METHODS OF INTERPRETATION OF THE EUROPEAN COURT OF JUSTICE

BY

CLAUS GULMANN

1. INTRODUCTORY REMARKS

Denmark's accession to the European Communities gave a new dimension to Danish law. From one day to the other a considerable and still growing body of law was made directly applicable in this country. Until now the impact of Community law has not been felt by most lawyers. There are, however, signs that this state of affairs may be changing. During the last two years Danish courts have in five cases submitted preliminary questions of interpretation to the Court of Justice of the European Communities.[1] Lawyers are beginning to see the practical interest of Community law. This interest will be strengthened by the tendency of the Community institutions to make rules within areas of law closer to everyday legal problems, e.g. environment law and consumer law.

This interest will undoubtedly develop into a concern with the functioning of the Court of Justice of the European Communities. It is a well-acknowledged fact that Community law cannot be understood without an insight into the role played by the Court of Justice in the development of Community law. Community law, being common to the nine Member States, must of necessity be intrepreted and applied in the same way in all of these states. This uniformity of interpretation and application can only be safeguarded by entrusting the final decision on the correct interpretation of Community law to one common institution, i.e. the Court of Justice of the European Communities. That Court has been given wide powers and heavy responsibilities.

The way in which the Court has used these powers and shouldered its responsibilities has already given rise to considerable debate in Denmark. Among other things the Court has been criticized for transcending the limits of what "according to common opinion" are the functions of courts.

It suffices for the purposes of this article to mention the well-reasoned opinion of Professor Peter Blok, based on thorough research regarding the Court's jurisprudence on the limitation of patent rights and other exclusive rights because of their collision with art. 36 of the EEC Treaty.[2]

[1] See, on these cases, Gulmann and Lynge Andersen in *UfR* 1978, p. 385.

[2] See *Patentrettens konsumtionsprincip,* Copenhagen 1974, p. 355, and *TfR* 1976, p. 620.

He points to *the very free style of interpretation of the Court of Justice and its very active contribution to the integration process.* In his opinion this can only give rise to *a very considerable uncertainty as to the content of the law.* Professor Blok maintains that *the Court can never be relied upon to stay within the limits set by the commonly acknowledged methods of interpretation.* His most serious objection, however, is that *the Court,* though trying to conceal it, *is acting as a lawmaker.* He asserts that it can never be the task of a court of justice to be the prime mover in an integration process. Courts, he holds, should confine themselves to safeguarding the correct application of the law as laid down by the legislators—a limitation not respected by the Court of Justice of the European Communities.

This rather simplistic reproduction of the views of Professor Blok may not do them justice. They have been mentioned partly to show how the Court is regarded by a considerable number of Danish jurists—some of whom, it is true, base their criticism on a limited knowledge of Community law[3]—and partly to show the necessity of the following remarks. The main purpose of those remarks is to help to provide a basis for further discussions of the functioning of the Court, especially in relation to its methods of interpretation.

It seems appropriate to mention first of all a number of the characteristics of Community law which can help to explain the role of the Court of Justice, then to examine what methods of interpretation the Court of Justice is using, and only after that to consider whether the Court can reasonably be accused of transcending the limits of accepted judicial method.

The reader will not find an exhaustive examination of these questions in the following pages. Not only are the intricacies of the problems discussed much too great to be treated in so short a space, but it may be of advantage to limit the remarks to the essentials, to the tendencies in the functioning of the Court. There is a certain danger of overanalysing the problems here discussed.[4]

[3] A criticism which is certainly not valid in regard to Peter Blok.

[4] This has been mentioned by Lord Mackenzie Stuart in *The European Communities and the Rule of Law,* London 1977, p. 72.

The best insight into the way the Court perceives its role in the integration process and its methods of interpretation can be obtained from the book just mentioned and from the following three works: Pierre Pescatore, *The Law of Integration,* Leyden 1974; Robert Lecourt, *L'Europe des Juges,* Brussels 1976, and *Reports presented to a Judicial and Academic Conference, Court of Justice of the European Communities,* Luxemburg 1976, especially the report presented by Hans Kutscher.

Contributions on the methods of interpretation of the Court, interesting especially from an historical point of view, are to be found in *Zehn Jahre Rechtsprechung,* Cologne 1965, p. 177 (Rapport général by Ricardo Monaco).

One should also mention the article Über die Auslegung der Europäischen

2. CHARACTERISTICS OF COMMUNITY LAW

Nobody can seriously maintain that the role and the functioning of the Court of Justice can reasonably be compared to the situation obtaining in national courts.

The Court of Justice has tasks not normally given to national courts, it must solve problems not normally encountered by national courts, and it works under conditions unfamiliar to national courts.

Its primary task is to make a new and in many respects revolutionary legal order function. *A legal order,* one of the declared purposes of which is to create an ever closer union among the peoples of Europe, i.e. to "integrate" the European countries, *a legal order* which has created supranational institutions with powers and means of an unknown scope and strength to implement this purpose, *a legal order* where institutions common to several hitherto sovereign states can make rules that directly give rights to and impose obligations upon the individuals of the Member States. In short, a legal order that cannot be compared to any existing legal order, whether international or national. It is a new legal order not only because of its youth, but also because of the lack of models on which the Court of Justice can base its decisions.

The task outlined above has been given to a Court composed of judges from all of the Member States, i.e. judges coming from countries with different legal traditions and therefore with different conceptual backgrounds.

These judges have to interpret and apply rules, common to nine countries with nine different legal orders. The content of these rules does not facilitate the Court's work. Often the rules concern problems little known to national judges, problems of an economic character which have to be seen in a "supranational" setting. And these problems have to be solved on the basis of rules which must of necessity give rise to problems of interpretation. They are drafted in all the languages of the Member States, all languages being "equally authentic", thus giving rise to linguistic difficulties, and they often either use new concepts or concepts only known to one or two of the countries or concepts which if known to all the countries may have different meanings, thus giving rise to dangers of misapprehension and disagreements. And often the formulation of the rules, not least in the fundamental provisions of the treaties, is deliberately vague,[5] either be-

Gemeinschaftverträge" in *Festschrift für Müller-Armack,* p. 279, written by Carl-Friedrich Ophüls, head of the German delegation that drafted the Coal and Steel Treaty.

[5] As examples from the EEC Treaty mention may be made of "measures having equivalent effect" (art. 30), "public policy" (art. 48), and "abuse of dominant position" (art. 86).

cause it was deemed necessary to allow for a dynamic development of the interpretation or to make it possible to arrive at a compromise.

Sometimes one sees mentioned in connection with the EEC Treaty the alleged pronouncement of Napoleon that "une Constitution doit être courte et obscure". It is a dictum that can aptly be applied to the Community treaties in general. Those treaties may be compared to constitutions—they set up the constitutional framework of the Communities and they are not intended to be often revised—and a large number of their substantive provisions are indeed "obscure", at least until clarified by the Court. It is certain that in a number of instances the drafters of the treaties preferred to leave to judicial interpretation the exact meaning of the provisions.

But more important for the understanding of the role of the Court may be the fact that the Community legal order is an independent and—albeit only within a limited area—*complete* legal order, founded on treaties which do not contain clear solutions of all the problems such a legal order must necessarily solve. This is true of a number of the essential problems concerning the functioning of the system, not least the intricate problems of the relationship between the new legal order and the nine existing legal orders and of the relationship between Community law and international law.

The system being complete, the Court must also, to avoid lacunae, supplement the written rules by a number of principles of a constitutional and administrative character. Both in deciding the content of these unwritten general principles of law and of the many vague concepts used in the treaties, the Court must use a comparative-law approach, i.e. look for guidance to the different solutions in the Member States. This approach has even been laid down in the treaties. Art. 215(2) of the EEC Treaty bases the non-contractual liability of the Community upon "the general principles common to the laws of the Member States".

Also of importance for the understanding of the functioning of the Court of Justice is the fact that the Council, the principal lawmaking institution of the Communities, has not always fulfilled its obligations under the treaties to issue secondary regulations. This must of necessity complicate the tasks of the Court, but at the same time it has been used as a reason for the Court to try to remedy these failures through its jurisprudence.[6] It is pointed out that the Court is charged by the treaties with upholding Community law and that it is therefore duty-bound to fill gaps left in that law.

[6] As an example of this line of thought one can mention the remarks of Hans Kutscher (*op. cit.* in note 3, p. 34).

To these circumstances it must be added that not all of the EEC treaty provisions are in harmony with one another[7] and that the economic and social development of the last 25 years has necessitated a new evaluation of some of the treaty solutions. In practice this new evaluation cannot take place through a revision of the treaties because of political difficulties. So one must accept that in many respects the tasks of the Court of Justice are not to be compared to those of ordinary national courts and that these tasks cannot be solved unless freer and more pragmatic considerations are allowed to play a considerable role.

The Court of Justice has been given tasks of such complexity and importance that its functions might well be compared to those of the Supreme Court of the United States.[8] The great importance the jurisprudence of that tribunal has had, not only for the development of law in a narrow sense but also for the development of society in general, is well known. The same is true with regard to the criticism—sometimes violent—that is levelled against the Supreme Court for its alleged lack of respect for the principle of judicial self-restraint. This criticism is not unlike that levelled against the Court of Justice.

3. THE METHODS OF INTERPRETATION OF THE COURT OF JUSTICE AS SEEN BY SOME MEMBERS OF THE COURT

When discussing a court's possible lack of respect for the general principles governing judicial method, including the general accepted methods of interpretation, the first difficulty one encounters is the nature of those principles and methods. Not only may they differ from one country to another and from one field of law to another, but in themselves they are always of a vague and indeterminate nature. Interpretation is not a process guided by fixed principles or mechanical rules. It is generally acknowledged to be a matter of judicial instinct. Professor Max Sørensen, in his study *Les Sources du Droit international,* has concluded: "The examination of the methods of interpretation of the International Court of Justice has shown that interpretation of treaties is not a logical activity or an activity

[7] See, in connection with these observations, the "Hauptreferat" by Werner von Simson concerning "Die unbestimmten Rechtbegriffe" in *Zehn Jahre Rechtsprechung,* p. 395.

[8] This comparison was made already during the Paris Treaty negotiations. The German ambassador Carl-Friedrich Ophüls mentions in *Zehn Jahre Rechtsprechung,* p. 177, that when a Court of Justice was first proposed during the negotiations concerning the Coal and Steel Community, it was a leading idea that the interpretation of the Treaty by that Court should be modelled on the interpretation of the US Constitution by the Supreme Court.

bound by rules; when it has the appearance of being so, this appearance only serves the purpose of giving the discretion of judges a necessary clothing of objectivity".[9] This is also the prevalent view of Danish authors when discussing the activity of Danish judges. Professor Alf Ross has expressed his opinion in the following way: "The judge has considerable freedom when interpreting the law to arrive at results which correspond with his social evaluations and balancing of interests, equity and general sense of justice ... This freedom is made possible because the technique of reasoning ... covers a great variety of 'rules of interpretation' and 'methods of deduction' without laying down any objective criterion for when one or the other of these must be used".[10]

It is not difficult to show that the Court of Justice of the European Communities uses "a great variety of rules of interpretation and methods of deduction". But it is much more important to show that gradually the Court has stressed the importance of some of the rules or methods of interpretation. These are the "systematic" or contextual and the "teleological" or purposive methods of interpretation, which the Court of Justice in connection with the so-called principle of "l'effet utile" is using more and more, not least in cases which are of especial importance for the functioning of the Communities.

The reasons for and the purposes and effects of these methods of interpretation may best be described by quoting the words of three leading members of the Court.

Judge Pierre Pescatore, in his *Law of Integration*,[11] has succinctly given his opinion in the following way:

> Another consequence of the freedom reserved to the Community judge is the important role played in the practice of the Court by what might be called *constructive methods of interpretation*, or, more precisely, the systematic method based on general conceptions of the Community structure and its legal system, and the teleological method based on the fixed objectives of the Treaties.
>
> ...
>
> First of all, some remarks on the *systematic method*. This is based in turn on the various systematic elements on which Community law is based: the general

[9] Taken from the Danish resumé of the book.

[10] See *Introduktion til Retsstudiet*, p. 119. This view is elaborated on in *Ret of Retfærdighed*, p. 129.

[11] See pp. 86ff. Judge Pescatore, who is also professor at the University of Liége, has in his textbook *L'ordre juridique des Communautés européennes*, p. 176, stressed that the use of these methods is not simply a question of the will of the Court, but is made necessary by the logic of the structure of the Community legal order. "An order based on the idea of a progressing integration requires dynamic methods of interpretation; a clearly architectured but still incomplete structure necessitates systematic reasoning; treaty interpretations based on definitions of the goals to be reached must necessarily be teleological." A highly illustrative example of the thinking of Judge Pescatore is to be found in "Les objectifs de la C. E. comme principes d'interprétation" in *Miscellanea W. J. Ganshof van des Mersch*, p. 325.

scheme of the legislation, the structure of the institutions, the arrangement of powers (in conjunction, where appropriate, with the objectives), the general concepts and guiding ideas of the Treaties. Here is a complete "architecture", coherent and well thought out, the lines of which, once firmly drawn, require to be extended.

...

As regards *teleological interpretation,* this is based on the consideration of the objectives assigned to the Community. Contrary to a widespread idea, this is not simply "one method among others". The rule of law being by its nature a provision with a certain objective, the teleological method is, in the last analysis, the decisive criterion of every legal interpretation. This is doubly true in the context of treaties, which proceed by laying down objectives rather than substantive rules. It is not surprising, then, that this method has proved particularly fertile, especially in the sphere of fundamental problems of an economic, commercial, and fiscal character which the Court of Justice has been required to resolve.

...

In view of these methods of interpretation, the case law of the Court of Justice has become within the Community framework a powerful factor for development of Community law in the direction of the objectives, both immediate and distant, assigned to the building of Europe. The manifestation of this dynamism of Community law is all the more remarkable since it partially coincides with certain periods of crisis and stagnation in the sphere of action of the political institutions of the Community. It has become apparent that the judges, simply because they are completely independent in carrying out their task, are more free to fulfil in all circumstances the vocation assigned to them by the Treaties than is the case at certain moments with the political institutions.

The former French president of the Court, Robert Lecourt, in his book *L'Europe des Juges,*[12] has written:

If the Treaty of Rome entrusts the Court with the mission of upholding the respect of the law in the interpretation and application of the treaty, it is certainly not in order to ask it to ignore the treaty's objectives, but to urge it to safeguard them and to use them as a guide in its interpretation. ... It is only after having fully understood the importance of this premise, on which everything in the treaties is based, that it is possible to deduce the methods of interpretation specific to a Community legal order. ...

The meaning of the judge's mission was all the less doubtful in that the treaties open with preambles singularly descriptive of the desired goals. As the texts of these treaties are more often than not general provisions expressing principles connected with rules more illustrative than exhaustive, they could do nothing but entrust to judges the task of deducing the legal effects. ...

The universe in which the judge is placed is in the nature of things one under continual creation. It is the theatre of frequent encounters, on a constantly disputed ground, between the impulses from the treaties and the cen-

[12] See pp. 235 f.

> trifugal forces still alive. Therefore all static conceptions of the treaties would lead to the languishing and ruin of the Community ...
>
> *The judge* is by the treaties themselves obliged to place himself in the middle of the dynamic perspective traced by them. This does not mean that he should transgress the natural limits of a purely judicial power, but that he should give the treaties the full extent of the desired effects. How could he ignore that fact that he is charged by the preamble of the EEC Treaty with upholding a legal order which consecrates the foundations of an ever-closer union among the peoples of Europe ... This introductory provision cannot be regarded as if it were unwritten. If it is expressed, it is meant that the judge should take it into consideration ...
>
> One will then not be surprised that the judge has armed himself with this rule of effectiveness ("la notion d'effet utile", "the concept of useful effect") to oppose, with only a rare lack of rigour, the centrifugal attempts. Nothing can prevail against the efforts to preserve this effectiveness ...
>
> What then is ... this "useful effect" of the treaties which the Court of Justice guards with such great care? It is the obligation for the judge to apply and interpret the treaty vision in such a way that in the whole area of the common rule this can develop the full range of its Community consequences, both legal and factual, both actual and potential, without being either hampered or so much more obstructed by any national obstacle of a legal nature which has not been expressly reserved.

The present president of the Court of Justice, the German Hans Kutscher, expressed his views in the following way in the concluding remarks of his contribution (mentioned in footnote 4) to the conference at the Court of Justice at which representatives of the national judiciaries and universities discussed the Court's methods of interpretation:

> It is recognized that when a judge states the law, gives it concrete form and precision, fills in gaps and develops it, he is participating in the lawmaking process, and thus that legislative bodies cannot be said to have a monopoly over the procreation of the law, since the courts and the legislature also share this task. This also applies to the Community judge and to the legislative bodies of the Community.
>
> It is true that the case law of the Court has furthered the economic and social integration of the states associated together in the Community and their peoples. The Court's methods of interpretation and its decided cases can be said to lean in favour of integration. However, the Court has not achieved this result by overstepping the limits assigned to every judicial function and assuming the functions of a legislative body. These effects are due rather to the fact that the Court has to give priority to a schematic and above all a teleological and dynamic interpretation geared to the objectives of the Treaty. It is only these methods of interpretation that match the special features and requirements of the Community and its legal system. The inevitable result of the schematic interpretation of Community law is that at times the arguments and the interpretation in the Court's judgments are deductive in nature, although

> reasoning from case to case has it place. It may be added that a schematic and teleological interpretation is particularly well suited to the legal system of a Community which has set as its objective the integration of modern states with very advanced economic and social structures which present and demand a high degree of rationality.

These quotations give a good picture of the mission the Court of Justice considers itself to have in the EC institutional system, and of the methods of interpretation it feels that it must use in order to fulfil that mission. They all evidence the will of the Court to further European integration by means of existing rules and the methods of interpretation described; but they also show that it is the Court's conviction that in doing so it is acting within the limits set by the treaties for its functions and in accordance with the intentions of the treaties. There is no doubt that both the Court—or at least most of its members—and the great majority of legal writers believe that it has been successful in its endeavours (to use the words of Judge Pescatore) "to become within the Community framework a powerful factor for the development of Community law in the direction of the objectives, both immediate and distant, assigned to the building of Europe".[13]

4. REFLECTIONS ON THE METHODS OF INTERPRETATION USED BY THE COURT OF JUSTICE

Though one will look in vain in the decisions of the Court for theoretical explanations regarding the methods of interpretation it uses, one does not have to read many judgments of the Court before realizing that the methods just described by the three members of the Court are indeed those used by the Court, particularly in those judgments that concern the fundamental questions of Community law.

Sometimes the Court begins its reasoning for a ruling by stating that the provision in question has to be interpreted on the basis of the "spirit, the general scheme and the wording of the treaty". An example can be found in the Continental Can judgment, where the Court said: "In order to answer this question one has to go back to the spirit, the general scheme and the wording of art. 86 as well as to the system and objectives of the treaty."[14] There is no doubt that here the Court is pointing to the teleologi-

[13] See *Law of Integration*, pp. 89 f.

[14] *Continental Can Co. Inc. and Europe Emballage Corporation* v. *Commission* (6/72) (1973) ECR 215.

cal and the contextual methods just described, as well as to the literal or grammatical/logical method of interpretation.

There is nothing unusual in these methods. They will surprise no judge, whether international or national.

The first sentence of art. 31 of the Vienna Convention on the Law of Treaties states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

And Professor Ross, in an elementary introduction to the study of law, has enumerated the decisive elements of interpretation in the following way:

> 1. The wording of the provision in connection with linguistic usages and syntactical rules.
> 2. The relationship between the provision and the other parts of the legal order.
> 3. Pragmatic considerations, i.e. an evaluation of the result of the interpretation (possibly supported by the *travaux préparatoires*) on the basis of the objectives the statute is supposed to serve, or on the basis of ordinary sense of justice or cultural tradition.[15]

One may notice three differences between the methods of interpretation as stated by the Court and those enumerated by Professor Ross. (a) The literal interpretation is mentioned last by the Court. (b) The Court does not base its interpretation of the treaties on *travaux préparatoires*. (c) Finally, interpretation based on "pragmatic considerations" as understood by Professor Ross is certainly broader in scope than the teleological interpretation as used by the Court. These differences will now be considered in turn.

(a) The first difference should certainly not be misunderstood. The Court of Justice will, of course, like any other court, take as a starting point for all its interpretations the usual meaning of the text of the provision in question. Both Judge Kutscher and Judge Lecourt stress this and refuse to accept the existence of a "hierarchy" as far as the methods of interpretation are concerned.[16] In my opinion, however, the order of the methods is not without significance. It is indicative of a tendency. It is probably fair to say that the Court does not feel so closely bound by the wording of the provisions as most other courts do. This may partly be explained by the difficulties stemming from differences in the various languages and by the existence of many vague and incomplete provisions. But the real reason is probably the importance the Court attaches to the contextual and teleo-

[15] See *op. cit.* This statement is elaborated on in *Ret og Retfærdighed,* pp. 128 ff.

[16] See *op. cit.*, p. 15 and p. 241.

logical methods. The Court will not be bound by an interpretation based on the strict understanding of "the usual meaning" of the text, when elements of interpretation based on the treaty system and the treaty objectives indicate a different result.[17] Thus it may be said that the style of interpretation is relatively free—if one limits one's understanding of that word to mean free in regard to the strict understanding of "the usual meaning" of the text.

(b) It is a fact that the Court does not use *travaux préparatoires* as an aid in interpreting the treaties.[18] It is said that the Member States themselves wanted this. They decided to cast a veil of secrecy over the material from the treaty negotiations. This means that most of the pertinent *travaux préparatoires* are not available.[19] But the refusal of the Court to consider even such material as is accessible can probably also be explained by the fact that it gives the Court greater freedom to interpret the treaties in accordance with the political, economic and social development of society. The Court is freer to discover "the will of the founding fathers" when it can limit its research to the treaty concerned, and especially the preamble and the introductory provisions on the objectives of the Communities. But this attitude of the Court is not in itself unusual. One knows the difficulties the International Court of Justice has had in accepting *travaux préparatoires* as an aid in the interpretation of treaties.[20]

In international law it is accepted by most authors that when interpreting multinational treaties and especially treaties establishing international organizations one does not try to find an "historic will of the parties, but rather the objective content of the rule".[21] And Professor Stuer Lauridsen has stated that one can generally find a tendency even with the Danish courts to prefer to find "the official reasons" for their decisions in "the objective context of the provisions rather than in the *travaux préparatoires*".[22]

(c) The third difference mentioned above is probably not a real one. It may be explained by the fact that a comparison is made between the

[17] The difficulties of discussing this question will be clear to anybody familiar with the problems inherent in the notion "usual meaning of the text". Professor Ross has called it illusory to think that one can base an interpretation "on the natural meaning of the words according to Danish usage" (*Ret og Retfærdighed,* p. 139). See also the note on "The Natural Meaning of Terms" by Hersch Lauterpacht in *The Development of International Law by the International Court,* London 1958.

[18] When interpreting acts of the Council and the Commission, the Court does not exclude the possibility of using available *travaux préparatoires.*

[19] See, on this point, L. Neville Brown and Francis G. Jacobs, *The Court of Justice of the European Communities,* London 1977, pp. 200 ff. See also Kutscher (*op. cit.,* p. 21) and p. 89 in the contribution by F. Dumon at the meeting at the Court of Justice mentioned in note 4.

[20] See, e.g., Lauterpacht, *op. cit.* note 7, p. 116.

[21] See Albert Bleckmann, *Europarecht,* Cologne 1978, p. 75.

[22] See *Retslæren,* Copenhagen 1978, p. 288.

official statement of a court of justice concerning its methods of interpretation and a law professor's explanation. Few, if any, judges would care in their judgments to accept pragmatic considerations, in so broad a sense as that used by Professor Ross, as being a decisive element of interpretation; but at the same time few, if any, judges would deny the truth of the point of view of Professor Ross. No one can doubt that pragmatic considerations as defined by Professor Ross play an important part in the interpretations of the Court of Justice, but the significant point is the weight, both relative and absolute, that the Court attaches to interpretations based on the objectives of the treaties as set out in the preambles and the introductory provisions. As Judge Donner has stressed, the Court does take these objectives "seriously".[23] And this has important consequences for the result of the interpretation.

At this point it is appropriate to make a few comments on the Court's use of "the rule of affectiveness" (l'effet utile") and the dynamic aspects of the methods of interpretation. It is indeed clear from the jurisprudence of the Court that it tries to interpret the provisions in such a way that they are given practical effect or, to use the words of Judge Pescatore, in such a way that "the building of Europe shall be a design that works in practice . . .".[24] But for courts to interpret provisions in order to give them practical effect is not unusual. This rule of interpretation can be dated back to the maxim of Ulpian, "ut res magis valeat quam pereat".

The word "dynamic" is often used in relation to the methods of interpretation of the Court, but its meaning in this connection is seldom explained. Most often it seems to refer to the fact that the integration process set in motion by the treaties is by nature a dynamic process, a fact which is certainly of importance in understanding the character of Community law. In a narrower sense, the word is used in statements concerning the use by the Court of dynamic methods of interpretation, i.e. methods which accept that legal rules must always be seen in the light of contemporary standards of society and that therefore the Court must not be bound by an historic will of the legislator or by its own prior decisions, but must participate in the continuous process of developing the law. This attitude is certainly not unknown either to international or to national courts. And it is generally agreed that it is especially indicated in the interpretation of constitutional law.[25]

[23] See the *Exeter Lecture* in European Law, "The Court of Justice as a Constitutional Court", delivered on October 28, 1977.

[24] See *Law of Integration,* p. 41.

[25] As early as 1819 this was pointed out by Chief Justice Marshall of the US Supreme Court, when he said: "We must never forget that it is a *Constitution* we are expounding ... intended to endure for ages to come, and consequently to be adapted to the various crises of

If these comments are correct, one may also question whether it is true that the methods of interpretation used by the Court are especially apt to create uncertainty as to the content of the law. Nobody will deny that the Community legal order is still so undeveloped that there exists uncertainty about a great number of important problems, and nobody will contend that the Court of Justice has always succeeded in finding clear solutions of all the problems submitted to it. But, considering the great variety and complexity of those problems, this should surprise nobody. It is hardly the methods of interpretation that can be blamed for the uncertainty.

On the contrary, the Court of Justice seems to apply its methods of interpretation with considerable measure of consistency. It can also be maintained that the use of these methods makes it possible to predict with a reasonable degree of certainty (considering the complexity of the problems) the outcome of cases due to be tried by the Court of Justice. The chances of "guessing" the outcome correctly are by no means meagre for those who have taken the trouble to understand the "thinking of the Court". For instance, one can be fairly confident that the Court will interpret the fundamental provisions of the treaties as extensively as possible and the exceptions as restrictively as possible, and one can assume with a high degree of certainty that of two *possible* solutions of a problem the Court will choose the one which is the more likely to further integration, i.e. the solution which will more effectively contribute to "an ever closer union between the peoples of Europe". Professor Hans Ipsen has expressed this in the maxim "in dubio pro communiate".[26] This is probably the essence of the rule of effectiveness as used by the Court. The provisions to be interpreted by the Court are to be found in treaties whose purpose is to promote integration, and they must therefore be interpreted in such a way that their legal effects will most effectively contribute to this aim. One can hardly regard this attitude as unacceptable, either logically or legally.

"Government by judges" is a phrase not infrequently uttered in connection with the workings of the Court of Justice, and Professor Blok is certainly not alone in charging the Court with assuming the role of legislator. Such accusations are the ones most vigorously rejected by those members of the Court who debate these problems in public.

Admittedly, such debates move on difficult ground. There is little disagreement on the principles. It is generally accepted, on the one hand, that

human affairs"; *McCulluch* v. *Maryland,* 17 US (4 Wheat) 316, 407 and 417 (1819). See also Max Sørensen, *Statsret* (2nd ed. by Germer), p. 301.

[26] See p. 131 in *Europäische Gemeinschaftsrecht,* Tübingen 1972. President Kutscher has (*op. cit.* note 3, p. 31) refused to accept this veiw as correct.

courts have a creative or constructive role in finding the law, that they may be said to "create law", and, on the other, that they must not act as "lawmakers". Disagreement only arises when these principles have to be applied to concrete cases. Little or no help for the resolution of such differences can be found in legal theory. It is to a large extent a question of judicial instinct or philosophy how active a role a court may have in the lawmaking process.[27] My own impression is that there have been instances where the Court of Justice has gone very far—perhaps even too far. At the same time, however, it is probably also justifiable to assert that up to now the Court has not played so active a part in the law-creating process as the US Supreme Court has. Whereas the latter does not refrain from creating detailed legal rules on the basis of the vague provisions of the Constitution, the EC Court of Justice has—with only a few possible exceptions—refused to establish principles which can only function if supplemented with detailed and judge-made rules.[28]

5. CONCLUDING REMARKS

It may be appropriate to add a few remarks in qualification of the foregoing reflections.

It would, of course, be wrong to think that the Court of Justice does not take account of political realities. The work of the Court is and must of necessity be a "permanent balancing act between the task of translating the fundamental legal principles of the Treaty into actual law, on the one hand, and the necessity of considering the practical results as well as the political realities and the limits of judicial power, on the other hand".[29] My reflections must only be understood to mean that more often than not the balancing undertaken by the Court of Justice—because of the emphasis it puts on the objectives of the treaties and the way it uses the methods of interpretation—leads to decisions in favour of "the fundamental legal principles".

In my opinion, the most pertinent topic for discussion is whether the

[27] The problem is only acute when the courts interpret formal constitutions. Outside this field the legislator is always able to change the decisions of the courts by adopting new legislation.

[28] It has refused to establish Community rules on periods of limitation, in connection with Commission sanctions of violations of arts. 85 and 86 of the EEC Treaty, *ICI and others* v. *Commission*, 48 etc./69 (1972) ECR 619, and it has refused to establish common rules concerning actions based on Community law for recovery of payments made by mistake, *Rewe Zentralfinanz* 45/76 (1976) ECR 1989.

[29] Taken from an annotation by Winkel and von Borries of the Irish Fisheries cases 61/77 and 88/77 in *Common Market Law Review* 1978, p. 494.

Court of Justice exaggerates the importance of the teleological method of interpretation, considering that the decisive objectives taken into account are those expressed in the preamble and the first few articles of the treaties. The salient feature of these objectives is not the clarity which is claimed for them but their generality. It may indeed be questioned whether all future Community action can in real life be based on a narrow respect for these objectives. It may certainly be asked whether democratic considerations should not lead to a greater acceptance of what the politically responsible Council of Ministers perceives to be in the best interest of the Communities. One may ask whether a fixation on the purposes of the treaties as laid down 25 years ago, to the almost total exclusion of all other practical considerations, is justifiable, having regard to the actual development of the European situation during these years. One may ask whether the dynamic method of interpretation should only be used when it leads to a strengthening of Community law. One may ask whether it is acceptable that the Court should regard itself as the only true guardian of the Community ideas—ideas laid down just after the war during a period when the world looked quite different from what it does today.

These are difficult questions. But perhaps their importance should not be exaggerated. The experience of the US Supreme Court has shown that a constitutional court cannot for any long period run either too far ahead of or too far behind the fundamental political and social currents of a society without losing its credibility. President Kutscher referred to this when saying in his final observations at the meeting on the methods of interpretation of the Court of Justice[30] that the decisions of a court of justice must, to be effective, be "accepted" by the people and institutions concerned. If the activist approach of the Court has indeed taken it too far ahead of political realities, the logical consequence of this would be a reversal of the jurisprudence of the Court. Such a reversal would either be undertaken by the Court itself or be forced by the Member States through revisions of the treaties or the appointment of judges more willing to show judicial self-restraint.

It is more than doubtful whether such a reversal will take place. The Member States disagree as to the degree of integration desirable and therefore also in their evaluation of the jurisprudence of the Court. As far as the treaties are concerned, the lack of agreement on this point will preclude any important changes in these in the foreseeable future. Thus it must be accepted that the most direct influence on the jurisprudence of the Court on the part of the individual Member States lies, whether one

[30] See footnote 4.

likes it or not, in the appointment of the judges. This observation is supported by the American experience.

One may also ask whether the majority of Member States mind that integration is furthered through the jurisprudence of the Court. One sees few attempts in the written or oral observations of the Member States in cases before the Court to question what the Court is doing or to change the tendencies of its jurisprudence. This attitude may, however, also be explained by the appreciation of the Member States of the clear limits which after all are placed on the role of the Court in the integration process. It is still the politically responsible institutions which have to take the important decisions concerning the development of the European Communities.

There is, against this background, little reason to believe that the Court of Justice will change its methods of interpretation in the years to come. Legal writing in general supports the principles adopted by the Court. And the Court seems to have little difficulty in living with the criticisms of the minority. Knowledge and understanding of the Court's methods will therefore continue to be of importance to the growing number of people concerned with Community law. Anyone who has to commit himself on a point of Community law needs to know the Community methods of interpretation, since these have a very significant bearing on the outcome. He cannot treat the problem as he would treat a problem of national law. It is not so much that the Community methods of interpretation are different from national methods. It is rather that they are used in the framework of a system which cannot be compared to the national legal order and that for this reason the Court of Justice has stressed the importance of certain methods to the exclusion of others. The Court has created a new legal tradition, and lawyers in the Member States must learn to live with this tradition.