Interpretation—a Critical Assessment of the Results*. Paper submitted to a Judicial and Academic Conference held at the Court of Justice September 27–28, 1976 (Office for Official Publications of the European Communities).

²⁷ *Ibid.* p. 25.

²⁸ The case of *Reyners v. Belgium*, Case 2/74 [1974] E.C.R. 631; [1974] 2 C.M.L.R. 305, may be given as an example of the latter situation. It enabled the Commission to withdraw a number of draft directives which were meeting with some opposition and enabled it to remind Member States that no discriminatory practices based on nationality could be relied upon by one Member State against nationals of other Member States working in a self-employed capacity.

²⁹ Reply on his promotion as Doctor *honoris causa* of the University of Amsterdam, January 1975.

³⁰ *The Times*, October 27, 1976.

³¹ See *Defrenne v. SABENA* [1976] E.C.R. 455.

³² *Europe: Journey to an Unknown Destination* (London, 1972), p. 25.

CHAPTER 2

THE COURT OF JUSTICE AND THE JUDICIAL PROCESS

THE SOURCES OF COMMUNITY LAW

To speak of a legal order or legal system without some attempt, however summarily, to describe, if not to define, its sources would be to evade the heart of the problem. Nowhere in the Treaties is "the law" defined although, as I have said, Article 164 of the European Economic Treaty, following Article 31 of the Coal and Steel Treaty, states baldly that the Court has the duty to see that "the law" is observed.

Obviously "the law" includes the rules of conduct to be found in the Treaties themselves and in the directives, regulations or decisions of the Council and Commission. At one end of the scale these rules may be stated with some precision. For example, when from time to time the Court is called upon to interpret the Common Customs Tariff, which applies at the external frontiers of the Communities, it has available the detailed wording of the Common Customs Tariff itself. This in turn must be read in the light of its own Explanatory Notes or the Explanatory Notes of what is known as the Brussels Nomenclature. At the other end of the scale the relevant rule of Community law may be expressed in terms of stark generality, such as is to be found in Article 30 of the EEC Treaty which prohibits quantitative restrictions on imports and all measures having equivalent effect without any definition of what *is* a measure having equivalent effect to a quantitative restriction.

Thus the texts of the Treaties or even the more detailed texts of secondary legislation are frequently inadequate to resolve the problems which they create. Much is unexpressed and yet solutions must be found. I shall say a little, later on, about the technique of the Court in overcoming these difficulties. At this stage, however, it is enough to point out that the use of the words "the law" in Article 164 and the reference to "any

rule of law" relating to the application of the Treaty in Article 173 indicate clearly that from the outset it was envisaged that the Treaties would be operated in accordance with certain basic principles recognised by all the Member States. These principles, as the Advocate-General M. Dutheillet de Lamothe has said in a case which came before the Court in 1970, "Contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law an unwritten Community law emerges."¹ Or as was said in *Merlini*,² "The fact that . . . a rule (invoked by a party) is not mentioned in written law is not sufficient proof that it does not exist."

Without attempting a jurisprudential analysis certain characteristics of Community law both written and unwritten deserve mention.

(1) The written law of the Community is not all of equal weight. Indeed it is hierarchic. At the apex stand the Treaties. In some respects they may be compared to a written constitution. Their terms are open to interpretation, but their substance is unchallengeable. Alteration can only come about by use of the formal amendment procedure. On the other hand subordinate legislation is not only subject to interpretation by the Court. Its validity may be challenged on the ground that it is incompatible with a higher rule of law. For example a Council Regulation may be challenged if it is not in conformity with the provisions of the Treaty under which it purports to have been made; a Commission Regulation may be annulled if disconform to powers granted by the Council; both may be contested on the grounds that they are contrary to one of the fundamental principles of Community law, "unwritten Community law."

Under written law may also be included those rules which may be derived from the written text of the Treaties by some interpretative process. I instance the principle to be deduced from the Coal and Steel Treaty that consumers shall be placed upon an equal footing with regard to economic rules³ or what is sometimes called the "unity" of Community law, that is to say that it must apply uniformly in all the Member States.

This, as we have seen, is a deduction from the objects of the Treaty of Rome, although it is nowhere there expressly stated.

I might here include the inspiration which the Court has gained from a consideration of the necessity to protect fundamental human rights. This necessity arises from the terms of the constitutions of the Member States, written and unwritten, or from the international conventions to which the Member States are signatories, but this is too large a subject to discuss here.

Again without attempting to discuss their exact position and role, passing mention, at least, must be made of other international conventions which have a bearing, sometimes an immediate bearing, on Community law, such as GATT or the Brussels Convention on Customs Nomenclature.

(2) "Unwritten Community law" is also far from homogeneous. While much more detailed dissection is possible and, indeed, has been done,⁴ two broad categories emerge.

(a) In the first place there are those unwritten rules, borrowed, it may be, in the beginning, from one or more national systems but incorporated into Community law because they seemed a useful guide to the substantive, as opposed to the procedural, legality of a Community measure. For example, as the Advocate-General Signor Trabucchi said in *Compagnie Continentale France v. Council*,⁵ "It is a principle recognised in the Community legal system that assurances relied upon in good faith should be honoured."

Allied to this proposition is the recognition in Community law of the related concepts of the necessity to protect legitimate expectations and to assure legal certainty. For example in *CNTA v. Commission*⁶ the Court held that, in the absence of an overriding matter of public interest, the Community would be liable if it abolished, unannounced, certain financial provisions "without adopting transitional measures which would at least permit traders to avoid the loss which they would have suffered."

Another rule of the same type, this time principally derived from German administrative law, but which I suggest accords with universal good sense, is that an administration should not,

in the exercise of a discretionary power, employ means which disturb economic interests out of all proportion to the legitimate aim sought to be achieved—what is generally known as the doctrine of proportionality, but which is more accurately to be described as the doctrine of disproportionality.

(b) Secondly, there are those unwritten rules which stem rather from the nature of the judicial function itself, from the concept of good administration or from the particular character of Community law. Some can be expressed in the Latin tags which are, or were, the common coin of lawyers in Western Europe, and which directly or indirectly derive from the texts of civil or canon law. Sometimes, indeed, these “principles” are no more than expressions of elementary logic and common sense.⁷

One example pertaining to the judicial function is to be found in *Transocean Marine Paint v. Commission*.⁸ In that case a group of medium-sized marine paint manufacturers formed an association to compete with larger undertakings. Since the association agreement was capable of affecting trade between Member States it fell within the prima facie prohibition contained in Article 85 of the EEC Treaty and was accordingly notified to the Commission, which granted exemption for a fixed period. When an application was made for that period to be extended the extension was given only on conditions one of which was unacceptable to the applicants. That condition had not been formulated in advance and the applicants had had no opportunity to comment on it. In these circumstances did the rule of *audi alteram partem* apply? The Advocate-General, Mr. Warner, Q.C., considered the domestic law of each of the Member States and found, with only two exceptions, that before taking action affecting private interests an administrative authority was bound to communicate its proposals so as to enable representations to be made. This survey he said,

“Must, I think, on balance, lead to the conclusion that the right to be heard forms part of those rights which ‘the law’ referred to in Article 164 of the Treaty upholds, and of which, accordingly, it is the duty of this Court to ensure the observance.”

Another illustration might be that of the rule *non bis in idem*—the rule that no one should be punished twice for the same offence—and which in a variety of forms is part of the domestic law of each of the Member States. It by no means follows, however, that penalties imposed abroad for conduct outside the territory of a Member State are relevant to the question whether a further penalty may be imposed internally in respect of the effects there of that conduct. The firm *Boehringer*⁹ had on July 3, 1969, been fined \$80,000 by a New York District Court for infringement of the United States federal law relating to unfair competition. On July 16, 1969, the Commission of the European Communities imposed a penalty of 190,000 units of account for breach of Article 85 of the Treaty of Rome. *Boehringer* pleaded that the Commission should have taken the former penalty into account. The Court had this to say: “The Commission must take account of penalties which have already been borne by the same undertaking for the same action, where penalties have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory.” It should be added that in the circumstances of that case the Court did not apply the principle since in its view the two convictions differed essentially as regards both their subject-matter and their geographical scope.

I have given only a few examples of unwritten rules of Community law out of many possible and I shall mention some others when I say something of the judicial process in Community law. The list is not closed since we are dealing with an evolving system. New problems will no doubt require the European Court to consider whether principles to be found in national law can provide a stepping-stone capable of furnishing a satisfactory answer at Community level. Often two principles may compete, in which case the selection becomes more difficult, and it is then all the more necessary to recall that Community law has the unique feature of being both an autonomous legal order and yet falling to be applied by the national judge in his own court as part of his own system.

It is for this reason that classic international law is at best a doubtful source. Let me give one illustration of this. The Commission—this was in 1962—had taken action against Belgium and Luxembourg¹⁰ on the ground that they had introduced certain new levies on imported milk products contrary to Article 12 of the EEC Treaty. *In limine* these Member States put forward what the Advocate-General called “the argument from international law or civil law of *tu quoque*.” The Commission, it was said, had been directed by a Resolution of the Council to set up a Community organisation for milk products by a certain date and this it had failed to do; had the Commission fulfilled its obligation then there would have been no need for the national levies to remain in force. This argument was rejected by the Court. After referring to international law which “allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own” the Court affirmed once again that the Treaty created a new legal order and was not limited to creating reciprocal obligations. The Treaty contained its own procedures to deal with any breach and accordingly “the basic concept of the Treaty requires that the Member States shall not take the law into their own hands.”¹¹

THE JUDICIAL PROCESS

Having outlined what I mean by the “sources” of Community law I turn to the separate but related questions—what are the boundaries of the judicial function and, within those limits, how does the Court make use of the materials which the sources of Community law have furnished?

I have stated the questions in this order since unless a problem is capable of judicial decision any discussion of specific techniques must be irrelevant. These questions are frequently swept into the same basket and labelled “interpretation” but this, I feel, obscures their independent quality. In any case, the word “interpretation” itself lacks precision.

In particular when the word is used by a francophone it seems to me that what is being discussed is a much broader concept than the task of construing a document—be it an Act

of Parliament or grandfather's will—the orthodox English use of the word “interpretation.” Perhaps to the lawyer who has no common law, “interpretation” is his whole life: it is the process of extracting justice from the texts.

Professor Steiner, writing, admittedly, in a different context, has said: “The French word *interprète* concentrates all the relevant values. An actor is *interprète* of Racine; a pianist gives *une interprétation* of a Beethoven sonata. Through engagement of his own identity, a critic becomes *un interprète*—a life-giving performer—of Montaigne or Mallarmé.”¹²

I do not complain of this. The danger of incurring the united wrath of the Académie Française apart, it is always permissible to write one's own dictionary provided the intention to do so is made plain.

It is nonetheless only in the broader sense that “interpretation” is apt to cover the whole question of decision forming by the judge—in effect the judicial process or as Mr. Justice Cardozo put it, with characteristic simplicity, “What is it that I do when I decide a case?”¹³

Accordingly I would first propose to say something about the judicial process generally. I would then like to stress certain particular aspects of the judicial process which have developed in the other Member States, aspects giving rise to differences of attitude, in kind or degree, from those which, hitherto at least, have prevailed in the United Kingdom. I would then like to consider shortly the extent to which these differences are reflected in the Treaties and the decisions of the Court of Justice. In particular, given the type of problem which comes before the Court and the role which it has to play, I would especially like to say something about its function (a) in controlling the exercise of discretionary powers and (b) in its indirect control of the exercise of powers by national agencies, be they described as legislative or administrative.

At the outset, however, since the work of any court is inextricably bound up with the procedural framework in which it operates, it is necessary, for the benefit of those to whom it may be unfamiliar, to say a little about the manner in which problems of Community law can arise for determination.

(a) The Community judicial structure

Busy as the Court of Justice is, litigation involving Community law is much more frequently to be found in national courts and tribunals. One of the features of the European Economic Community, in particular, is that its day-to-day administration is conducted by national agencies. It is against the acts or omissions of these national agencies that appeals are taken according to the means of review provided by the national legal system.

For example, the German importer who has been called upon to pay a charge at the frontier and thinks that the imposition was not justified by Community law will object to the local German customs office, the Zollamt, and then to the Hauptzollamt concerned, from which an appeal will lie to the appropriate Finanzgericht. The migrant worker resident in France will take a refusal to pay him the social security benefit to which he thinks he is entitled to the local Commission de Recours Gracieux and, if necessary, thereafter to the appropriate French courts.

If the national judge finds that the case before him involves the interpretation of the Treaty or the validity and interpretation of the "acts" of the institutions of the Community he may, and in certain cases must, refer the problem to the Court in Luxembourg for a preliminary ruling by what is known as the Article 177 procedure—a procedure to which I have already made passing reference.

A large, indeed the major, part of the work of the European Court consists, accordingly, in answering questions put to it by national courts seeking an interpretation of a rule of Community law or in determining the validity of "acts" of the Community institutions, such as regulations or decisions of the Council of Ministers or the Commission. The questions put to the Court should be in abstract form permitting an abstract answer since it is for the national court and not the European Court to *apply* the law so declared to the facts of the particular case. This distinction underlines the complementary role of the two courts, Community and national. The role of the European

Court is to assist the national court and not, as is sometimes suggested, to act as a Court of Appeal.

Nevertheless this neat division of function may obscure certain difficulties which arise in practice.

The categories of question reaching the Court of Justice of the European Communities via the Article 177 procedure vary in their essentials and may, in turn, require a varied approach. To give a number of examples: —

(1) The national judge may ask the European Court to interpret the Treaty and to say whether in the light of that interpretation a certain Council or Commission regulation is invalid. If the Court declares the regulation invalid then the task of the national judge is usually relatively simple. He applies his own law regarding the consequences of an *ultra vires* act.

(2) He may ask the European Court to interpret a Community regulation in order to see whether a national agency has applied it correctly. Once again, provided the answer is sufficiently clear there should be no difficulty in practice. I say "should" because in a case before a national court where the facts are complex it is, in the first place, not always easy for the national judge to frame an abstract question divorced from the specialities of the case before him, nor, in the second place, is it always easy for the Court of Justice to return an answer which is free of the factual content of the problem. The borderline between questions of law and questions of fact is frequently imprecise. One does not need to go to the law reports to realise this. The proposition is vouched by the nineteenth century *Punch* cartoon of the puzzled station-master trying to unravel his company's rule book. "Cats is 'dogs' and 'rabbits' is dogs and so's Parrats, but this 'ere 'tortis' is an insect and there ain't no charge for it."

The grey zone between questions of fact and questions of law may give rise to a twofold difficulty. First, the European Court, in an attempt to assist the national court may marginally overstep its function of declaring the law *in abstracto* and come close to telling him how to apply it—alternatively, in an

effort to avoid this trap it may give an answer of such generality as to be of very limited help. In fairness to itself, the European Court is well aware of the difficulty and, as it has said repeatedly, always tries to give what it considers to be a useful answer in the case before it. This in turn may present a difficulty since it is then relatively easy for some of our enthusiastic critics to take a sentence or two from the particular case and elevate it to the nightingale's divine melodious truth, an error to which the common lawyer, taught as he is never to take a judicial observation out of context, should be less prone.

(3) The national judge may ask the Court of Justice to interpret a directive by the Council or Commission—or even a recommendation, which by the express terms of the Treaty has no binding force—in order to see whether a provision of his national law is in conflict with the interpretation given by the Court or whether he can by applying his own national rules of interpretation achieve conformity. If he cannot then the solution will vary according to what his own system provides for such a contingency. It is here, as I have tried to show in discussing the so-called “supremacy” of Community law that difficulties have from time to time arisen and, doubtless, will arise again.

(4) The most awkward situation, however, may arise where two factors are involved. First the national judge may ask whether a certain treaty provision, or indeed Community secondary legislation, has “direct effect”—that is to say whether Community law gives to the individual rights which his national courts must recognise and protect. In the second place if the Court of Justice of the European Communities has answered this question with a “yes” he may ask what is the effect of a national law which appears to run counter to that right? Given the basic division of function, the European Court cannot, of course, say that a particular national law is without effect in a particular case, still less that it is invalid. What the Court can do and does is to furnish the national judge with what it regards as the appropriate factors to be taken into

account by the latter in assessing the compatibility of his national law with the Community concept. Sometimes these factors involve an assessment of the economic impact of the national measures and one must heed the danger, as the Advocate-General, Mr. Warner, put it recently, of setting "national courts, and in particular minor criminal courts, an impossible task."¹⁴

That is to say the division of function between the Court of Justice of the European Communities and national courts may hide a real problem of justiciability by the former exporting it to the latter.

The solution to this difficulty, and this is essentially the theme of what follows, is to be found in the proposition that most problems are justiciable given adequate guide-lines. These guide-lines, these points of reference, can only be provided by the legislative mechanism of the Community. As a result of the changes which have taken place since 1957 in the nature and rate of change of economic forces at work the written law of the Community does not always provide sufficient markers or give adequate guidance on priority when two principles are on a collision course.

Similar problems, of course, arise, and arise perhaps more obviously, in those cases where the European Court itself is called upon to apply Community law, since any judge applying a rule of law to given facts must have first ascertained the appropriate law to apply, however simple or automatic in a given case the mental process may be.

The Court of Justice of the European Communities, however, itself only applies Community law in "direct" actions which total less than half the number of cases which come before it in an average year. "Direct" actions are those cases which begin and end before the Court of Justice—for example a complaint to the Court by the Commission that a Member State has failed to fulfil its Treaty obligations; an appeal by a commercial undertaking against a Commission decision to impose a penalty for breach of Article 85 or an action by an individual against the Community seeking damages under Article 215, paragraph 2,

which concerns the "non-contractual" liability of the Community. By way of illustration (and ignoring cases involving claims by Community officials) there were brought in 1975, 69 cases for preliminary rulings as against 35 direct actions; for 1976 the figures were 75 and 32 respectively.

It is not always appreciated that the same situation in fact and, broadly speaking, the same question in law can arrive on the Court's doorstep by different routes. Imagine one Member State, Ruritania, finding itself flooded with imports from another Member State, Evallonia, of "hat frames, including spring frames for opera hats"—I have not invented this category of merchandise: you will find it specifically mentioned in the Common Customs Tariff.

Ruritania, in an attempt to safeguard its national industry, imposes a border duty on the imports.

Evallonia could bring an action before the European Court against Ruritania on the ground that the latter was in breach of the Treaty. Before doing so, however, Evallonia must report the matter to the Commission as guardian of the Treaty and the Commission would, itself, probably initiate proceedings before the Court of Justice against Ruritania for failure to fulfil a Treaty obligation.

In the meantime, however, a Ruritanian importer of spring frames for opera hats has been made to pay duty on a particular consignment. The importer then brings an action in the Ruritanian courts to recover the payment. Since his claim may raise the question of the interpretation of Article 12 of the Treaty, which forbids the introduction between Member States of new customs duties, the Ruritanian judge may decide to refer one or more questions of Community law to the European Court.

The latter's task in the two cases is, however, not the same. In the direct action by the Commission against Ruritania it can and will examine all the facts and will decide whether or not Ruritania is in breach of its Treaty obligations. In the case of the action before the Ruritanian judge the European Court must confine itself to answering the questions of Community law which have been submitted to it. The compatibility with

the Treaty of Ruritania's imposition of a new customs duty remains a question for the national judge, although no doubt the answer which he gets from the Court of Justice of the European Communities should enable him to decide it without difficulty.

(b) *The nature of a justiciable issue*

It is against that brief account of the manner in which the Court operates that one turns to the fundamental question of what issues are appropriate for determination by a court—what matters are justiciable. This question must of course, be faced by any court but it is a particularly live one for the European Court. The European Treaties are intensely political texts in the sense that they set out explicitly a series of political goals and prescribe, in greater or, more frequently, less detail the methods by which these goals are to be achieved. On the road to their achievement the Community institutions must necessarily dispose of a fair margin of discretion in the choice and execution of those methods. The European Treaties as a whole cover a large part of the economic life of the Member States. Accordingly the broader question of what is a justiciable issue frequently concentrates itself on the Community stage into the more specific one of how far it is proper for a court to concern itself with matters involving policy and administrative choice.

At the risk of over-simplification, may it not be said that all judicial processes reduce to the process of comparison? First the appropriate rule of law must be found, be it well known or wrested only with difficulty from the sources available; in turn the facts of the matter in hand are laid alongside the law to be applied and the excess or shortfall determined. Sir Edward Coke was wholly apt in his metaphor when he said the law was "the golden mete-wand and measure to try the causes of the subjects."

All this is just another way of saying that without adequate guide-lines a court has no starting point, no standard, against which to measure the problem before it. These guide-lines may come from the clear text of a legislative measure or be extracted by some interpretative process; they may be found in the in-

herited wisdom of a common law system or embodied in a *jurisprudence constante*; they may, indeed so far as the Court of Justice is concerned, be found in certain fundamental principles which, as I have already said, emerge as unwritten Community law.

The obverse of this proposition is that when the guide-lines available permit two or more solutions, and where the competent Community institution has chosen one which conforms to the legal rules in force the limit of the judicial function has been reached. The matter ceases to be justiciable and enters the domain of true administrative discretion.

This formulation in part begs the question or, at least, demands the further one as to what is meant by conformity with the legal rules in force? That the decision taken must be in accordance with the terms of the enabling power, that it must be *intra vires*, goes without saying. What, however, if the rules in force provide that the Council or Commission may only prescribe means which are reasonably appropriate to achieve the end desired? In such a case the implications and virtues of the decision may have to be examined much more closely.

As Professor Asso has put it

“There are many cases where a decision cannot legally be taken unless such a measure is necessary. Thus the judge who is called upon to examine its legality may be obliged to examine its merits. This, however, is only considered by the judge as an element constituting the legality of the decision. It is accordingly necessary to make a distinction between the merits of a decision as an element of its legality and the whole merits of a decision where the judge substitutes his assessment of the facts for that put forward by the administrator.”¹⁵

It is here, I think, that a misunderstanding, at least in the past, has existed within the United Kingdom. Observations such as “We cannot investigate whether the Minister had sufficient evidence before him to justify his decision”¹⁶ confuse the separate question whether the Minister had a sufficient basis for his decision in fact as well as in law and whether

as between two tenable solutions he chose the correct one. I see no reason why the former should not be regarded as a justiciable issue and, as I hope to make clear, it is so regarded in most, if not all, of the other Member States.

For the rest it is but an application—often a supremely difficult application—of the judicial process of measurement, comparison and evaluation.

In fact the concrete case is often far from easy and what to one judge may be a justiciable matter is not so to another. One can illustrate that from a recent English case.

In *Miliangos v. Geo. Frank (Textiles) Ltd.*¹⁷ the House of Lords by a majority decided to depart from the rule of long standing whereby courts in England could express their judgments in sterling only and sterling calculated at the date of breach of the relevant obligation. The House was conscious of the injustice which the old rule could create in a period of fluctuating exchange rates and was aware that a change could “enable the law to keep in step with commercial needs and with the majority of other countries facing similar problems.”¹⁸ Lord Simon of Glaisdale dissented.¹⁹ The appeal, he said, raised questions

“The answer to which imperatively demands the contribution of expertise from far outside the law—on monetary theory, public finance, international finance, commerce, industry, economics—for which judges have no training and no special qualification merely by their aptitude for judicial office. . . . Law is too serious a matter to be left exclusively to judges.”

After an analysis of the problems which might be involved in a judicial change of settled law, Lord Simon continued:

“The very qualifications for the judicial process thus impose limitations on its use. This is why judicial advance should be gradual. ‘I am not trained to see the distant scene: one step enough for me’ should be the motto on the wall opposite the judge’s desk. It is, I concede, a less spectacular method of progression than somersaults and cartwheels; but it is the one best suited to the capacity and resources of a judge.”

The warning is salutary and I am well aware that many have criticised some of the decisions of the European Court—fortunately not a high proportion—for having failed to heed it.

Whether such criticism is justified is not for me to say—at least not here—but one can make certain general comments.

Within limits what is or is not a justiciable issue can be a question of degree and indeed of individual temperament in the sense that what to one may be sufficient material on which to base a balanced view may not be so to another. *Miliangos* demonstrates how opinions can diverge, even between judges trained in the same system sitting on the same bench in the same case.

Inevitably the possibility of diverging views must exist in a court the membership of which reflects a diversity of background and training. Though I might add, in parenthesis, it is the degree of harmony among the members of the Court of Justice of the European Communities which is remarkable, not the occasional difference of approach.

(c) *Justiciable issues in the Member States*

For the common lawyer, however, to evaluate the working of Community law it is necessary for him to have regard to certain distinctive features of the judicial process to be found in the original Member States, all of whom belong to what Professor René David would classify as “*la famille Romano-Germanique*.”²⁰ I use the expression “common lawyer” with all apologies to my old friend Professor T. B. Smith of Edinburgh and perhaps to certain purists of the Chancery Bar, as including anyone brought up in any one of the three legal systems of the United Kingdom. I could include the Republic of Ireland, which has essentially a common law system in the field of private law, but it is marked out as having a written constitution which submits its legislation to judicial control.

In presenting these features of the laws of the original Member States I am very conscious, in the effort to compress what has elsewhere been the subject of much ampler treatment, that I may have fallen into the trap of over-generalisation. Moreover, others might disagree with my selection. I can only

say that they are those which I have found most relevant to the day-to-day work of the European Court. I group them under five heads, not necessarily in any particular order of importance. They are, respectively, (1) the separation of powers; (2) the distinction between public and private law; (3) the fear of a "denial of justice"; (4) the factor of constitutional control and (5) national attitudes to the control of administrative acts.

(1) *The separation of powers*. Traditionally in the original Member States, as for the common lawyer, questions of justiciability are subsumed under the heading of the separation of powers—the eighteenth century division between the legislature, the executive and the judiciary.

It is of course as true today as it was in 1748 that

"There is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control: for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."²¹

Montesquieu's distinction, however, only goes some way to resolving contemporary national problems. For him the executive was not the administrative power as we know it today—it was the power "in respect to things dependent on the law of nations," the making of peace or war and the protection against invasion. To anticipate, still less is his distinction very helpful at the Community level. Indeed I suspect that if Montesquieu had been asked to consider some current Community legislation, taking as a random sample Regulation 2335/72 of the Commission on "the production and marketing of eggs for hatching and of farmyard poultry chicks," he might have felt the need to revise his classification.

In the present context I would offer the following comments.

(a) The threefold division is designed to emphasise the necessity of independence of the three "powers" and the necessity of each being available as a check on the other: it does not tell us much about their respective competences. These may be, and are, understood differently in the Member

States. All three powers, however, have this in common. They are rule-making powers—a court of law as much as the legislature. Even if a court bears to decide only the case before it, it is in practice creating a pattern for the future conduct of all.

(b) Different Member States have interpreted Montesquieu's tripartite division in different ways according to their own constitutional concepts. The manner in which power is divided is as different from one side of the Rhine to the other as it is across the Channel.

(c) According to the way in which rule-making powers are variously distributed in the other Member States the line between what is an administrative act and what is legislative may not always appear in the same place as the common lawyer would put it. For example, as I understand it, the power of a Minister in France to make regulations concerning matters which are the concern of his department may not depend on delegated powers from the legislature but can be an autonomous power directly derived from the constitution.

(2) *Public law and private law.* Almost any basic textbook published in "*la famille Romano-Germanique*" will tell you that "Public law and private law are the two great provinces of law."²² Why? asks the common lawyer.

The distinction has, it is true, respectable historical antecedents—the distinction between *jus publicum* and *jus privatum* of Roman law is well known and even persisted through Europe's feudal period when the conception of "the state," on which it depended, had temporarily vanished. The history, however, of the distinction between public and private law in Western European legal theory is too complex to attempt here even in the most abbreviated form, nor do I feel myself competent to try. Nor do I seek to explain its basis in law. "Of the many attempts to provide the practical distinction with some sound foundation of legal theory none seems to have gained anything like general acceptance."²³ Indeed one author, writing in the thirties, speaks of 104 solutions as having been suggested.²⁴

Historical antecedents are, fortunately, very probably irrelevant. What does matter is the practical consequence that

the law governing relations between the state and the individual is regarded as something *sui generis* and set apart from the law which governs the relations between citizen and citizen.

“The modern conception of the ‘administrative act’ has been worked out on these lines. Whilst the acts of private individuals can only have legal consequences in so far as they are an application of some existing rule of law, the acts of the executive officials, within their general competence, are, it is said, in themselves evidence of compliance with the condition of their validity, for they draw their authority from an extra-legal principle immanent in their nature as expressing the will of the State and, therefore, are free from all limitations not expressly placed upon them.”²⁵

At first sight this is a recipe for totalitarianism but the same approach which in the name of liberty of the state frees it from the controls of private law has also recognised the need for the state to be subject to controls of its own. I have already instanced the efficacy of the Conseil d’Etat, now reinforced by a network of administrative courts throughout France. The same is also true in the other original Member States to a greater or lesser degree. Particularly is this so in the Federal Republic of Germany, no doubt as a reaction against past excesses inspired by the belief that the state was above the law. The common lawyer must, accordingly, take into account how deep the distinction goes. Not so long ago I discussed with a distinguished German lawyer the question of the importer who had paid, under protest, a certain sum to the customs. Said I, without thinking, “His claim to restitution, of course, rests on a quasi-contract.” The reaction was most indignant. “Not in *public* law. The question must always be the legality of the act of the state agency. If it is declared illegal then it automatically follows that the state must then repair the consequences.” The result is probably the same, but the road to it is very different.

(3) “*Denial of justice.*” To me, an important contrast, although I accept that it is only one of degree, exists between those systems whose courts feel that it is their duty to take the

initiative to achieve a just solution and those who regard the role of the judge as that of an arbiter between two or more views as preselected and presented by the parties to the case.

I say degree, since, "Even in England, . . . a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law."²⁶

In most European countries the judicial system abhors a vacuum. I need cite only the famous Article 4 of the French Code Civil: "The judge who refuses to judge, on the pretext that the law is silent, obscure or lacking, shall be proceeded against as having been guilty of denying justice." The horror of a *déni de justice* is very real in the minds of judges and jurists in some Member States, though perhaps nowhere so forcefully expressed. Gaps must be filled, solutions must be found. If you cannot find express guidance, reason by analogy. As Mr. Norman Marsh, Q.C., has pointed out, the first draft of the German Civil Code had a clause stating that "Situations for which no provision is made are to be governed as appropriate by the provisions regulating other situations of similar legal nature" but these words were dropped on the ground that the proposition was self-evident.²⁷

The most extreme example of this point of view, and one also frequently cited, is Article 1 of the Swiss Civil Code. After underlining the intention that the Code should be regarded as comprehensive it provides that: "If the Code does not furnish an applicable provision, the judge shall decide in accordance with customary law and, failing that, in accordance with the rule that he would establish as legislator."

Once again, the common lawyer must be on his guard against applying too rigid a conception of the judicial function to a specific case. The judicial attitude which says "It is for you, the plaintiff or the pursuer, to satisfy me that you are well founded in law and in fact and you have failed to show me that there is a rule of law to support your argument" undergoes a certain sea-change when it crosses the Straits of Dover. There the judge feels it his duty to establish that there is a rule of law applicable. Once found, of course, he applies it in

the usual way to the facts in hand. It would be facile and inaccurate to suggest that one had moved from the world of remedy to the world of right, but nonetheless there is a difference of approach which can affect the readiness of a court to accept matters as justiciable.

(4) *Control of constitutionality in Member States.* Inevitably there must be a different approach to justiciability where the acts of the supreme legislature can be challenged as incompatible with the terms of a written constitution. Even within the original Member States, however, the pattern is not uniform. For example a distinction has been drawn between those countries whose constitutions have been most affected by the French Revolution and its teaching of the unconditional supremacy of "*la loi*," the written and definitive text enacted by Parliament, and those countries which recognise that even "*la loi*" must give way before the provisions of a constitution. In countries such as Italy and the German Federal Republic it is possible to trace a more interventionist approach by the courts than in, say France, where the role of the judge has been stated in classic terms by the Commissaire du Gouvernement in the well known case of *Syndicat Général de Fabricants de Semoules de France*.²⁸ The judge "may neither criticise nor misconstrue a statute": his task "remains the subordinate one of applying the statute." In particular as regards the Treaty of Rome: "if the legislator has manifested a precise will, if the national statute insinuates itself as a necessary intermediary between the Treaty and the application required of it, no provision of the Constitution excuses the judge from respecting that will."

I am not to be taken as saying that the view of the Commissaire du Gouvernement necessarily reflects today the view of the French Supreme Courts—only that it expresses very clearly one Continental tradition. On the other hand there are those countries in which the courts, while recognising the separation of powers, must always have regard to some higher standard. Against or beside these traditions we have a third approach, that of the United Kingdom, where the written text must always be read against a background of common law, in

theory, at least, universal in its wisdom, but a theory which wears thin in those areas where statute has been the innovator and the common law has little to offer. Here the Republic of Ireland provides an interesting bridge. While it shares the same common law tradition, it has at the same time a written constitution which vests in the Supreme Court a power to control the conformity of parliamentary legislation.

(5) *National attitudes to the control of administrative action.* Once again it would be an impossible task to compress into a few sentences an account of the varied relationship which exists in each of the original Member States between the judicial function and the administrative function and the extent to which the former may control the latter.

Nor is it possible accurately to summarise in a few words the relationship between the judiciary and the administrator in the United Kingdom. Indeed the judicial function itself may be defined in a variety of ways according to the end for which a definition is required. For example what might *prima facie* seem the performance of an administrative duty may become judicial if the question is whether *certiorari* will lie.

Considerable effort has been expended to rationalise a distinction between the two functions. For example, in the 1932 Report on Ministers' Powers—the Donoughmore Report—the authors stated that:

“The two mental acts differ. In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion.”²⁹

The decision of the Admiralty to place a Departmental contract for stores or the decision of the Home Secretary to grant naturalisation to a particular alien, were, said the Committee, typically administrative. There have, since then, been significant changes of attitude by both the judiciary and administrators, national and local, or so it seems to me, but to develop this would take us down a different path.

For my purposes the terminological and conceptual difficulties can be avoided. When one comes to the question of judicial review of administrative acts there is little difficulty in recognising the protagonists. The relationship between the two is, however, for a variety of reasons extremely complex. In particular the convoluted history of the forms of process available and the variety of statutory language used by Parliamentary draftsmen have obscured the issue. It is, however, certain that "there is no constitutional minimum of judicial review in English law and the jurisdiction of the courts may be excluded by apt statutory language."³⁰

Other countries in the Community take a different view. In the Federal Republic of Germany it is just because a decision is administrative that there must be control by an appropriate court. Admittedly, to British eyes at least, this doctrine can take an extreme form and may lead to undue caution and formalism on the part of the officials concerned. To which, I suppose, the answer might be given that these defects can exist even without the possibility of judicial control.

May I give one example, however, of a successful challenge to an administrative decision which must seem remarkable to a British lawyer. A university student was refused a room in a college hostel—it was argued that the college as an independent trust was not part of the state administration but this was rejected. The only reason given by the authorities to the student was that he was less suitable than other candidates. The Karlsruhe Administrative Court held that this reasoning was insufficient and did not permit the court to see whether the trustees had used their discretion properly. Since the court was unable to determine the point the refusal was annulled.³¹

A similar approach can be found in France.³² At the time in question—the early 1960s—French law imposed an *ad valorem* tax on real property transactions for value. There was, however, an exemption for property acquired in the course of certain specified operations, including the regrouping of commercial undertakings. For such an exemption to be obtained it was necessary to have the prior assent of the relevant

Minister and the Secretary of State for Finance, who were themselves bound to consult a body known as the Conseil de direction du Fonds de développement économique et social.

Maison Génestal were a firm of customs forwarding agents who operated in a number of French ports including Le Havre. They were interested in buying an old rice mill in which they proposed to regroup their existing activities. Their application for tax exemption was, however, turned down. The Minister of Construction, who had received an unfavourable report by the Conseil de Direction, felt unable to support the application and his view was adopted by the Finance Minister, who in communicating his decision to the Maison Génestal said only that the proposed operation "did not appear to him, in the general interest, to have sufficient economic advantage to justify his agreement the consequences of which would be a substantial reduction in tax." Against the latter's decision the Maison Génestal appealed to the Administrative Court at Rouen. In due course the matter came before the Conseil d'Etat, who in remitting the matter back to the local court observed that the reasons given by the Minister "were formulated in terms too general to allow the court to judge whether the decision attacked was vitiated by material error in fact, error in law, or absence of power" and were, accordingly, insufficient. That is to say the court was entitled to look at the assessment by the Minister of a concept as indefinitely expressed as "general economic interest," not to substitute their view of this concept but to see whether there was anything inherently wrong in the reasoning adopted by the Minister. Nonetheless the decision would be examined, not only for error in law but, and most importantly, for "material error in fact."

Another example of how an administrative act may be subject to judicial control can be taken from the illustration used in the Donoughmore Report itself—that of the placing of an Admiralty contract. When the report was presented in 1932, even with the experience of the First World War, the extent was not appreciated to which government contracts, often for enormous quantities of goods to be delivered over long

periods of time, could affect materially the economic life of the country as a whole as well as the fortunes of individual firms. So far as the European Economic Community is concerned the original Member States have long accepted that the placing of public works contracts by the state is subject to judicial control whether as a branch of public law falling within the jurisdiction of the administrative courts or as a branch of private law. That similar control should apply to the Community as a whole seemed obvious to the original Member States. A restriction by a Member State to its own nationals in placing public works contracts (and any other contract for that matter) offends against the principle of freedom to provide services anywhere within the Community and the right of all qualified undertakings in all Member States to compete for what work is available. Hence two Council Directives of 1971³³ which provided for the elimination of all restrictions based on the nationality of the tenderer and providing for compulsory publicity when work above a certain value is put to tender, and for the introduction by national authorities of objective standards by which the tenders should be judged.

Both in the original Member States and in the Community we are a long way from the Donoughmore Report's qualification of an Admiralty contract as "an act of purely 'business' character."

CONCLUSION

Can any general conclusion be drawn? Tentatively, yes. I pay full tribute to the remarkable effort made in recent decades by the English and Commonwealth judiciary to analyse and rationalise the relative functions of judge and administrator—Scottish case law has been less abundant—but this achievement has started from a restricted base. Indeed I am tempted to say that English administrative law is like French *haute cuisine*—both have achieved outstanding results with indifferent ingredients. In the original Member States, however, the common lawyer will find certain underlying general principles which determine the relationship between the courts and the administration. Instead of examining in detail the legislative base for

each exercise of administrative authority in order to see whether and to what extent he may obtain access to the courts he can invoke a series of principles derived from public law. At the heart of any system of public law is the recognition that just because the needs and obligations of the state are not the same as those of individuals, the individual must be protected and judicial machinery must be available to provide that protection. There is, if you will, a presumption in favour of judicial control and it is this presumption which has been given explicit shape in the Treaties establishing the European Communities.

Judicial control, however, must recognise that for the administrator to do his job properly he must enjoy a reasonable measure of discretion as to the means he adopts. Moreover, the administrator, by the nature of his task, is frequently faced with having to take action rapidly in the face of unexpected economic forces; with having to assess the future impact of those forces; with a variety of courses open to him and a choice to be made among them. How can the judge acting with hindsight replace the administrator reacting to the pressure of events?

More often than not the issue is confused by an allegation that the problem is not one of law but economics and is thus not a fit matter for judicial treatment.

“How, in the present state of things, can a judge hope to combine economic with legal rectitude? Only, it is said, by giving his attention to the teachings of economists of repute. If this is his only course, the judge may well despair, for there is no study which surpasses the science of economics in the abundance, variety and vigour of its *dissensiones dominorum*.”³⁴

Or as it has been more succinctly put: “In general judges are not qualified to decide questions of economic policy, and such questions by their nature are not justiciable.”³⁵

This may be to misconceive the nature of judicial control available in even those Member States who provide it in its least extensive form. The control is not over the merits of the decision as such but over its legality. Legality in this context

implies conformity with certain objective standards within which the administrative action was permissible and the existence in fact of the necessary circumstances which alone allowed the administrator to take the action in dispute. Judicial control may even require an examination of the various alternatives open to the administrator in order to see whether the one chosen was reasonable in proportion to the end to be achieved. Once, however, the administrative decision in question has passed the test of legality the Court's duties are over. It will not then substitute its own appreciation for that of the administrator.

The statement, therefore, that questions of economic policy are not justiciable requires qualification. "Policy" itself is a word with many shades of meaning. In so far as it means a choice of objectives then I fully accept that policy is not justiciable. This is so not only in the United Kingdom but also in the original Member States. That the policy is *economic* policy makes it neither more nor less justiciable. A government decision to encourage industry in general to move to areas of high unemployment is not a justiciable matter, nor is the decision by a Minister in charge of planning to restrict the number of permitted access roads leading on to busy thoroughfares. It makes no difference that the one is dictated by economics and the other by reasons of road safety: both are decisions of policy. On the other hand an individual problem which involves consideration of economics may indeed give rise to very solid and three-dimensional alternatives.

After all, judges in the common law system have grappled, and grappled successfully, with economic concepts and continue to do so. May I briefly instance the problem facing the Judicial Committee of the Privy Council in the series of cases in which it considered section 92 of the Commonwealth of Australia Constitution which says that "trade, commerce and intercourse among the States . . . shall be absolutely free"—a provision which the High Court of Australia has even more frequently had to construe and which is an interesting forerunner of Title I of the Treaty of Rome.

In *James v. Cowan*³⁶ and *James v. The Commonwealth*³⁷ the issue was the compatibility with section 92 of State and Commonwealth legislation controlling the marketing of dried fruits. A Commonwealth Act required licences to be granted. This, it was held, could prohibit entirely, if the licence was refused, or if a licence was granted in part, partially prohibit inter-state trade. In *Commonwealth of Australia v. Bank of New South Wales*³⁸ the provision under attack was a Commonwealth Act seeking to prohibit private banking. In *Hughes & Vale Pty. Ltd. v. State of New South Wales*³⁹ it was the requirement to obtain a licence—which might be granted or refused by an official of the Executive in his uncontrolled discretion—by inter-state road haulage operators.

In each case the Board held the legislation incompatible with the Constitution. The Privy Council observed in the *Bank of New South Wales* appeal that in applying section 92 of the Constitution “the problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law,”⁴⁰ but nowhere in the three appeals which I have cited nor in the judgments of the courts below is there any suggestion that the issue, properly regarded, were other than entirely justiciable.

Perhaps the most striking example of all has been the work of the Restrictive Practices Court. This court has produced a long series of distinguished judgments which embrace intensely complicated considerations of economic fact and opinion and which involve the interpretation of a statute some of whose terms are no more precise than those of the Treaty of Rome.

Notes

¹ Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125 at 1146; [1972] C.M.L.R. 255 at 271.

² Case 108/63 [1965] E.C.R. 1 at 10; [1965] C.M.L.R. 109 at 126.

³ Case 8/57, *Groupement des Hauts Fourneaux et Aciéries Belges v. High Authority*, 1958 Rec. 223.

⁴ See for example F. Dumon, *The Case Law of the Court of Justice*, Judicial and Academic Conference September 27–28, 1976

(Luxembourg 1976), pp. 59–80; P. Pescatore in *Miscellanea* (W. J. Ganshof van der Mersch), Vol. 2, p. 325 *et seq.*

⁵ Case 169/73 [1975] E.C.R. 117 at 140; [1975] 1 C.M.L.R. 578.

⁶ Case 74/74 [1975] E.C.R. 533.

⁷ Indeed the Court may now be coming close to the cardinal doctrine of English equity that people should not make unconscionable use of their legal rights. See the conclusions of the Advocate-General, Mr. Warner, in case 102/75, *Petersen v. Commission* (delivered October 26, 1976).

⁸ Case 17/74 [1974] E.C.R. 1063; [1974] 2 C.M.L.R. 459.

⁹ Case 7/72 [1972] E.C.R. 1; [1973] C.M.L.R. 864.

¹⁰ Cases 90 and 91/63, *Commission v. Luxembourg and Belgium* [1964] E.C.R. 625; [1965] C.M.L.R. 58.

¹¹ [1964] E.C.R. at 631 and [1965] C.M.L.R. at 72.

¹² *After Babel* (London, 1975), p. 27.

¹³ *The Nature of the Judicial Process* (1921, Yale Reprint, 1971), p. 10.

¹⁴ Case 31/74, *Galli* [1975] E.C.R. 47 at 69; [1975] 1 C.M.L.R. 211.

¹⁵ Bernard Asso, "Le contrôle de l'opportunité de la décision économique devant la Cour Européenne de Justice," *Revue Trimestrielle de Droit Européen*, 1976, 21 and 177, for a full discussion of the question.

¹⁶ Cf. *Peter Holmes Ltd. v. Secretary of State for Scotland*, 1965 S.C. 1. Contrast, however, *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 W.L.R. 1320 and *Colleen Properties v. Minister of Housing and Local Government* [1971] 1 W.L.R. 433.

¹⁷ [1976] A.C. 443.

¹⁸ Lord Wilberforce at 467.

¹⁹ At p. 481.

²⁰ *Les Grands Systèmes du Droit contemporains* (5th ed., Paris, 1973).

²¹ *L'Esprit des Lois*, Bk. II, Chap. 6, quotation from Edinburgh edition of 1750.

²² e.g. Du Pasquier, *Introduction à la théorie générale et à la philosophie du Droit* (4th ed., Neuchatel, 1967), p. 23.

²³ J. W. Jones, *Historical Introduction to the Theory of Law* (Oxford, 1940), p. 140.

²⁴ Gurritch, *L'idée du droit social*, cited by Jones, *supra*.

²⁵ J. W. Jones, *supra*, p. 147.

²⁶ *Jones v. N.C.B.* [1957] 2 Q.B. 55, per Lord Denning at 63.

²⁷ *Interpretation in a National and International Context* (Heute Brussels-Namur, 1973), p. 66.

²⁸ [1970] C.M.L.R. 395 at 404, 405.

²⁹ Committee on Ministers' Powers, 1932, Cmd. 4060, p. 81.

³⁰ S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed.), p. 26.

³¹ V. G. Karlsruhe, judgment of December 16, 1971, DVB1, 1972, p. 431.

³² C.E., 1968, *Maison Génestal* 2.

³³ Directives 71/304/CEE and 71/305/CEE of August 16, 1971. *Official Journal*, No. L185, pp. 1 and 5.

³⁴ J. W. Jones, *supra*, p. 246.

³⁵ *Charles Roberts & Co. v. British Railways Board* [1965] 1 W.L.R. 396 at 400, Ungeod-Thomas J.

³⁶ [1932] A.C. 542.

³⁷ [1936] A.C. 578.

³⁸ [1950] A.C. 235.

³⁹ [1955] A.C. 241.

⁴⁰ [1950] A.C. 310.

CHAPTER 3

JUSTICIABLE ISSUES IN COMMUNITY LAW

INTRODUCTION

I HAVE indicated what seem to me to be certain distinctive features of the judicial process in the original Member States. Similar problems concerning the nature of a justiciable issue arise in varying degrees within the Community legal system. That they do not arise before the Court of Justice of the European Communities in the same manner as before national courts is, of course, due, first, to the special nature of the Community judicial structure which I have already described and, secondly, to the nature of the problems with which the Court is most frequently concerned.

It may be convenient, however, to take the same topics in the same order—separation of powers, the distinction between public and private law, the denial of justice and constitutional control. So far as the last element, the control of administrative acts, is concerned this falls into two parts, the direct control of Community institutions as such and the indirect influence which the Court exercises in respect of certain aspects of national law.

(1) *The separation of powers*

I have suggested that the traditional division of powers into legislative, executive and judicial has been understood in a way which varies from one Member State to another. So far as the Community itself is concerned the threefold division does not fit easily into the fourfold division of the Community institutions—the Council, the Commission, the Court and the Parliament.

Three factors in particular stand out.

(a) It is sometimes difficult to identify the Community “legislature.” It is not, as presently constituted, the European Parliament, which has primarily a consultative function. That is not to minimise the importance of the European Parliament. Its

consultative role is of the greatest value. It provides a forum in which opinion can be moulded and expressed and the power of members to ask questions, written and oral, of the Commission ensures a vital element of democratic control, albeit indirect. The Parliament is not, however, a true legislative body in the sense that this implies the right to initiate and pass legislation which, within whatever constitutional limits may be imposed, has binding effect.

(b) Nor is the Council of Ministers truly a "legislature" in this sense—although its directives and regulations are frequently referred to as legislation. In many fields, including some of the most economically important, the Council may only act on a proposal by the Commission and should it wish to amend such a proposal can only do so if it is unanimous.

(c) On the other hand the Commission is more than the traditional executive. In addition to its duty to "ensure the proper functioning and development of the common market" it has the duty to "formulate recommendations or deliver opinions on matters dealt with in (the) Treaty" if it considers this to be necessary. Moreover the Treaties provide that the Commission shall have its own power of decision and shall participate in the shaping of measures taken by the Council.

What relevance has this to the nature of a justiciable issue in Community law? This, I think. The Treaties avoid the word "legislation" as this would be understood in terms of traditional constitutional law. Instead they speak of "acts" of the Council and Commission and expressly make such "acts" justiciable by specifying (in Article 173) the grounds on which their legality may be challenged.

A directive, regulation or decision of either the Council or the Commission may be declared void if there has been "lack of competence, infringement of an essential procedural requirement, infringement of (the) Treaty, or of any rule of law relating to its application or misuse of powers." Under the broad umbrella of "infringement of a rule of law relating to the application of the Treaty" are included many subsidiary grounds of challenge such as that the "act" in question has been based on a material error of fact or that it offends against

the principle that all persons in like circumstances should be treated alike. Thus the justiciable quality of a Community "act" is closely related to the current practice in the majority, at least, of the original Member States. Moreover these are grounds which may be invoked by the individual litigant before his own courts when he finds himself affected by the application of a Community "act" and wishes to challenge its validity.

In addition, of course, the individual while not challenging the validity of a Community Act, may always seek an interpretation of it which is favourable to his interests.

The right to challenge the validity of an act of a Community institution or to seek a favourable interpretation reflects, I suggest, an attitude which I foreshadowed in mentioning national attitudes to the separation of powers. I have already instanced the striking development, since the last war, of administrative law in the United Kingdom. Nevertheless, faced with a dispute with a public authority, your articulate citizen still tends first to write to his M.P. or to *The Times* or to both, according to his *credo*. Elsewhere, particularly in Germany, the same citizen telephones his Rechtsanwalt and tells him to sharpen his forensic knife. He expects the law to provide a means of settling the dispute and is seldom disappointed.

(2) *Public and private law in the Community*

One might say that nearly all Community law is public law as the original Member States would understand the distinction. That is to say, Community law is largely concerned with the relations between individuals and the Community Institutions or between individuals and national agencies charged with implementing Community rules: it is also concerned with the relationship between the Community by virtue of its juristic personality and its Member States. Of course certain facets of Community law may have a direct bearing on the relationship between private persons. The most obvious example of this is the prohibition contained in Article 85 of the EEC Treaty, under pain of nullity and penalty, of agreements which adversely

affect the freedom of trade between Member States. Even so most would classify the Commission's power to take action in respect of an infringement as belonging to the realm of public law.

Specific traces of the division between private and public law are to be found in the Treaty. The power given to Member States by Article 36 to maintain or impose restrictions on the free movement of goods "justified on grounds of public morality, public policy or public security," the exceptions on similar grounds to the right of freedom of movement for workers or the free right of establishment all have echoes of this primary classification.

Indeed, in a recent case, one of the first brought to the European Court under the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, an express reference to the distinction is to be found in the decision of the Court.¹ The Court was asked for guidance on the scope of the Convention. What is to be understood by a Civil and Commercial matter? However "Civil law" or "Commercial law" is classified in the eyes of lawyers of the original Member States—and bear in mind the Convention as yet applies only to the original Member States—each is a division of private law, indeed, according to some, one of the two principal divisions.

The case concerned a claim by Eurocontrol, an organisation set up by international treaty, the signatories to which did not exactly correspond with the original Member States, to co-ordinate and provide air traffic control services. Its costs were recoverable on a *pro rata* basis from the airlines using its services. The seat of the organisation is in Brussels and the treaty stipulates that the courts there should have jurisdiction. Judgment was obtained in Brussels against a German airline and Eurocontrol sought to enforce the judgment in Germany.

In interpreting the Convention the Court recognised that the question whether a matter was "civil or commercial" could not be determined according to the classification recognised by the law of the national court where the action originated. Practice from Member State to Member State was much too

varied. For example, in one Member State matters of customs and excise are questions for the ordinary courts, in another for the administrative courts. It was therefore necessary to find some Community solution. The solution adopted by the Court was to exclude from the subject-matter of the Convention those relationships generally recognised as being governed by public law. Although the Court refrained from any exhaustive definition, it was of the opinion that the words "civil or commercial" pointed to a private law relationship and could not be extended to the situation where a public authority was acting in furtherance of its special powers.

(3) *Denial of justice*

I find it difficult to point to any specific decision of the Court where the *horor vacui* has been a decisive element, yet in terms of general approach I find it all pervasive. However sparse or intractable, the available sources of Community law must somehow be persuaded to reveal an answer. The litigant, or the national judge, must not be sent away without an answer. This would truly be a denial of justice. Accordingly if, from time to time, you are tempted to think that in its search for a solution the European Court has made too much of too little, please remember the spirit that has informed the attempt.

(4) *Control of constitutionality*

As I have already said, the Treaties have much in common with the written constitutions of the original Six and of Denmark and Ireland. The Treaties share with national constitutions an inability to be changed except by special procedure. Like national constitutions the Treaties are above challenge by the courts; on the contrary, it is the Treaties which set the standard against which ordinary legislation may be challenged. The hierarchic structure of Community law which I have described fits well with the traditions of the eight Member States which have written constitutions. In so far as one of the duties of the European Court is to determine the compatibility with the Treaties of subordinate Community legislation, it is in

essence performing the role of a constitutional court. Moreover it seems to me, although perhaps I should hesitate before making so sweeping a generalisation, that the structure of the constitutions of the Member States lends itself necessarily to a form of interpretation which transfers usefully to the Community Treaties.

(5) Control of Community administration

I have indicated the fundamental difficulties encountered at a national level. The administrator must be allowed to do his job. He must assess the basic data accurately; he may require to draw from the basic data secondary conclusions of fact; he must then consider what courses are open to him and which of those courses are permissible within the legal framework in which he operates; he must balance the pros and cons of these courses and make his choice. At the risk of repetition I should again point out that the judge's role is essentially different. He can evaluate the accuracy of the basic data as well as the administrator; he can evaluate the secondary conclusions at least to the extent of seeing whether they are supportable by the primary facts; he can assess the legal competence of a proposed course of action but he cannot make the final choice between the competing solutions. Should he find the solution chosen to be illegal, though this is more debatable, he may not fill a gap with a solution of his own choosing. I say more debatable because it is in this area particularly that national systems show their differences. In some the judiciary are prepared to go a good deal further than in others. I have instanced the extreme example of the Swiss Civil Code which in certain circumstances specifically requires that the judge should act as legislator but I prefer not to wander down that by-way since, first, Switzerland's solution in 1907 was regarded as novel and although well received in certain quarters it remains, I think, unique and, secondly, so far as my incomplete knowledge goes, it appears that the solutions reached by using it could, in some instances at least, have also been achieved by other means.²

The same problems face the European Court in its sphere as face the national judge in his, and the techniques in use by the Court are similar to those used by national courts.

In the first place the European Court will examine the evidence before the administrator to see whether he has fallen into a material error of fact. The Court may further examine the inferences which he has drawn from the primary facts and will then consider the compatibility of his chosen course with the law. As M. Maurice Lagrange has said,

“It is for the Court to investigate whether the different reasons stated in the contested decision are, on the one hand, correct in substance and, on the other, such as to justify the decision in law. In particular, the Court must review the administration’s concept of the legal nature of the interests which it must take into consideration and it is only within these limits that the discretionary power . . . can be exercised.”³

That the Court in individual cases may find its task a difficult one is inevitable. Unfortunately not all cases are easy. But the difficulties over the justiciability of a given issue frequently stem not from the nature of the problem but from the absence of proper guide-lines. This, as I shall suggest later, must be the responsibility of the Member States as represented in the Council of Ministers, or, if their powers permit, the Commission.

In dealing with the situation in which a national judge is faced with a challenge to the validity of an administrative act in furtherance of economic policy I said that, in my view, while the policy might not be challenged there was nothing inherently non-justiciable in economic facts. The same considerations apply to the European Court.

The Treaties establishing the Coal and Steel Community and the European Economic Community have by their nature a high degree of economic content and the Court cannot evade the problems which arise. Take for example its jurisdiction to hear appeals against decisions by the Commission in matters relating to unfair competition. What is a dominant position in a given market? What constitutes abuse of a dominant position?

Again, regulations made in the agricultural sector frequently empower the Council or the Commission to act when they consider the market in question to be "gravely perturbed" or "perturbed." It is not infrequently alleged in actions before the Court that the Council or Commission had no valid reason to suppose that the market was or was likely to be perturbed.⁴ The Court has to face up to the difficulties involved. An attempt was made to sidestep them under the Coal and Steel Treaty where Article 33 states: "The Court may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations," but adds the important proviso "save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application." This formulation leaves wide open the question whether the High Authority has fallen into manifest error not only of law but also of fact—material error of fact being in terms of Community law a violation of a rule of law. So even in Coal and Steel cases the Court may have to see whether the facts on which the discretionary exercise was based were manifestly misconstrued.

The task of the Court is facilitated by the form in which Community legislation is presented. In this connection, as an instrument for determining legality, I cannot over-emphasise the importance of the preamble to, say, a regulation. Here the Council or the Commission, as the case may be, has to state the reasons which form the basis in fact and in law for its determination.⁵ These allow the Court to consider not only whether the act in question is in conformity with the empowering instrument, but also whether in fact and in law the operative measures are justifiable in terms of the preamble.

The latter is always a justiciable issue falling within the competence of the Court but unless properly analysed can give rise to misunderstanding. Council Regulation such and such may give power to the Commission to take corrective action when the market in question is or is likely to be perturbed. The preamble to the Commission's Regulation will cite the power

and then will, or should, proceed to state the factors giving rise to its proposition that the market is or is likely to be disturbed. Here the Court can and will control its factual validity. There is nothing very unfamiliar in this—in essence it is the same as having to “prove the preamble” in promoting a private Bill. In so far, however, as the preamble is an expression of policy in the sense of a choice between more than one competent course of conduct, the Court will not attempt to assess its worth.

In one recent case, for example, the Court has said:

“As the evaluation of a complex economic situation is involved, the Commission . . . enjoys, in this respect, a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion.”⁶

“Manifest error” is, however, a phrase with a wide meaning including error of law and error of fact. Moreover the Court may test the choice which has been made against certain of the unwritten principles of Community law to which I have already referred. For example the so-called doctrine of proportionality—more accurately described as disproportionality—involves a consideration of the problem whether the means chosen by the Commission might cause a disproportionate interference in the market compared with some other solution—a question which involves a necessary consideration of the other possible solutions. Or again, if the point be put in issue, the Court may consider the solution chosen and investigate whether it involves discrimination against other persons equally entitled to uniform treatment under the proposed scheme. If it offends against these canons, grounds have been established for annulling the administrative measure. Once again, however, it must be emphasised that the Court will not substitute its own judgment of what is correct.

To this rule there is only one partial exception. Article 174 of the Treaty of Rome says that:

“ If the action is well founded, the Court of Justice shall declare the act concerned to be void. In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.”

Thus in the case of a Community act which would otherwise be declared void because of partial error the Court may save what is unobjectionable.

(6) The European Court and national law

I have already emphasised that the Court of Justice has in general no competence to apply national law, nor when a question is referred to it by a national judge can it interpret national law. It cannot in a reference under Article 177 declare, for example, that a national law is incompatible with the Treaty of Rome. On the other hand on an application by the Commission or another Member State it may declare that a state has, in adopting or maintaining in force a law, failed to fulfil its obligations under the Treaty. Here the Court may indeed have to interpret the meaning of the disputed measure.

Nonetheless even in references to the Court under Article 177 the complementary nature of the two jurisdictions renders it inevitable that from time to time the interpretation given by the European Court to a provision of Community law may require administrative or even legislative action at national level.

The recent case of *Bodie*⁷ illustrates two propositions which I have tried to make. In the first place, it shows how a decision of the Court may necessitate legislative change in a Member State. It is also an example in one and the same case of the Court's fulfilling its judicial role and declining that of the legislator or administrator.

Beer produced in the Federal Republic of Germany was taxed on a sliding scale. Breweries having an annual production figure of less than a certain amount were taxed at so much per hectolitre: above that figure the tax was at a rate which increased in a series of steps as the volume of production

increased. The object of all this, of course, was to give a slight fiscal advantage to small breweries, which with higher overheads might not have been able to compete with the giants.

Imported beer, on the other hand, was charged at a flat rate nearer the upper end of the sliding scale for home-produced beer.

A German importer of foreign beer attacked the flat rate charge on the ground that it contravened Article 95 of the Treaty of Rome which says that no Member State shall impose, directly or indirectly, on the products of another Member State any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

The Finanzgericht Düsseldorf referred three questions to the Court. The first was whether a tax of the type imposed by the Federal Republic was indeed compatible with Article 95; the second question, assuming the first to have been answered "no," was whether it would be so compatible if the imported beer were to be taxed at the domestic rates applied to the total annual imports of beer by each individual importer.

These questions, involving as they did the construction of Article 95 and the consideration of the features of a tax such as that imposed by Germany, were obviously within the Court's jurisdiction.

The Court answered the first two questions by saying that Article 95 would be infringed if the tax on the imported product and the tax applied to the similar domestic product were calculated in different ways and in accordance with different rules leading, if only in certain cases, to a lower taxation of the domestic product. Even if the system were changed to a sliding scale based on importers' total annual importation of beer, this would also offend against Article 95, since such a method might result in beer imported from a specific country being at a disadvantage as compared with the similar domestic product. This could arise when the tax rate to be applied was calculated on the total quantity of beer imported by an importer who obtained his supplies from a number of different breweries, whereas the home-produced beer was subject to a tax calculated on the total quantity produced by each brewery.

The third question, however, was of a quite different order. It assumed, correctly as it turned out, a negative answer to the first two and asked, "According to what data must the rates of tax to be applied be ascertained and within what limits must they keep themselves in order to comply with Article 95 of the EEC Treaty?" As the Advocate-General, Mr. Warner, said in his opinion, this virtually amounted to an invitation to the Court to lay down how imports into Germany of beer from other Member States should be taxed.

Here, obviously, the Court felt that it would be overstepping its legitimate function. The choice of a tax system was for the Member State, provided only that it did not contravene rules laid down in the Treaty. It was not for the Court to choose between two or more compatible schemes.

The Court pointed out that the initial choice of applying a graduated tax to home-produced beer calculated on the basis of the yearly production of each brewery was a matter which fell within the discretion of the Member State concerned. Having once chosen such a scheme, it became the point of reference for the purpose of determining whether the tax applied to a similar product coming from another Member State complied with Article 95. Given the type of tax in force in Germany for domestic products, compliance with Article 95 could only be achieved if foreign beer was taxed at the same rate, or at a lower rate, applied to the same quantities of beer produced by each brewery during the same period of time.

That is to say the Court was ready to interpret Article 95 of the Treaty and to consider whether certain specific types of excise duty were or were not compatible with it—this, as I have suggested, is an example of the operation of the true judicial function. In addition the Court was prepared to go a little further in order to help those concerned and to indicate what it regarded as certain salient features of the problem which the German legislature would have to keep in mind. Beyond that it felt it could not go—certainly it must stop short of seeming to exercise the different function which, as I have already suggested, begins at the moment when two or more

options, each sound in law, emerge. It is not for a court to proceed to election between these options.⁸

INTERPRETATION

Given, then that the European Court is seised of a problem susceptible of judicial treatment, how does it set about finding an answer? I said at the beginning that this question is often designated as one of interpretation and indeed there has been much valuable discussion under this patronym.⁹

I have already cited Mr. Justice Cardozo's succinct formulation, "What is it that I do when I decide a case?" A question which Cardozo later answered¹⁰ by saying:

"My analysis of the judicial process comes then to this, and little more: logic and history and custom and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired."

Over 50 years later and 3,000 miles nearer home Lord Wilberforce in *Black-Clawson Ltd. v. Papierwerke A.G.*¹¹ referred to:

"The important element of judicial construction; an element not confined to a mechanical analysis of today's words, but, if the task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs."

Underlying these two quotations is an objective recognition of the vast range of problems that call for judicial decision, the diversity of ways in which they may arise and an understanding that the approach in each case must be appropriate to the problem in hand.

Many generalisations about the working of the judicial process tend to be unhelpfully diffuse and are particularly

dangerous when related to a collegiate court such as the Court of Justice. Too often in contemporary writing and in discussion with those interested I find implicit the view that because the Court is collegiate it is also unipersonal. It would be more realistic to accept that the Court consists of a group of individuals, each no doubt the epitome of reasonableness but each having a mind of his own. The judgments of the Court are not infrequently an attempt to synthesise a number of voices agreed on the end result but reaching the same destination by different roads.

So much has already been said or written on "interpretation" in both the broader and the narrower sense that I refrain from adding more, except a note of scepticism and the suggestion that there are dangers in over-analysis. As was once remarked by Lord Porter in giving the advice of the Judicial Committee of the Privy Council, "The human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit."¹² Or, as Lord President Robertson long since observed, "There are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics un-awares."¹³

May I plead for the simpler approach. However much one may admire the intellectual capacity to refine a concept out of existence, a judge is unlikely to find in such a result the assistance he needs. In the case of the European Court as with any court, it is the nature of the written instrument before the Court and the circumstances in which it is being invoked that dictate the approach of each judge rather than the converse assumption that he brings to a neutral instrument a predetermined approach.

Accordingly I mention only one or two aspects of "interpretation" in the narrower sense, aspects which if not unique to the Court of Justice of the European Communities are not commonly encountered in national courts.

(1) In the first place there is the language problem. The Treaties of Rome are equally authentic in all Community

languages and so is all secondary legislation made under them. This, incidentally, is in contrast to the Treaty of Paris, which was drawn up only in French. What may appear relatively plain from one text may not be so in another. Moreover the use of one phrase in one language may mask a meaning which evokes concepts peculiar to a national system. To give one well-known example, the French concept of *ordre public* can and does present difficulties in other systems. The freedom of movement for workers or the right of establishment may be curtailed for reasons justified on grounds of *ordre public*—translated into English as “public policy.” Yet in many contexts “public order” would be a more appropriate reading of this many-sided concept.¹⁴

“A mayor may introduce a traffic plan for his town in order to maintain *l'ordre public*. Departmental sanitary regulations are enacted to satisfy the demands of health and *l'ordre public*. To prevent a disturbance against *l'ordre public* the police authority may prevent the holding of a public meeting. In the name of *l'ordre public* the preservation of decency on the beach may be the object of a municipal decree.”¹⁵

Thus, as Professor Lyon-Caen has said¹⁶: “Its role is so extensive that the concept itself has lost all precision.” Can so indefinite a notion operate effectively in a Community composed of nine Member States? I suspect that we shall hear a good deal more about it.

Both the danger of too much reliance on one language and the unexpected pitfall that always lurks for the unwary administrator are demonstrated by the case of *Stauder v. Ulm* in 1969.¹⁷ Who could have foreseen that the famous butter mountain could put in issue the protection of fundamental human rights?

In order to dispose of surplus butter it was decided to allow its sale at a reduced price to certain persons in receipt of social welfare payments and whose income did not allow them to buy butter at normal prices. Among other administrative measures the butter was to be provided to the recipients, as the German text literally had it, “in exchange for a coupon

issued in their names." The plaintiff, who was entitled to the concessionary butter, brought an action in the German courts on the ground that a coupon issued in his name would involve revealing his identity to the retailer or retailers concerned. This, he maintained, although the reported case does not clearly explain why, was an infringement of his fundamental rights as protected by the German Constitution. The matter was referred to the Court of Justice, where all was resolved. The Court examined the four language versions, there being at that time, of course, only four official Community languages, and found that according to two of them the requirement was that the coupon be one "referring to the person concerned." Methods could thus be found of checking entitlement other than the actual naming of the beneficiary. "Interpreted in this way," the Court added, "the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."

(2) What holds good for documents which the Court has to expound also holds good for the pronouncements of the Court itself. The Court has to use words which are intelligible in all languages. Once again the difficulties of *l'ordre public* become apparent in cases such as *Rutili v. Minister for the Interior*¹⁸ where in the English version of the judgment the translators felt constrained by the official text of the Treaty to speak of conduct which might constitute "a genuine and sufficiently serious threat to public policy" when "public order" would have been much more appropriate. Of these difficulties, *pace* certain commentators, the Court is only too well aware.

(3) Furthermore the Treaties themselves, and sometimes subordinate legislation, refer to a number of important concepts but leave them undefined, sometimes intentionally so. If the Treaties are to have practical consequence definitions and explanations must be found by the Court.

Probably the best known of these is the reference in Article 215, paragraph (2), of the Treaty of Rome to the "general

principles common to the laws of the Member States," words described by M. Gand, then Advocate-General, as "ambiguous —no doubt intentionally ambiguous" ¹⁹ and by M. Lagrange as "merely a diplomatic formula, such as is often to be found in international treaties." ²⁰ Fortunately, so far, the Court of Justice has been able to resolve cases before it based on Article 215 without having to mention these troublesome words.

A more recent example of intentional ambiguity which caused the Court much perplexity, is one which I have already mentioned in another context, the words "Civil and Commercial matters" occurring in the title and in the opening article of the "Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters." These words are of crucial importance, since they govern the whole field of application of the Convention. Yet in the report on the Convention presented by the Drafting Committee of Experts to the governments of the six Member States in 1968 ²¹ we find it stated that, "The Committee has not specified what should be understood by 'civil and commercial matters,' nor has it ruled on the problem of qualifying the expression by determining the law according to which it should be interpreted," thus showing that it was fully aware of the potential difficulties.

(4) In addition there may well be a certain difference of approach when the text to be construed arises in the context of a mature legal system with long-established rules, compared with the situation which, from time to time, arises in Luxembourg when the Court is called upon for the first time to pronounce upon a problem.

As has often been said, whenever Parliament produces a statute purporting to codify the common law, the first thing practitioners do is to go back to the pre-codified law in order to understand what the statute means. With the Treaties one is starting from scratch. Perhaps "has started from scratch" is more appropriate. Many people are still unaware that the law reports of the Court of Justice already consist of 22 stout

volumes. Nonetheless the reservoir of guidance is limited when compared to the *Law Reports* and their predecessors.

It has been suggested to me that Community law is at the same stage of development as English equity in the eighteenth century—with a like need for freedom and inventiveness. I feel scarcely qualified to comment—my parallel would be that we are at a stage somewhere between Erskine's *Institutes* and Bell's *Commentaries*.

(5) Furthermore, as one experienced and senior Community official has said, "The conditions in which Community law was and is prepared are hardly conducive to careful drafting. This is true not only of the treaty negotiations in Val Duchesse, but also of the horse trading which takes place all the time in the Council."²²

One has heard the same said of parliamentary legislation, particularly in connection with late amendments, but seldom has this practical consideration been so forcefully expressed. The Court is not unmindful that a text which it has to consider may not have been drafted in circumstances conducive to limpidity.

For these reasons the Court tends to avoid a minute textual analysis and may even decline to proceed on the basis of such a well-known maxim as *expressio unius exclusio alterius*—for the good reason that it is by no means true in Community drafting.

CONCLUSIONS

Accordingly the Court, in seeking guidance, looks frequently to the purpose of the text in dispute—what has now become fashionable among some to call the "teleological" approach. I suspect that this word is as unfamiliar to most British lawyers as it was to me until a short time ago. On my explaining its meaning, recently, to a distinguished English judge, he replied that he felt like Monsieur Jourdain, who for 40 years had been speaking prose unawares. Like some members of the Judicial Committee of the House of Lords I prefer the epithet "purposive."

The form of Community legislation facilitates the purposive approach. Since the abolition in United Kingdom legislation of the preamble, the intention of an Act of Parliament has had to be gleaned from its content as a whole, whereas with the Treaties their intention and objectives are plainly stated. In the case of subordinate legislation, the requirement that it must be reasoned enables the Court by a consideration of the preamble easily to deduce its object.

The use by the Court of the purposive approach—seeking out the object of the text in dispute and trying to give practical effect to it—has attracted both praise and criticism. Commentators, both kind and critical, have frequently referred to the approach of the Court as “activist” or “dynamic,” but with great respect I wonder whether these adjectives do not obscure the issue, as well as suggesting that the Court offends against Talleyrand’s principle of “*pas trop de zèle*.” For me they conjure up a vision of the Court rising from its collective bed with—as the late Field Marshal Viscount Montgomery of Alamein might have said—“a glad cry upon its lips” saying “let us be dynamic today.”

Once again may I emphasise that it is the text—including of course its expressed objectives—which dictates the approach of the Court. As I have said, I meet so often in discussion the phrase “the policy of the Court.” Apart from the inherent improbability that such a many-headed Hydra would have a uniform policy it must be underlined that it is the Treaties and the subordinate legislation which have a policy, and which dictate the ends to be achieved. The Court only takes note of what has already been decided. “It is not for the Court to remedy the situation, by modifying, by way of interpretation, the content of the provision applicable to one or other case, since such modification pertains exclusively to the competence of the Community legislature.”²³

As Professor Nicolaysen has well put it: “The Common Market is *not* intended to function as the majority of judges consider desirable and expedient, but as prescribed by the Treaties, in the most efficient way however, and by using all possibilities which have a basis in law.”²⁴

At the same time, there is nothing new or unusual in a court seeking a solution of a problem which will make things work rather than bring them to a halt. In English law the maxim *ut res magis valeat quam pereat* goes back at least as far as *Coke on Littleton*.

I suspect that if one could truly see into the minds of some of the critics of some of the Court's more discussed decisions the disagreement is less with the Court's reasoning than with the aims and purposes of the Treaty itself. While from time to time the Court may have to extrapolate from a limited series of datum points, the datum points exist and cannot be ignored. Or to change metaphor, if from time to time the signposts are few, the direction in which they point is usually fairly clear. You may not like the chosen path, but that does not absolve the Court from following it.

It is, I think, the latter point that is most often overlooked. I have even heard it said that the Court acts on the maxim that "Law is what is good for the integration of the Community" with the implication that the Court was adopting a standpoint based on political conviction rather than judicial reasoning. To speak of "*gouvernement des juges*" is only a polite way of saying the same thing, that the judge is usurping the role of the legislature and executive. Lord Devlin's aphorism, "The British have no more wish to be governed by judges than they have to be judged by administrators,"²³ would find, I feel sure, a responsive echo elsewhere in Europe. The difficulty, as always, is to find the dividing line between the functions.

As concerns the European Court, however, it seems to me that much misunderstanding stems from a failure to make the essential distinction between the Treaties themselves on the one hand and, on the other, the law which must be observed in their interpretation and observance. As I have already said, the Treaties are the result of political choice, a choice which even now is controversial, just as domestic legislation is frequently the result of controversial political choice. In one sense it may be said that by giving a meaning to a politically motivated text which renders it effective the law is furthering

a political end, but this confuses the implementation of a choice with the choice itself and misunderstands the nature of the judicial task. As the Procureur-général of the Belgian Cour de Cassation, M. Dumon, has aptly said, "a political decision should not be confused with a decision that entails political consequences."²⁶

At the moment of signing the original Treaties the political will manifested by the original Member States was sufficiently aligned to enable agreement to be reached as to both the objects to be pursued and the institutional machinery to enable those objects to be achieved. One is entitled to assume that a similar will again manifested itself to permit the signing of the Treaty of Accession. Inevitably under pressure of economic and social forces there have been fluctuations in that political will: centrifugal forces co-exist with centripetal. The Court is, of course, aware of these forces—judges do read the newspapers—but it is no part of the function of the European Court—any more than of any other court—to be influenced by such considerations. Indeed, it is their duty not to be so influenced. Far from the Court's task being a political one in the sense of responding to the changing pressures that affect political decision, its task is to provide a series of uniform standards which, to quote Article 164 of the Treaty of Rome once again, assure that in the interpretation and application of the Treaties the law is observed.

Notes

¹ Case 29/76, *LTU v. Eurocontrol*, judgment October 14, 1976.

² Du Pasquier, *op. cit.*, 201 and 211.

³ Case 14/61, *Hoogovens v. High Authority* [1962] E.C.R. 253 at 284; [1963] C.M.L.R. 73.

⁴ e.g. Cases 106 and 107/63, *Alfred Toepfer and Getreide-import Gesellschaft* [1965] E.C.R. 405; [1966] C.M.L.R. 111.

⁵ Art. 190 of the EEC Treaty.

⁶ Case 55/75, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof* [1976] E.C.R. 19 at 30.

⁷ Case 127/75, *Bobie Getränkevertrieb GmbH v. Hauptzollamt Aachen-Nord* [1976] E.C.R. 1079.

⁸ There may still, of course, be a question for the national judge. Does he allow the whole tax to be refunded or by exercising a power

equivalent to that given to the Court of Justice under Art. 174 deduct from the refund at least the minimum that could have been exacted?

⁹ For example see: Norman Marsh, Q.C., *Interpretation in a National and International Context* (Heute-Brussels-Namur, 1973); *The Interpretation of Community Law*, papers by Dr. C. D. Ehlermann and Mr. Ian Sinclair, C.M.G. (University of London King's College, June 11, 1976); Court of Justice of the European Communities, Judicial and Academic Conference, September 27–28, 1976, papers by Dr. H. Kutscher, Judge of the European Court, M. F. Dumon, First Advocate-General of the Cour de Cassation of Belgium and Professor C. J. Hamson, Q.C. (Office of Official Publications, Luxembourg, 1976).

¹⁰ *The Nature of the Judicial Process* (1921, Yale Reprint, 1971), p. 112.

¹¹ [1975] A.C. 591 at 628.

¹² *Commonwealth of Australia v. Bank of New South Wales* [1950] A.C. 235 at 313.

¹³ *Edinburgh Street Tramways Co. v. Magistrates of Edinburgh* (1894) 21 R. 688 at 704.

¹⁴ Indeed it is so translated in the European Convention on Human Rights.

¹⁵ Bernard, *La notion d'ordre public en droit administratif* (Paris, 1962), p. 2.

¹⁶ (1966) *Revue trimestrielle de droit européen* 693.

¹⁷ Case 29/69, [1969] E.C.R. 419; [1970] C.M.L.R. 112.

¹⁸ [1975] E.C.R. 1219; [1976] 1 C.M.L.R. 140.

¹⁹ Cases 5, 7 and 13–24/66, *Firma Kampffmeyer and Other v. Commission* [1967] E.C.R. 245 at 269.

²⁰ (1965) 3 C.M.L.Rev. 32.

²¹ *Bulletin of the European Communities*, Supplement 12/72, English version, p. 17.

²² Dr. C. D. Ehlermann, Director, Deputy Financial Controller, Commission of the European Communities, *op. cit.*

²³ Case 97/71, *Interfood GmbH v. Hauptzollamt Hamburg-Ericus* [1972] E.C.R. 251.

²⁴ *Basic Problems of the European Community* (Oxford, 1975), p. 167.

²⁵ *The Times*, October 27, 1976.

²⁶ Paper presented to Judicial and Academic Conference, September 27–28, 1976, note 9, *supra*.

CHAPTER 4

“ POLITICS, PHILOSOPHY AND ECONOMICS ”

HITHERTO I have been dealing with the judicial process viewed as it were from the inside. That is to say I have suggested that there are limits beyond which the Court of Justice of the European Communities cannot properly move, limits which are imposed by the nature of the judicial function itself.

There are, however, certain external factors which from time to time may affect the full performance of its task by the Court. Those which I propose to mention vary in their origin and in the nature of the problems they pose for the Court. They have, however, one thing in common. They arise from the changes, political and economic, which have taken place since the final draft of the Treaty of Rome was approved in the early months of 1957.

In the first place there have been political developments affecting the decision-making process in the Community, developments which are not easily to be reconciled with the terms of the Treaty; developments which may have the effect of withdrawing from the Court's control whole areas of Community action. In either case they have a close bearing on the work of the Court.

In the second place there has been failure to take Community action where action is required. Proposals in important sectors have been put forward by the Commission but have been rejected or only approved in part because of lack of agreement between Member States. The result, so far as the Court is concerned, is that, from time to time, it has had to resolve problems in the absence of important guide-lines or, indeed, even of adequate rules of law relevant to the matter in hand. In the extreme case, as I have already illustrated, it has been known for those who sought to negotiate a text, and who have been unable to agree, to settle for an ambiguous expression in the hope that the Court would one day be able to resolve the ambiguity.

Thirdly, the Treaty of Rome contained a number of unexpressed but important economic premises which are no longer true today. I leave it to the specialists to say whether, indeed, they were ever wholly valid. Of these I instance two. In the first place there was an assumption that rates of exchange between Member States themselves and between the currencies of Member States and the principal external currencies, particularly the dollar, would remain stable. In the second place there was an assumption that real earnings would increase at a steady rate and that Member States would retain the capacity to control prices in many important sectors through the medium of market forces combined with Community schemes for particular sectors or, alternatively, by the co-ordination by Member States of their economic policies. Both these premises have proved false. After a period of comparative stability we have seen a series of upheavals in the relative values of key currencies and in place of controlled economic growth we have been propelled by inflationary forces of alarming strength.

These difficulties must be resolved by the legislator and the economist. I certainly disclaim any particular competence even to paddle in the opaque waters of economic theory but I am obliged to peer into them since the existence of these difficulties can give rise to major problems of principle for the Court, problems for whose solution the existing Community instruments give insufficient guidance. Particular difficulties, for example, may arise when, through change in economic circumstances, two principles, each comprehensible and justifiable in itself, come into conflict with each other. In such a situation the Court may find itself without a clear pointer, in the form of effective Community legislation, to the proper priorities to accord.

There is one further limiting factor which I might mention briefly at this stage, although I would like to return to it when I look to the years ahead. It is this. The most important parts of the Treaty of Rome as yet largely unimplemented are Titles II and III of Part Three—Economic and Social Policy. The Treaty provisions here are for the most part so indefinite,

sometimes no more than exhortation or declaration of intent, that it is difficult to envisage a justiciable issue emerging directly from their terms. There is a possibility, therefore, that important areas of Community action might be withdrawn from control by the European Court unless, when these chapters come to be fulfilled, steps are taken to embody the decisions involved in proper regulatory form.

Let me illustrate what I have just said by three examples:

POLITICAL DEVELOPMENTS AND JUDICIAL CONTROL

As I have already mentioned in dealing with the question of separation of powers, the institutional structure of the Treaties is most carefully conceived.

To recapitulate briefly, the Commission has the task of "ensuring the application of the provisions of this treaty and of the provisions enacted by the institutions of the Community in pursuance thereof," a duty which may involve an application to the Court in terms of Article 169 for an order declaring that a Member State has failed to fulfil a Treaty obligation. While the number of times the Commission has exercised this power has not been numerically large—45 in all as at late-1976—this is without question one of the key provisions in the Treaty. The existence of the power is as important as its exercise. The Commission has the ability to formulate recommendations or opinions in matters which are the subject of the Treaty but its power of decision is limited to those cases where such a power is directly conferred by the Treaty or where a competence has been conferred upon it by the Council. The Council of Ministers, on the other hand, has a general power of decision but in many cases—indeed the majority of cases—can only act on a proposal by the Commission although it can, of course, direct the Commission to submit proposals on a given topic. In a number of specified areas, but among them the most important, the Council itself cannot take a decision without consulting the European Parliament. The Council can amend a Commission proposal if it is unanimous. Otherwise it can only adopt

the proposal as it stands or ask the Commission to submit fresh proposals.

By Article 173 of the Treaty the Court has the duty, when properly seised of the matter, to review the legality of the "acts" of the Council and the Commission.

Article 189 provides that in order to carry out their task the Council and Commission are required, *inter alia*, to make regulations, issue directives and to take decisions. All these are "acts" for the purpose of judicial control and must "state the reasons on which they are based." I have already mentioned the importance of this requirement in that it permits the Court to compare the considerations invoked in a particular case with the powers which empowered the "act" to be made and to compare the end result with the expressed intention.

The word "act," however, is not limited to regulations, directives and decisions—I omit any reference to opinions and recommendations as these are, in any event, not binding on those to whom they may be addressed.¹ For example a resolution of the Council relating to Community staff salaries has been held to be an act capable of judicial control—but whatever the exact form of the "act" it must emanate from either the Council of Ministers or the Commission, the only two Community institutions empowered in terms of the Treaty to legislate or make rules of general or specific effect.

"Summit" meetings have been part of Community life from an early stage. Some have, indeed, been of crucial importance, such as that held at The Hague in December 1969 at which it was agreed to reopen discussion with those countries which were then applying for membership of the Communities.

The decision to formalise these summit meetings—to say "to institutionalise" them would be to introduce confusion—under the name of the "European Council" was taken at the meeting of Heads of Government at Paris in December 1974 and obtained a mixed reception. The Commission's Annual Report for 1975,² "welcomed this 'major innovation,' seeing in it a possibility of strengthening the decision-making capacity of the Community, but this enthusiasm was tempered by an

awareness that it could affect the institutional structures set up by the Treaties.”

In political terms, that is, the danger was seen that the Council of Ministers might be downgraded. In legal terms the question may arise with some acerbity as to whether or not the European Council is a Community Institution whose acts are susceptible of control. On one view, at least, the European Council is in every sense above the law—or at least above the law of the Treaties.

Perhaps this does not matter. The decisions taken by the European Council do not normally raise justiciable matters and their implementation must always, it seems to me, be in the hands of the Council of Ministers or the Commission or of Member States who, by one procedure or another, are all subject to the Court's control. The possibility exists, however, that a Member State might be led by a European Council decision into a course of action incompatible with the Treaty, thus placing the Commission in a position of real difficulty. This fear is, I trust, more theoretical than real and the same Commission Report³ contains the reassuring statement that the “active participation of the Commission made it possible to ensure that Community procedures are respected, and it is on the basis of Commission proposals and communications that the major European Council policy guidelines have been adopted.”

What gives rise to more concern is a tendency for the Council of Ministers first to deliberate as a Community Institution and then to doff its conciliar hat and as a meeting of “representatives of the Governments of the Member States” to take further decisions without, as far as I know, even leaving the room. Meeting *au sein du Conseil* is the more graphic French expression.

If one leaves aside the situation where the Treaty expressly imposes a duty upon the Member States as such to act collectively—for example in the appointment of Commissioners or Members of the Court, appointments which are made not by the Council of Ministers but “by common accord of the Governments of the Member States”—the

problem arises as to the status of such decisions in Community law. What, moreover, is their status in international law? Much must depend on their content and the purpose of the instrument concerned.

Why resort to this device at all? There are comprehensible political reasons. It is a useful vehicle for recording a general policy statement or declaration of intention which is not intended to have any legal effect and yet which may receive the publicity stemming from its appearance in the "Information and Notices" pages of the *Official Journal*. It is a method of securing agreement—often in the best interests of the Communities—when other methods might fail. But the dangers are obvious. This procedure may avoid the necessity of the decision's being based on a proposal by the Commission or it may avoid the necessity of making a reference, which might otherwise be necessary, to the Parliament or to the Social and Economic Committee. Most important of all—although there may be arguments the other way—there is a risk that important fields of Community decision may be removed from judicial scrutiny.

Curiously, at first sight, the Treaty of Accession appears to legitimise these offspring of dubious parentage. By Article 3 it is provided that:

"The new Member States accede by this Act to the decisions and agreements adopted by the Representatives of the Governments of the Member States meeting in Council. They undertake to accede from the date of accession to all other agreements concluded by the original Member States relating to the functioning of the Communities or connected with their activities."

The explanation for this has been given by my colleague, Professor Pescatore:

"When the original Member States negotiated the conditions of accession with Denmark, Ireland, Norway and Great Britain, it was necessary to resolve the question of the acceptance by these states of the whole body of secondary law. Now, it was discovered, at that time, that

outside the secondary legislation which fell into the categories expressly envisaged by the treaties and thus necessarily included in the accession to those treaties there was a mass of instruments which were very varied as to form and content and which had been adopted by the Member States as forming an integral part of Community law. In order that there should be certainty that these instruments also should be accepted by the new members the original Member States agreed with them an express clause,"⁴

that is to say Article 3 which I have just quoted.

Opinions may differ but I wonder whether Article 3 must not be read with an implied clause of "in so far as they are capable of affecting legal relations."

The difficulty which I have outlined was omnipresent in the controversial case of Mlle. Defrenne, the air hostess who invoked the equal pay provisions contained in Article 119 of the Treaty of Rome.⁵

Article 119 states that during "the first stage" each Member State should ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. Whatever the meaning of that provision might have been, it was plain that action was called for by the completion of "the first stage" which the Treaty defined as ending on December 31, 1961.

Conscious, no doubt, that not all Member States had taken appropriate action, a Resolution was adopted by a Conference of representatives of Member States "meeting in Council" on December 30, 1961, agreeing to eliminate all discrimination, direct and indirect, between male and female workers by a series of steps over a period ending on December 31, 1964. This was followed by a series of reports on the situation in the original Member States, the most recent of which was dated July 1973. Matters were still not satisfactorily resolved and on February 10, 1975, the Council adopted a measure—this time by way of Directive, providing further details concerning the scope of Article 119 and allowing Member States a further year to put in hand the appropriate national measures.

So far as the Resolution of December 30, 1961, was concerned the Court had no difficulty: it was "ineffective to make any valid modification of the time limit fixed by the Treaty." As the Court made plain: "Apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236."

As for the Directive of 1975, the Court held it to be competent in so far as it was intended to encourage the proper implementation of Article 119, particularly in so far as it sought to eliminate various indirect forms of discrimination. Once again, however, the Court held that the Directive was quite incompetent to reduce the scope of Article 119 or modify its temporal effect.

Thus in this case the Court was able to elide the problem of the exact nature of the Resolution of 1960 since it was clear that nothing short of using the Treaty procedure itself could modify or abridge an express Treaty provision. Nonetheless the Court had to take into account that Member States and, more importantly perhaps, employers in the Member States, had acted on the assumption that the full impact of Article 119 had been postponed. In such special circumstances the Court felt the principle of legal certainty prohibited the reopening of past transactions. Many critics have found this result unsatisfactory, although I can imagine the reaction had the judgment of the Court required the renegotiation of tens, if not hundreds, of thousands of individual contracts of employment. One thing, however, is clear. It demonstrates the dangers of attempting to by-pass the proper institutional procedures specified in the Treaties.

CURRENCY FLUCTUATIONS

Another and perhaps more concrete example of how a shift in economic forces can create problems for the Court is to be found in the constant, and often overnight, fluctuations of the currency rates of Member States which, in turn, have materially affected trade between Member States and with third countries during the last few years.

Relatively stable rates of exchange are among the economic premises of the Treaty of Rome. While each Member State remains master of its own currency it has, nonetheless, a duty in terms of Article 104 to pursue an economic policy designed to achieve the equilibrium of its overall balance of payments and to maintain confidence in its currency. The same article, incidentally, also provides that this shall be done while taking care to ensure a high level of employment and a stable level of prices. One may perhaps be excused a wry smile in rereading in 1977 this confident and praiseworthy manifesto of twenty years ago.

The same belief in the stability of parities also lies behind the provisions of the Treaty relating to free movement of capital and is, indeed, at the foundation of the concept of a common external tariff coupled with the abolition of all measures impeding the free movement of goods within the Community. It is at the root of all the sectorial schemes within the Common Agricultural Policy—and they are in the majority—which call for a common intervention price and threshold price expressed in Units of Account. These, as you know, were originally introduced in 1960 and have a value of 0·88867088 grammes of fine gold—the pre-devaluation value of the United States dollar.⁶ The importance of this, of course, was that the parity of the currencies of the Member States *vis-à-vis* the Community Unit of Account was the same as that communicated to the International Monetary Fund in terms of the Bretton Woods Agreement of 1944.

The Treaty of Rome stopped well short of prescribing monetary union but the first international monetary crises of the late 1960s—the French devaluation in August 1969 and the revaluation of the Deutschmark in October—prompted the commissioning of the committee under the presidency of M. Pierre Werner, then Prime Minister of Luxembourg, to make proposals for monetary union. The report of that committee which was presented in October 1970 called for the total and irreversible convertibility of currencies and the irrevocable fixing of parities. This bold suggestion, however, was unacceptable on a political level and was overtaken by events. The

starting point, perhaps, was the crisis of May 1971 when an enormous influx of short term capital led the German and Dutch Governments to free the rates of exchange. Notwithstanding the Community decision of July 1, 1972, to limit the range as between the currencies of any two Member States to 2.25 per cent. of official parity rates, "the Snake," by 1974 no fewer than four currencies were floating outside this range.

These events required Community action to safeguard the operation of the Common Agricultural Policy. The reason for this is demonstrated by a simple example.

Intervention agencies in each of the Member States offer the same intervention price for agricultural produce presented to them. The agency has no option but to buy at the intervention price which is calculated in Units of Account and which is then for each Member State reconverted at fixed parities which are normally settled annually and which can in a situation of rapidly changing rates of exchange be substantially out of line with the market rate. Let us assume that the French franc has depreciated against the Deutschmark. The astute operator—and there are many astute operators—buys a large quantity of cereal at the current market price in France, pays for it in French francs and then transports it to Germany, where he offers it to a German intervention agency who is obliged to give him the common intervention price converted into Deutschmarks at an out-of-date rate. He thus obtains a handsome profit on reconverting his German currency into French, even after deducting his transport costs.

This new form of arbitrage is, of course, the antithesis of a true market which presupposes that supply and demand are regulated by genuine consumer need. In order to preserve the proper function of the agricultural policy and on the recital that "in the course of the last few weeks certain foreign exchange markets within the Community have been disturbed by speculative movements involving an abnormal influx of short term capital,"⁷ it was decided in May 1971 to introduce a frontier charge or payment known as "monetary compensatory amounts" with the object of mopping up profits of

the type just mentioned and of making exports practicable from strong currency Member States. The system was later extended to external trade to avoid the deflection of export or import business and to prevent circular transactions. The regulations governing the exaction or payment of monetary compensatory amounts are immensely complicated and have been amended with bewildering frequency in response to further changes in the rates of exchange both between Member States and in relation to the dollar.

It is difficult to give a short and up-to-date account of the various currency crises since 1971 and I make no attempt. It would, I fear, be out of date before the ink dried on the page and of only antiquarian interest by the time these lectures are delivered.

In any case, you might ask, what is the relevance of this to the work of the Court? It could be said that I have just described a series of economic emergencies requiring a political rather than a legal solution. This is true. Nonetheless commerce continues and must continue in good times as in bad. Moreover, economic storms can sometimes bring fortune to those who can ride with them provided they can still steer a course when driven under bare poles. At any rate, the economic climate of the Community is ever reflected in the disputes, claims and grievances of those whose commercial transactions have been affected. Accordingly the Court has been compelled, in spite of the obvious difficulties, to apply the discipline of legal analysis to measures whose impetus has been the necessity of finding an immediate response to unacceptable economic pressures.

That is to say, the Court has had to consider the actions of the Community institutions taken, of necessity, at speed against a background of rapidly changing pressures, when almost every aspect has been under fire from those whose interests have been affected.

This can be demonstrated by a number of cases of which I select the following.

*Balkan-Import-Export v. Hauptzollamt Berlin Packhof*⁸ concerned the import into Germany of a consignments of ewes'

milk cheese from Bulgaria. This fell into the customs category of "cheese of sheep's milk or buffalo milk, in containers containing brine, or in sheep or goatskin bottles." In passing, one must salute the thoroughness of the authors of the Common Customs Tariff lists. All human activity, imaginable or unimaginable, is there encapsulated.

The importer found himself compelled to pay a substantial surcharge in the form of a compensatory amount although the exchange rate between German and Bulgarian currencies had remained unaltered. The first ground of attack was that the regulation which introduced these amounts was invalid in so much as it was based on Article 103 of the Treaty which does not relate to the Common Agricultural Policy but refers only to the "conjunctural policies" of the Member States. This is a curious phrase, at least to me, although I understand that *conjuncture* and *Konjunktur* have a quite precise meaning in French and German law as opposed to astrology. It means, of course, and was so translated in some of the earlier unofficial translations of the Treaty, "short term economic policies."

The Court accepted that the Council had no alternative but to accept the floating of the Dutch and German currencies if the wave of speculative capital into Germany and the Netherlands was to be checked, although the currency flotation undoubtedly imperilled the unity of the Common Market. The object of compensatory amounts was not protectionist but intended to maintain the system of uniform prices, "the foundation of the present organisation of the markets." They are, said the Court, a trifle optimistically perhaps, "of an essentially transitory nature." Otherwise they would have had to be adopted by the Council under those articles of the Treaty relating specifically to agriculture and this in turn would involve a mandatory duty to consult the European Parliament.

"The suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States (the effect of which they had partially to offset) "

all justified recourse to Article 103. In this connection it is worth noting that subsequent amendments to Regulation 974, when the same degree of urgency did not exist, were made under the more elaborate procedure for agricultural regulations.

Balkan-Import-Export was a claim before the German courts for restitution of the compensatory amounts paid and came to the Court of Justice by way of a reference under Article 177. In *Merkur v. Commission*⁹ the applicant tackled the Commission directly. His ground of action was not that he was required unjustly to pay a sum of money but that the Commission had failed to fix a compensatory payment for exports of barley from Germany for a period of about 12 weeks following the taking of powers to introduce monetary compensatory amounts.

Probably the plaintiff's most powerful argument was that during that period he was discriminated against in comparison with traders who exported products which had benefited from the compensatory payments from the beginning of the scheme. The Court, however, rejected the claim. While the Community institutions were empowered to mitigate the effects of the upward floating of the Deutschmark they were not bound to compensate for all the effects in so far as these were disadvantageous to exporters. The difference in treatment could only have amounted to discrimination if it had been arbitrary. Again the urgency of the Commission's task was emphasised and the Court pointed out

“ Since the assessment which the Commission had to make was perforce an overall one, the possibility that some of the decisions it made might subsequently appear to be debatable on economic grounds or subject to modification would not in itself be sufficient to prove the existence of a violation of the principle of non-discrimination, once it was established that the considerations adopted by it for guidance were not manifestly erroneous.”

These two cases related to the crisis of 1971. That of 1973 following on the February devaluation of the United States

dollar also produced—and continues to produce—its crop of litigation. One of the most interesting cases raised the question of retroactive Community legislation. *Industria Romana Carne Affini*¹⁰ carry on business as importers of meat. They claimed damages from the Commission on the ground that they were called upon to pay too much on importing frozen meat from the Argentine. I use the vague phrase "too much" quite deliberately as the regulations in question are tediously complicated.

One of the relevant regulations was published in the *Official Journal* on April 7 but stated that it was to be applicable from February 26. These dates were crucial as the first of the imports in question took place on March 22, 1973, that is to say before the regulation was in force but after the date to which it had retrospectively been made applicable. The reason for this, it was explained by the Commission, was the sheer pressure of events. On February 1, 1973, the agricultural regulations became applicable to the new Member States. There was on February 14 a devaluation of the dollar and Italy withdrew from the Basle agreement. On March 1 the exchange markets were closed and on March 19 there was a revaluation of the Deutschmark.

In his opinion the Advocate-General, Mr. Warner, considered the national rules of the Member States regarding retroactive legislation. As regards statutes, he said the well established rule in all the Member States other than Germany, which forbade it totally, was that whilst Parliament has power to legislate retroactively there is a presumption against its doing so. As regards subordinate legislation, it appeared that the most widely accepted rule, which, said Mr. Warner, is also the most logically consistent with the rule applying to statutes, is that subordinate legislation may only be given retroactive effect if and in so far as the enabling statute authorises it, either expressly or implicitly.

This was not the situation in the present case and after referring to the economic crisis Mr. Warner had this to say:

"I do not underestimate the strain that these events, happening in quick succession, must have put on the

Commission's staff. But the fact that they occurred cannot lead to the conclusion that the Council must at an earlier date have empowered the Commission to legislate retroactively as to monetary compensatory amounts or as to adjustments to them. Too often at the national level the power to legislate retroactively is used, not because its exercise is called for by the nature of the problem that is being dealt with, but simply in order to make life easier for the Executive. It would be deplorable if that practice were to spread to the Community level."

In the end result, however, the Court held that there was here no true retroactivity. Certain factors necessary for the calculation of monetary compensatory amounts only became known after the end of the period of time. Retrospective calculation was inherent in the system and unavoidable.

One final example: I have just mentioned that after the further devaluation of the dollar in February 1973 event followed event with immense rapidity. Originally the amount of the monetary compensatory amount had been calculated by reference to the rate of the national currency concerned against the U.S. dollar. On February 23, 1973, the Council of Ministers adopted a regulation indicating that the dollar would no longer be used as a point of reference in calculating monetary compensatory amounts. Early in March support for the dollar was abandoned by the Council. On March 23 the Commission's proposal for a reform of the system of compensatory amounts was debated by the Council. On April 30 the Council adopted a regulation¹¹ abandoning the dollar link.

One side effect of the original scheme was that in trade with third countries, where the contract was expressed in dollars, the system operated as a hedge should the dollar be devalued. As the Court observed in *CNTA v. Commission*¹²

"The system of compensatory amounts cannot be considered to be tantamount to a guarantee for traders against the risks of alteration of exchange rates. Nevertheless the application of the compensatory amounts in practice avoids the exchange risk, so that a trader, even

a prudent one, might be induced to omit to cover himself against such risk."

Accordingly, said the Court, "The Community is therefore liable if, in the absence of an overriding matter of public interest, the Commission abolished with immediate effect and without warning . . . compensatory amounts . . . without adopting transitional measures."

What do these instances demonstrate? First, I think, that the Court has had and is having to deal with a series of cases—I could extend the list many times without difficulty—arising in circumstances not only never envisaged by the Treaty of Rome but in circumstances running counter to one of its basic premises. Secondly, they show that the Court appreciates that in moments of economic stress when contingency measures have to be taken the Community authorities must be allowed some lee-way. That with hindsight it may appear that the measures chosen were not necessarily the best is not sufficient to annul what has been done. Even so, and this is the third and most important point, "the law" must be applied to protect the administered if, no doubt with the best motives imaginable, the Council or Commission, as the case may be, has failed to protect their legitimate interest. In particular the cases show that the Court can protect the legitimate expectations of the reasonable trader who may have been misled by the action of the Community. On the other hand the Court is less susceptible—as some reported cases also show—to the blandishments of the large and experienced undertaking well able to see in which direction the economic wind is blowing and able to make for a safe anchorage before the storm cloud breaks.

PRICE CONTROL

The same shift in economic forces which I have already mentioned can give rise to another type of problem for the Court. In this situation you find two important and valid principles in potential conflict without there having been any adequate guidance from the Community legislature to the

Court as to their relative priority. The interaction of national measures of price control and Community rules provides an illustration.

In principle, Member States have retained control over the field of short term economic policy which includes the right to regulate prices, but with the important limitation that any measures taken must not be in conflict with the principles of the Treaty. As the Court said in *Commission v. France*,¹³ "The exercise of reserved powers cannot . . . permit the unilateral adoption of measures prohibited by the Treaty."

In certain spheres, of course, Member States have surrendered entirely their power of regulating prices to the Community. I need only instance the products covered by Annexe I to the Coal and Steel Treaty and refer to Article 61 which states explicitly that it is the High Authority—today of course the Commission—which has the power to fix maximum and minimum prices within the area covered by the Community for the products covered by that Treaty.

To quote the words of the Commission in December 1973: "The Treaty establishing the Coal and Steel Community contains special provisions relating to prices which preclude intervention by the Member States . . . official intervention in the field of prices is the Communities' responsibility."¹⁴

Similarly Article 67 of the Euratom Treaty provides that Member States may not by national regulation contravene Community prices for certain source materials or special fissile matter. So, too, by a series of Council regulations, the Community has established a system of tariffs relating to transport of goods by road between Member States. Once again it is not within the competence of Member States to depart from the terms of this tariff.

Most noteworthy, however, is the very restricted competence retained by Member States in connection with goods covered by the Common Agricultural Policy.

As is known, most sectorial schemes are based on three prices—the target price at which it is hoped that the producer will be able to sell his product in the open market, a threshold price which is the level below which imported products cannot

enter the Community, and most critical of all, the intervention price, which is the price at which the various intervention agencies in the Member States must accept any quantity which may be offered to them of products with which the sector is concerned. The underlying object of these schemes is to permit the distribution of such agricultural products on equal terms throughout the Community, thus for any given producer enlarging the market to many times what it would have been had he been restricted to his own country. It is accordingly vital that the scheme should not be subject to any impediment direct or indirect and the Court has on many occasions ruled that any measure by a Member State which affects the uniform operation of such a scheme is incompatible with the Treaty. For example in *Granaria v. Produktschap voor Veervoeder*¹⁵ it was held that a Member State had no power to exempt a given importer from levies desiderated by the scheme. Or again in *Grosoli*¹⁶ the Court has said that only the Community Institutions could prescribe a special use for goods imported under a particular quota scheme set up by the Community. Again in *Hannoversche Zucker v. Hauptzollamt Hannover*¹⁷ legislation by the Federal Republic of Germany in an attempt to fill a gap in the common organisation of the market in sugar was held not to be competent, any gap having to be filled by the Community itself.

Above all, any action by a Member State tending to disturb the price scheme forming part of the common organisation for a particular sector is almost certain to fall foul of this principle. For example should a Member State impose a maximum price for sugar which is below the intervention price, that is to say the price which by Community law the producer is entitled to receive, there would plainly be a conflict.

At the same time the Community has been very conscious of the necessity to combat inflation and in 1972 and again in 1973 there have been resolutions adopted by the Council of Ministers urging action by Member States. That of December 17, 1973,¹⁸ may be taken as typical:

"In order to combat inflation, and to ensure that the conditions essential for a high level of employment are

maintained, the Council agrees that the Member States and the Community should adopt immediately and in parallel the appropriate measures to implement, in the early months of 1974, a vigorous campaign to reduce the rise in costs and prices.”

Moreover certain specific tasks were envisaged for Member States, including “ strict surveillance of the conditions in which prices are fixed for goods and services and possibly limiting profit margins.”

It is implicit in these resolutions that one way, at least in the short term, of fighting inflation is to impose measures of price control, although I would prefer to leave it to economists to evaluate their real efficacy. At any rate all Member States have for a long time had an apparatus permitting them to put into force measures of price control and most have done so since the evil of inflation became particularly rampant.

Thus we have two principles liable to come into conflict with each other. In the first place we have the principle that in order that there may be an effective common organisation in a particular sector of the agricultural market Member States must take no unilateral action liable to impede its proper functioning. On the other hand we have a reiterated recognition at Council level of the necessity for each Member State, according to the means of which it disposes, to take action to fight inflation which if allowed to get out of control would damage the whole concept of the Common Market beyond repair.

In these circumstances one would have hoped that either the Council itself or, by virtue of powers delegated to it, the Commission, would have made appropriate rules to permit this conflict to be avoided. Such action was, indeed, forecast by the Resolution which I have just quoted. In practice such rules have not been made and in several cases it has been left to the Court to attempt to resolve the problem in the absence of legislative guidance.¹⁹

All these cases concerned prosecutions for breach of current Italian price control regulations. In each the defence main-

tained that the regulation in issue was incompatible with Community law. The answer given by the Court in *Galli* may be taken as representative.

"In sectors covered by a common organisation of the market, and especially when this organisation is based on a common price system, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation as established under the common organisation."

Can ways be found to deal with this situation? What is the solution? Professor Waelbroeck of the Faculty of Law in the Free University of Brussels ²⁰ has suggested four possible answers.

1. That all national price regulations should be abolished. This he rejects out of hand without much difficulty. On a purely practical level Member States would not be prepared to see this weapon removed from their hands, however doubtful might be its effect in the long term. In any case, he suggests that in its psychological effect and in its efficacy for a limited period the power to pass price control legislation constitutes an indispensable element in all short term economic policy.

2. He suggests that one solution might be found in Article 100 of the Treaty, which provides that the Council has the power to prescribe by way of directive for the approximation of all legislation of the Member States which directly affects the establishment or the functioning of the Common Market. In particular Articles 101 and 102 provide for the possibility of an approximation of legislation in the case where a difference provokes or might provoke a distortion of the conditions of competition. This again Professor Waelbroeck eliminates as an effective answer. Articles 100 to 102 only envisage the approximation of legislation and not its unification. Moreover, he points out that even if harmonisation does take place Member States still retain their own "*arsenal législatif*" which they would use on the basis of national interest and that what is required is not so much harmonisation of law but a harmonisation of national policies.

3. In the third place Professor Waelbroeck considers whether it would be sufficient if, as the Council itself required in its Resolution of December 5, 1972, the evolution of prices were to be "the object of information and acting together at a Community level." He considers it doubtful whether such action, limited to an exchange of information and co-operation, would be sufficient to eliminate distortions in competition resulting from disparities in the application of price regulations. Experience, he says, has sufficiently shown in effect that such measures have a limited effect. As long as the responsibility for decisions to be taken rests on the authorities of the Member States, one must expect that they will act for the main part in response to national pressures, the interests of their Community partners taking only second place.

4. Accordingly he sees the answer in the fourth solution, that of the matter being governed by Community regulation using Article 103 of the Treaty as a point of reference, and says:

"Only the adoption at Community level of a pricing policy would be capable of resolving the paradox which arises from the co-existence in what professes to be a single market of nine different and often contradictory systems of price control. In the perspective of an economic and monetary union it is truly an aberration to see the Member States continue to battle against inflation by adopting in desperate fashion measures of control which hinder the movement of goods and distort competition within the Common Market."²¹

I would endorse his views not as a political choice but as a necessary aid to the proper performance of the judicial task. National measures of price control are inspired by laudable motives and encouraged in non-legislative form by the Council. Yet, as I have sought to show, they can and do conflict with other rules of Community law, rules which regarded from their own standpoint are equally admirable. So far the Court, inevitably I believe, has resolved the conflict in favour of those more imperative rules. If Member States wish matters

otherwise it is for them through their representatives in the Council of Ministers and, if necessary after consulting the European Parliament, to take formal steps to change the priorities and to change them in a form which the Court can recognise and apply. The problem of national price control measures is but one example of a problem which exists in other guises and which should be solved in the Council chamber and not in the court room.

This is essentially a reiteration of my earlier proposition that most problems are justiciable given proper points of reference. The Court in each case does its best with the guidelines available to it and will continue to do so. An assessment, however, of the merits of competing courses, an assessment of priorities, is, as I have tried to show, not part of the judicial function. The Court can only follow legal imperatives. If in the field of economic regulation these lead to a result which is out of phase with the intended progress of the Community—although I trust that this is only rarely so—then it is for the Community legislator to provide in proper form texts which the Court can apply.

Notes

¹ By Art. 189 of the Treaty of Rome.

² p. 18.

³ p. 19.

⁴ *L'ordre juridique des Communautés européennes* (Liege, 1973), p. 129.

⁵ Case 43/75, *Defrenne v. SABENA* [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98.

⁶ See Mégret, *Agriculture*, Vol. II, p. 200.

⁷ Regulation (EEC No. 974/71) of the Council, May 12, 1971, *Official Journal*, Special Edition, 1971, p. 257.

⁸ Case 5/73 [1973] E.C.R. 1091.

⁹ Case 43/72 [1973] E.C.R. 1055.

¹⁰ Case 7/76 [1976] E.C.R. 1213.

¹¹ Regulation 1112/73, Council of April 30, *Official Journal*, L114/4 of April 30, 1973.

¹² Case 74/74 [1975] E.C.R. 533 at 549.

¹³ Cases 6 and 11/69 [1969] E.C.R. 523 at 640; [1970] C.M.L.R. 43.

¹⁴ See *Communication to Production Undertakings*, dated December 28, 1973. *Official Journal*, C115/6.

¹⁵ Case 18/72, Rec. 1972, 1163; [1973] C.M.L.R. 596.

¹⁶ Case 131/73 [1973] E.C.R. 1555; [1974] 2 C.M.L.R. 40.

¹⁷ Case 159/73 [1974] E.C.R. 121.

¹⁸ *Official Journal*, C116/22 of December 29, 1973.

¹⁹ Case 31/74, *Galli* [1975] E.C.R. 47; [1975] 1 C.M.L.R. 211; Case 60/75, *Russo v. AIMA* [1976] E.C.R. 45; Case 65/76, *Tasca* [1976] E.C.R. 291.

²⁰ *Les réglementations nationales de prix et le droit communautaire* (Brussels, 1975).

²¹ p. 59.

CHAPTER 5

FUTURE TRENDS

THE European Communities are, as I have repeatedly said, based upon legal order—the Community rule of law. While the objects of the Communities and the means of achieving them were and are a matter of political choice and agreement, Community law is there to ensure that the consequent obligations are fulfilled, and that rights are safeguarded according to accepted and acceptable principles. These rights and obligations concern not only Member States and the Community Institutions, but commercial undertakings and individual citizens. It is this feature which distinguishes the Communities from all other international associations. Moreover it is, as I have tried to underline, national courts and not the Court of Justice of the Communities which are, for the most part, charged with the task of operating this legal order in accordance with rules applicable uniformly in all Member States. This is the special characteristic of Community law and the true *acquis communautaire* which must be preserved whatever changes and advances are made in the near or distant future.

All are agreed that change and progress are required if European integration is to continue. At present few are agreed on the destination desired or the method of getting there. It may, indeed, be wrong even to talk in terms of a “destination” and better to think, rather, in terms of a continuing process of adaptation to changing circumstances. Whatever the approach may be, there are choices to be made which will be of the greatest importance in the years ahead. While these choices will for the most part be political, no lawyer who accepts that the Community must remain subject to a rule of law can be indifferent to the debate.

Dr. Dahrendorf has said that the first Europe, the Europe of the Customs Union, is at an end and that we are now in the second Europe, a stage of evolution in which practical

progress is yet to be made but still a stage "before this progress has yet found its fixed form institutionally." He envisages "A dozen or more developments in energy, science, defence, foreign policy co-operation and other areas which will not at first sight appear to strengthen the Community directly." There will come a moment, however, a moment which he places before 1985, "where the transformation of our co-operation into a European union really makes sense. And then the institutions will be created which will constitute the European union."¹

Dr. Dahrendorf's views provide a useful starting point for any discussion of the future role of the Court and the maintenance of the Community legal order.

Is the first Europe at an end in terms of legal order as I have sought to explain these words?

In one sense, yes. The Treaty of Rome laid down much to be accomplished by the end of the transitional period, which ended for the original Member States on January 1, 1970, and for the newcomers, subject to a number of exceptions, on January 1, 1977. By the end of the first stage of the transitional period, which for the original Member States was January 1, 1962, the principle that men and women should receive equal pay for equal work was to be assured. By the end of the transitional period the Customs Union was to be complete—in fact this was achieved by July 1, 1968; the Common Agricultural Policy was to be brought into force; freedom of movement of workers was to be secured, restrictions on the freedom of establishment or to provide services by nationals of Member States abolished; so too were restrictions on the movement of capital and by the same date common rules applicable to international transport, other than by sea or air, were to be laid down.

Thus for some time now many of the goals prescribed by the Treaty of Rome have become fully obligatory and to that extent, if you will, the first Europe is at an end. But that is not to say that the effects of the "first Europe" are at an end, or that the complications which it has engendered have been resolved. Far from it. From the legal point of view one might say that the first Europe is now only beginning,

since only from the end of the transitional period did many obligations become wholly effective in law.

During the 25 years of the life of the Coal and Steel Treaty and the 20 years of the Treaty establishing the European Economic Community the Court of Justice has tackled a number of important chapters of both Treaties and has built up a substantial body of case law.

As one might expect the largest group of cases has arisen from the working of the Common Agricultural Policy but this is closely followed by problems of social security and the operation of the Common Customs Tariff. Even in fields where cases have been less numerous the topics dealt with by the Court have been of the greatest importance. I instance, and they are only instances, the free movement of workers between Member States and the right of establishment in so far as individuals are concerned and, for the industrialist, the prohibition against agreements affecting inter-state trade and against the abuse of a dominant position; the use of patents and trade marks, transport and the permissible activities of state monopolies.

This work will obviously continue. The Court has far from exhausted the catalogue of problems which human understanding or misunderstanding can create.

Publicity given to one decision often attracts similar cases. Sometimes indeed our decisions have unexpected side-effects. In *Rutili*,² *Bonsignore*³ and *Royer*⁴ the Court affirmed the Community rule that the right of a Member State to expel a worker who is a national of another Member State or otherwise to curtail his freedom of movement must be justified by the behaviour of the individual concerned and not based on considerations of general policy. It is not, however, only the worthy worker who finds obstacles in his path. I am assured on uncontested authority that the *souteneurs* in one of Europe's major ports are only too familiar with the Court's decisions in *Rutili* and *Bonsignore* and quote them when understandable attempts are made to run them over the nearest available frontier with the minimum of formality. I confess that I am not too concerned. The requirement that

a deportation order should be individually justified does not, I consider, strike very deeply at the right of Member States, a right unimpaired by the Treaties, to export the recidivist to the one place that cannot refuse to have him—his mother country, however thin maternal love may have worn.

In the fields, then, where the transitional period has ended and obligations have become absolute I see the flow of work for the Court ever increasing. Undertakings will continue to evade the rules relating to unfair competition; the rules relating to the Customs Tariff or the Common Agricultural Policy will continue to be misconstrued or misapplied—at least there will be no shortage of those who maintain that this is so. Dare I even say it, there will be Member States who evade, or try to evade, their Treaty obligations.

In terms of the continuing process of the rule of law then, the first Europe is far from at an end. Where, however, the debate begins to accelerate is when one asks the question—Are the existing Treaties enough?

This question can be divided into two. First, to what extent do the Treaties already contain the framework for adequate Community action in the face of modern needs; secondly, what are the matters where Community action is imperative but for which, as yet, no sufficient foundation in law exists?

ACTION BASED ON THE EXISTING TREATIES

There remains, in my view, considerable scope for future Community activity on the basis of the present texts. I do not give a full catalogue, but select only some examples.

(a) In the first place even the Common Agricultural Policy is far from complete. There is as yet no market organisation in mutton, alcohol or potatoes. Doubtless I shall be put right by those who know better, but I venture to suggest that if there had been we might perhaps have avoided the situation which arose not so long ago when in one part of the Common Market potatoes were in short supply while in another they were being distilled to produce schnapps.

(b) Probably the Article which provides the widest base for future action is Article 100. This, you may remember, is the one which says that the Council, acting unanimously on a proposal from the Commission, may issue directives for the approximation of such provisions of the law of the Member States as directly affect the establishment or functioning of the Common Market. Much work, as you know, is currently in progress. The Convention on the European Patent has been signed and parallel work is in progress with a view to creating a Community trade mark. The European company, fair trading law, products liability, consumer credit, suretyship and commercial agency are all the subject of current consideration, nearly all at the stage of draft. Only the limits of time and human resource, I am sure, prevent the list of topics being extended.

(c) There is scope for further activity in the related fields of state monopolies of a commercial character (Article 37) and aids granted by Member States (Article 92). In 1975 the Court had to consider the state alcohol monopoly in Germany⁵ and the Italian monopoly of the sale of manufactured tobacco.⁶ In the case of state aids—which are defined very widely—there is a continuous process of appraisal and scrutiny by the Commission. In addition there are the difficulties created by public undertakings “to which Member States grant special or exclusive rights” (Article 90). As the Commission itself has said⁷:

“The special relationship between State and certain enterprises means that the State can influence their behaviour and can put their operations on a privileged footing as compared with other firms. It is generally difficult to analyse the resulting distortions. Bearing in mind the role which many of these enterprises play in their respective countries, the Commission’s staff are examining the whole range of relationships between Member States and the undertakings which they control and are considering the possibility of issuing a Directive to back up Article 90.”

(d) Moreover there is scope for Community action within the field of short term economic policy. Article 103 provides that the Council may, acting unanimously, decide upon measures appropriate to the situation, and by a qualified majority may issue any directives needed to give effect to those measures. This is a very wide power indeed particularly when account is taken of the fact that when the Council is unanimous its exercise is not limited to directives. The Council may proceed by regulation with all the consequences that that entails.⁸

(e) As regards balance of payments, Articles 104 to 109 provide a fairly elaborate code intended to enable problems to be resolved and indeed resort has been had to their provisions only too frequently during the repeated crises caused by or causing sudden fluctuations in the rates of exchange between the currencies of Member States.

For example Article 107 permits the Commission to authorise other Member States to take necessary measures should a Member State make an alteration in its rates of exchange which is inconsistent with its duty to pursue the economic policy needed to ensure the equilibrium of its overall balance of payments. On more than one occasion such action has been considered by the Court.⁹

EXTENDED COMMUNITY ACTION

“The Treaty [of Rome] is a remarkably flexible instrument, but it was drawn up nearly 20 years ago when the needs and priorities in Europe were very different.

The main issues confronting the Member States of the Community today—inflation, unemployment, the need for better co-ordination of economic policy—are ones where the Rome Treaty gives little guidance. Unless the Community can make some progress in these key areas the probability is that it will wither away: and the real progress that *has* been made in the creation of a common market could be in danger through revived demands for protectionism.”

So wrote, last year, a former senior Community official and a perspicacious observer of the Community scene.¹⁰

“Inflation, unemployment, the . . . better co-ordination of economic policy”—how can these be the subject of rules which are sufficiently precise to enable them to form part of the Community legal order? Can economic policy become economic law? I have already tried to say that while choice of policy itself may not be justiciable there is no reason why the legal and factual basis for policy decision need escape judicial consideration. Moreover, to be effective, economic policy must be translated into economic law whether in each Member State or for the Community as a whole.

Economic law has been defined as “the totality of legal rules promulgated in furtherance of economic policy.”¹¹ Inevitably these rules are many and diverse and at present vary greatly from state to state. I make no attempt to give an exhaustive list—much work has already been done on this—but obviously they include such measures as are introduced by or as a consequence of budgetary control—for example, by expanding or limiting the amount of funds available to individuals or commercial undertakings by the general level of taxation. Then there is the whole field of state aids to industry or to agriculture which again may take a large variety of forms. There is the field of money supply, exchange rate policy and export credit terms. Community economic law has already had an effect on the power of Member States to operate unilaterally in all these spheres. Any extension of Community competence will further reduce scope for unilateral action and this, in turn, will demand consideration and reconsideration of the availability of appropriate remedies to those affected. Since matters such as the incidence of fiscal burdens, the granting of export credit or the availability of subsidies are for the most part likely to be handled by national agencies—as has been the practice even in that most unified of sectors, the Common Agricultural Policy—it will still be to his national courts that the litigant must turn in the first place.

It is, however, in the field of economic law that the greatest risk of administrative arbitrariness occurs. State aid or intervention is frequently selective in its nature. In very many cases it is granted not as of right but as the result of the exercise of

discretion. It has been said of one national scheme for regional aid: "rules do not govern the amount of grants; reasons are not stated to disappointed applicants; discretion is not guided by standards or rules or precedents; and administrators maintain almost complete secrecy about recipients and amounts."¹² There is perhaps nothing inherently wrong in the principle of selection taken alone, or at least administrative necessity may impose it, but it remains nonetheless essential that the exercise of such discretion should be subject to the rule of law.

Where national measures are subject to Community law the use of the directive would seem particularly appropriate. As is well known, a Community directive is binding upon each Member State to whom it is addressed but leaves to the national authorities the choice and form of methods. This would permit each Member State to adapt its administrative procedures in its own way while achieving overall uniformity and at the same time providing the necessary criteria to enable their exercise to be judicially considered since, as I have sought to underline, a judge can only perform his function if he has appropriate standards at his disposal which he may apply.

So far as the Community's own body of economic law is concerned, a similar approach is essential. Professor Van Gerven of the University of Louvain¹³ has suggested some form of economic constitution for the Community derived from the common fund of legal principles. In his own words:

"Let us recall these principles: individual liberty of enterprises in economic matters, as much in their relations with each other as with the public authorities; equality of enterprises with regard to public benefits and burdens; protection of the freedom of competition, especially with regard to small- and medium-sized enterprises; protection of the freedom of the consumers to consume and, more importantly, not to consume; the necessity for the public authorities to promote solidarity between the groups of the population for the benefit of the least privileged groups, and to programme and quantify the objectives of a social and economic policy which aim to implement such solidarity; and the necessity to set on

foot negotiating organs and procedures in order to associate individual enterprises with the realisation of these objectives.”

It might be that a courageous judge could without express mandate deduce at least some of these principles from the substratum of common concepts already forming part of Community law but would it not be better to render those principles explicit and place them at the forefront of the new accord whatever form it may take?

In saying that there should be “negotiating organs and procedures” Professor Van Gerven had touched on an important matter. As I have tried to show, there is a limit in practice and in theory as to what a judge can or may do in controlling the exercise of administrative discretion. Common sense suggests that it is better for the administrator to make the right decision in the first place than to get it wrong initially and leave the administered to seek amelioration of its unhappy effects by judicial *bricolage*. This requires that there should always be an opportunity for interested parties to express their views at a time when these views can be of some effect. That this opportunity should not be accorded as of grace but as of right—“institutionalised” to use current jargon—goes without saying.

ESSENTIALS OF A CONTINUING COMMUNITY LEGAL ORDER

In the fluid area of economic co-ordination and control what are the essential elements of legal order which I suggest must be preserved?

In the first place it appears to me to be essential that the existing legal procedures should remain. When it is sought to extend the ambit of Community action to matters not expressly covered by the existing Treaties this should, so far as may be possible, be done by using the powers conferred upon the Council by Article 235. That provides that if action by the Community is necessary in the course of the operation of the Common Market and the Treaty has not provided the necessary powers, the Council may take the appropriate

measures. This wide authorisation is subject to three conditions. In the first place the Council must be unanimous; secondly, it can only act on a proposal by the Commission and, thirdly, the European Parliament must be consulted. It is a most valuable power and was recognised as such at the summit meeting at Paris in October 1972.

There the Heads of State were agreed that they should "use as broadly as possible all the facilities of the Treaties, including Article 235 of the European Economic Treaty."¹⁴

At a recent count Article 235 had been used over 100 times.¹⁵ Very many of the measures concerned have had as their object the creation of research programmes but a not inconsiderable number have been more immediately positive in content. Among these I mention, by way of example only, one of 1970 laying down a common structural policy for the fishing industry¹⁶ and two of 1975, a Council Decision of March 3 relating to the prevention of marine pollution from land-based sources and a Council Regulation of March 18 effectively setting up the European Regional Development Fund.

Plainly, Article 235 is capable of more extensive use. If, however, what is proposed cannot properly be brought within the ambit of Article 235 then, in my view, recourse should be had to the Treaty amendment procedure in Article 236, thus extending automatically the scope of Community law. While I recognise the negotiating and political difficulties which may be involved I remain convinced that the maintenance of the existing legal order justifies the effort involved. If for any reason this should not be possible then at the very least there must be created expressly a legal system parallel to that already existing. As a lawyer, however, I am against this way of proceeding. The Community legal order in its present form is wide enough and adaptable enough to meet new demands put upon it. As M. Tindemans has rightly said we should build "upon the institutional bases already accepted by the Member States within the framework of the existing Treaties."¹⁷

Whatever shape the extended Community competence may take, however, it is essential that it should maintain the existing characteristics of the present system—that is to say that rules should exist which are obligatory upon the signatory state and, where appropriate, should be capable of creating rights which the citizen or commercial undertaking can enforce before the courts. The principle must also be preserved that should the national and the Community rule diverge, the latter rule must take precedence over the former. The reason for that remains the same—that it is idle to talk of an economic Community unless, in relation to the same subject-matter, you have uniform rules, uniformly applied.

In the second place I have already tried to indicate by selected examples how the absence of specific Community guide-lines has, even in the present circumstances, if not actually impeded, certainly not made any easier the Court's task of finding adequate solutions in law to some of the problems before it. The necessity for such guide-lines will become ever more apparent in any extension of Community activity.

As the Court itself has said, extra-judicially¹⁸:

“Experience has shown . . . that when the European authorities provide clear and positive rules of law they are easily absorbed by the judicial system and the national courts can apply them without difficulty. . . . Difficulties therefore arise at the source of Community law and not at a later stage.”

This will become particularly relevant in the field of economic integration, where the choice of rule to be applied by the Community legislator or administrator may not be a justiciable matter. What is essential is that once the choice has been made it should be expressed in a form capable of creating rights and that the courts should be given appropriate standards in order that they may, without difficulty, see whether those rights have been infringed.

This involves the corollary that once decisions have been taken by the Member States they should be embodied in Community acts which are susceptible to judicial control and

capable of creating enforceable rights. To preserve the unity of Community law, not only must independent international agreement among the Member States be avoided, but so also should resolutions and declarations, however high-sounding their title and however beguiling their Community air which, juridically, appear no more than "hollow blasts of wind."

CURRENT PROPOSALS

I would be going far beyond the scope of these lectures, and indeed baptising outside my parish, if I were to offer any comment on the substance of the proposals now current for further integration, whether this be called European Union or identifiable under some other label. M. Leo Tindemans, however, in the report on European Union which he presented to the Heads of Government of the Community on December 29, 1975, has identified a series of sectors where joint action is required. They include the necessity to co-ordinate on a Community basis each sector of the external relations of the Member States "whether it be a question of foreign policy, security, economic relations or development aid." Member States must acknowledge the interdependence of their economic prosperity: there must be a "common economic and monetary policy to cope with this prosperity, common policies in the industrial and agricultural sector and on energy and research to safeguard the future." Regional policy, he considers, will be required to correct inequalities in development and social action to mitigate inequalities in the distribution of wealth. There must, he said, be institutions with "the authority needed to define a policy, the efficiency needed for common action and the legitimacy needed for democratic control."¹⁹

Of the political consequences of these choices, M. Tindemans had this to say: "They cannot occur without a transfer of competences to common bodies. They cannot occur without a transfer of resources from prosperous to less prosperous regions. They cannot occur without restrictions, freely accepted certainly, but then enforced unreservedly."

This conception, which I believe to be true, only serves to underline the necessity of a legal order to safeguard all legitimate interests. The content of any new competence, the manner of its transfer, and above all, the limits of its exercise must, it seems to me, be defined with precision.

Let me take one example, because it is one which M. Tindemans himself gives,²⁰ the suggestion that there should be a common European body responsible for regulating and controlling nuclear power stations. This control would extend to the siting, construction and operation of power stations and the disposal of their radio-active waste. Obviously to be effective such a body would need immense powers and just because of this must be subject to legal control: democratic and political pressure is not enough. It should be compelled to exercise its powers through set forms and to give reasons for its actions in just the same way as the Commission and Council are required to do by the Treaty of Rome. The same right to attack decisions of this new body should be available to all parties affected as is given by Article 173 to attack decisions of the Council and the Commission. There should, for example, be the right to claim before a properly constituted court that the decision in question was insufficiently reasoned or that the means chosen were disproportionately restrictive having regard to the end to be attained.

This is a relatively simple example of the extension to a new institution of the type of judicial control already familiar at both Community and national level. It is in the field of "common economic and monetary policy" or "common policies in the industrial and agricultural sector" that greater difficulties may be foreseen. Inevitably these generalised concepts will be filled out by more detailed criteria. Without such concrete rules the judicial process cannot begin to operate. The question remains: how can you find legal rules which are precise enough to create ascertainable rights within the context of something so nebulous as a common economic policy?

I have already cited Professor Van Gerven's proposals for an economic constitution but much will depend on the procedures adopted to assure the ends chosen. Here con-

siderable research has been done. Dr. Zijlstra, whose academic, political and banking experience place him in a formidable position to judge²¹ has analysed in depth the types of instrument required to achieve a common economic policy, instruments which range from mere forecasting exercises through an ascending scale of formality—consultation, voluntary or obligatory, the setting of targets by sectors or for the economy as a whole, targets which may be supported by aids, subsidies, tax incentives and the like, to the extreme of planning supported by direct coercion, such as, for example, the refusal to permit an undertaking to develop in any site other than one chosen by the directing authority.

What range of means will be selected to further the chosen economic policy of the common endeavour I cannot forecast. This is part of the debate ahead. I would assume, however, that anything approaching total coercion must be excluded. The foundation of the existing Treaty is the market mechanism and if today it is felt that the market mechanism alone is not enough, equally it cannot be eliminated without changing the whole basis of the European Communities—indeed without changing the whole basis of Western European society as we know it today.

Whatever means may be chosen, legal order can only be sustained if the means are primarily conceived in terms of personal right rather than administrative discretion, although I fully accept the necessity of the latter provided it is subject to legal control. This, I would suggest, implies that certain minimum standards be observed.

(1) When administrative choices have to be made adequate opportunity must be given for those concerned to state their point of view. Within the limits of practicability advance publication of intention should be the rule and not the exception.

(2) Whenever possible interested parties or those representing them should be identified in advance and consultation made obligatory. This duty to consult should be backed by the sanction that a decision taken without the statutory

procedures being fulfilled would be liable to be annulled. Precedent for this is to be found in the Treaty of Rome as it exists at present. For example the Commission is in a variety of matters bound to consult the Economic and Social Committee, which is composed of representatives of all trades and callings in the Member States.

(3) Wherever possible decisions should be taken on the basis of right rather than discretion. We have seen that on the national scene the method chosen to achieve the same end is to a large degree a matter of political or administrative choice. Let us suppose that a Member State has in the past decided to encourage a certain type of industry in a certain area. It may be that a decision is taken, and in the United Kingdom it has been the case, that industry of a specified type, perhaps in certain areas only, should receive favoured tax treatment by means of investment grants or capital allowances, receive exemptions from taxes such as Selective Employment Tax or receive the carrot of a regional employment premium. Under this method the granting or withholding of these benefits are matters of right controllable by the courts. From a political viewpoint, however, the same result can be achieved by the allocation of funds to be granted at the discretion of the executive. Herein, as I have suggested, the danger of arbitrary behaviour or, which is almost as injurious to the concept of the rule of law, apparent arbitrary behaviour, creeps in. The same considerations apply *a fortiori*, it seems to me, when one is dealing with Community resources on a Community scale.

(4) It follows, therefore, that if the needs of effective administration can only be achieved by a discretionary scheme the limits of that discretion must be carefully circumscribed to prevent the disturbing effect and, indeed, the plain lack of justice, of unequal treatment between persons placed in similar positions.

(5) The principle must be maintained that all decisions must be adequately reasoned so that, if necessary, they may be subjected to judicial scrutiny, whether at national or Community level.

DEVELOPMENT OF THE LEGAL ORDER

Is it, however, enough merely to maintain the elements of the existing legal order or is more required? In its memorandum to M. Tindemans the Court of Justice itself—while of course presenting no view as to the scope and content of further European integration—has certain suggestions to make which appear to be of importance.²²

First, any rule embodied in the legal system of which we are speaking must be effective, that is to say judicially enforceable. In the case where the Community rule—and I use the word Community as embracing both the Community as it exists and as it may become—is enforceable in the national courts no problem is presented. National enforcement procedure is available.

One gap which exists at the moment under the Treaty of Rome is to be found in the case where a Member State has been held by the Court to be in breach of a Treaty obligation. Here the Treaty does no more than provide that the Member State is required to take the necessary measures to comply with the judgment of the Court of Justice.

As I have said, actions by the Commission against a Member State have been relatively few in number and in every case the Member State has always complied with the judgment of the Court. The reason is not far to seek. No country likes to demonstrate the failure of political will that continued defiance would entail. Moreover in certain systems a breach of the Community legal order may expose the Member State to an action of damages in its own courts. Nonetheless it can be maintained that it is in principle unsatisfactory for a court to pronounce judgment when no evident sanction exists.

Matters were and are otherwise under the Coal and Steel Treaty. By Article 88 if a Member State has not fulfilled its obligations by the time limit set by the High Authority, the High Authority, with the assent of the Council acting by a two-thirds majority, may, among other remedies suspend payment of any sums which it may be liable to pay to the State in question. No parallel power exists under the Treaty of Rome.

Accordingly the Court of Justice has proposed that

“In its judgment against a defaulting State, the Court should be able to specify those steps which that State is invited to take, secondly that the execution of the judgment should be subject to an appropriate systematic control and finally that any advantages sought by the State concerned should be conditional upon its rectification of the failure.”²³

Nonetheless one wonders. If political will is absent will material considerations prevail?

Secondly, the primary purpose of any legal system is to control arbitrary action and protect the rights of individuals. Certain areas can be identified where the need for control may become apparent.

(a) A problem may arise if a directly elected European Parliament demands and obtains power to enact primary legislation in certain defined areas. Is this power to escape all legal control? I would trust not. Let us suppose that such a Parliament decides to pass legislation seemingly inconsistent with its powers or indeed with the Treaties as they then constitute the Communities. Should there be a court to control this manifestation and if so, what court? Member States such as the Federal Republic of Germany, the Republics of Ireland and Italy with their tradition of a Constitutional Court designed to solve this very problem would, I suspect, insist on such control and I note with interest the proposal that judicial control is now considered the appropriate way to deal with analogous difficulties which might arise in connection with the proposed Scottish Assembly.

(b) Doubts have been expressed concerning the full efficacy from the individual's point of view of the procedures open to him—by which, of course, I mean not just the citizen but anyone possessing personality in law—to challenge Community secondary legislation of all kinds when he can show a sufficient interest so to do. At the moment under Article 173 he can only do so if he is the recipient of a decision addressed to him or, and this is rare, a decision which although in the form of a

regulation is of direct and individual concern to him. Before his national courts the individual, on the other hand, is empowered to challenge the validity of a regulation as well as its application to him. He may request his national judge to use the Article 177 procedure and to submit a question to the Court of Justice but there is no way in which he can insist that the step be taken if he is met with a refusal by his national judge. It has been suggested that the Treaty might be amended to permit a litigant to make a direct approach to the Court of Justice—in effect to create a right of appeal to the Court of Justice against a refusal by the national judge. This is tempting but one might ask whether there would not be a danger of disrupting the essentially complementary relationship between national court and the Court of the Communities.

(c) I should also mention the proposal contained in the Tindemans report that an individual should be able to appeal directly to the Court of Justice against any act of one of the institutions of the proposed European Union which infringes his basic rights. This raises the whole question of the protection of fundamental rights within the Community—their definition and their place within the Community legal order. This topic is the subject of much current activity and warrants a separate discussion, so regretfully I put it on one side. The position of the Court remains plain, “Fundamental rights form an integral part of the general principles of law, the observance of which it ensures.”²⁴

(d) Further difficulties can arise in connection with the “competitor” action. In a mixed economy receipt of state aid may be important. It is often, however, more important that your competitor should not receive aid when you have been refused it. Yet few Member States recognise an action in law by an aggrieved competitor and it is, in any case, not easy to set the limits wherein such an action might be recognised.

The problem has been encountered by the European Court. In *Eridania v. Commission*²⁵ the latter granted certain aids to three sugar refiners in Italy to permit them to enlarge their production capacity. Most, if not all, of the other Italian

refiners objected and there was considerable argument about their right to do so. Article 173 of the EEC Treaty allows an individual to challenge a decision which, although in the form of a decision addressed to another is of "direct and individual concern" to him. The Court held that:

"The mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question cannot suffice to allow any trader in any competitive relationship whatever with the addressee of that measure to be regarded as directly and individually concerned by that measure."

The Court then qualified this by saying that "only the existence of special circumstances" might enable the competitor to bring proceedings. In that case the Court was prepared to hold that the contested decision might have a direct effect on the applicant's business since the enlargement of a competitor's capacity might have the effect of reducing the production quota available to the applicants—a quota under which they received specially favourable treatment under the Community scheme.

In *Holtz & Willemsen v. Council*²⁶ the Court entertained, but finally rejected, a claim at the instance of a German producer of colza oil for damages based on a preference given by a Community scheme to Italian competitors.

It is, however, by no means clear what the result would have been in these two cases had the applicants succeeded. The effect of annulling the grant to the sugar refiners in the *Eridania* case would have been unfair to the company if it required the repayment of sums received in good faith and which by reason of their having carried out the factory enlargement for which the grant was made they might have been in no position to refund. In *Holtz & Willemsen* the applicants might have received damages but that still would have left their competitors in receipt of funds which *ex hypothesi* were unlawfully paid to them.

Since prevention is better than cure, it has been suggested that it would be more satisfactory if the competitor could object to the contemplated concession earlier on at the

administrative stage. For example, if it was obligatory to publish all applications for aid, "Greater publicity might enable any competitors to submit their objections to the competent authorities. If they did so moreover they would thereby become co-addressees of the decision and as such would be entitled to be heard in any action which was brought." ²⁷

CONCLUSION

While accepting the principle, sometimes forgotten, that the administrator exists for the administered, one must also allow the former to do his job efficiently. If every act of the Community is to be open to challenge in court by any individual however tenuous his interest and however wild his claim the Community institutions, though they might occasionally be prevented from doing harm, would also be able to do precious little good. Once again it is important to bear in mind that there are other and perhaps even more important ways of achieving good administration than by judicial control. Consultation and persuasion at the stage of policy formation must be allowed to play a major part and the Court should be regarded as a port of final call.

A legal order—a Community based on law—cannot continue by virtue of a Treaty text alone. The maintenance of that legal order must be the preoccupation of everyone—not the lawyers only—concerned with the application and observance of Community rules. There is a temptation in all organisations concerned with complex administration to place barriers between it and the public. Not with evil intent but because it is so much easier not to have to give reasons to applicants who would probably not understand them anyway; so much more pleasant to feel that one's actions are not to be subject to tiresome scrutiny: so much more simple to subordinate awkward problems of entitlement to administrative convenience. Sir Leslie Scarman has clearly illustrated this, taking as his example the Supplementary Benefit Act of 1966, an Act "couched in language which asserts that supplementary benefit is not charity but right." ²⁸

Then "because of the complexity of the problem—and it is a very complex problem—the administrative and bureaucratic machinery takes over and converts right into that which is acceptable to administrative policy." The same attitude could so easily evolve within the Community should it assume ever more detailed tasks of administration.

The Community rule of law can only be preserved if as much of the regulatory power as possible is expressed in terms of right and not discretion; if clear guide-lines are given so that judicial comparisons can be made and matters rendered fully justiciable; if reasons are always fully given so that they can be considered and tested. Above all the legal order can only be preserved if the Community judge, whether in his national court or at Luxembourg, is alive and ready to use the judicial techniques at his disposal and is alerted and reminded of their existence by advocates and their clients equally anxious to maintain that order.

Let the last word be with M. Robert Lecourt, who was for 15 years a judge of the European Court, nine of them as its President, and who has contributed so much to the evolution and understanding of Community law.

"The foundations of the European legal structure have been laid; now we must build upon them."²⁹

Notes

¹ Interview recorded in *Europa*, *The Times* edition of December 3, 1975.

² Case 36/75 [1975] E.C.R. 1219; [1976] 1 C.M.L.R. 140.

³ Case 67/74 [1975] E.C.R. 297; [1975] 1 C.M.L.R. 489.

⁴ Case 48/75 [1976] E.C.R. 497.

⁵ Case 91/75, *Hauptzollamt Göttingen and Bundesfinanzminister v. Wolfgang Miritz* [1976] E.C.R. 217; and Case 45/75, *Rewe-Zentrale des Lebensmittel-Grosshandels GmbH v. Hauptzollamt Landau/Pfalz* [1976] E.C.R. 181; [1976] 2 C.M.L.R. 1.

⁶ Case 59/75, *Pubblico Ministero v. Flavia Manghera and Others* [1976] E.C.R. 91; [1976] 1 C.M.L.R. 557.

⁷ *Ninth Annual Report*, p. 88.

⁸ Case 5/73, *Balkan Import-Export v. Hauptzollamt Berlin-Packhof* [1973] E.C.R. 1091.

⁹ Case 9/73, *Schlüter v. Hauptzollamt Lörrach* [1973] E.C.R. 1135 and Case 10/73, *Rewe Zentrale v. Hauptzollamt Kehl* [1973] E.C.R. 1175.

¹⁰ Michael Shanks, *The Times*, July 14, 1976.

¹¹ In a series of studies undertaken at the instance of the Commission: *Competition* (Approximation of Legislation Series, No. 20, Brussels, 1974).

¹² K. C. Davis, *Discretionary Justice* (University of Illinois Press, 1976), p. 198.

¹³ (1976) 13 C.M.L.Rev. 219.

¹⁴ *Rapport général sur l'activité des Communautés* (1972), p. 17.

¹⁵ A useful list may be found in *Europarecht* (1976), p. 22 *et seq.*

¹⁶ *Official Journal*, 1970, Special Edition, p. 703.

¹⁷ *Bulletin of the European Economic Communities*, Supplement 1/76, p. 29.

¹⁸ "Suggestions of the Court of Justice on European Union," *Bulletin of the European Communities*, Supplement 9/75, p. 19.

¹⁹ *Bulletin of the European Economic Communities*, Supplement 1/76, p. 29.

²⁰ *Supra*, p. 27.

²¹ *Politique économique, etc.* (Série Concurrence (C.E.E.), No. 2, Brussels, 1966), pp. 32, 33. Also summarised in Kapteyn and Verloren van Thematis, *Introduction to the Law of the European Communities*, p. 276.

²² *Bulletin of the European Communities*, Supplement 9/75.

²³ *Bulletin of the European Communities*, Supplement 9/75, p. 17.

²⁴ Case 4/73, *Nold* [1974] E.C.R. 491; [1974] 2 C.M.L.R. 338.

²⁵ Cases 10 and 18/68 [1969] E.C.R. 459.

²⁶ Case 153/73 [1974] E.C.R. 675; [1975] 1 C.M.L.R. 91.

²⁷ F.I.D.E. Conference, Brussels, October 2-4, 1975, Judge A. M. Donner, "Interim General Report on the Structural Economic Policy of the Community," p. 24 of roneo text.

²⁸ Address given to the Law Society of Scotland, 1976, *Law Society of Scotland Journal*, p. 273.

²⁹ *L'Europe des Juges* (Brussels, 1976), p. 309.

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THE NATIONAL INSURANCE COMMISSIONERS

by

Sir Robert Micklethwait,
Q.C., M.A., Hon.LL.D.

*formerly Chief National Insurance
Commissioner*

Social Security is an area of law of growing importance and there are clear signs that the legal profession, as well as academic lawyers and those who are called upon to advise the public, are taking an increasing interest in the law which surrounds its application and administration.

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