Vorträge Reden und Berichte aus dem Europa-Institut / Nr. 202
herausgegeben
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The justification of decisions by the European Court of Justice

Vortrag vor dem Europainstitut der Universität des Saarlandes
Saarbrücken, den 19. Dezember 1989

EUROPEAN JURISPRUDENCE

Legal Justification in the European Court of Justice

I. Introduction

In this paper I would like to give an account of some of the main ideas which I have defended in my doctoral thesis.[1] The aim of this paper is to persuade all those interested in the law of the European Communities (EC) that legal theory can greatly contribute to a better understanding of EC law. Of course, I cannot here deal with all the areas where jurisprudence (Rechtstheorie) can enlighten EC jurists. This paper deals only with one such area: the justification of judicial decisions. The number of works on legal reasoning is continually growing and a high degree of sophistication is being achieved in the subject. Still, although one sometimes comes across theories of legal reasoning applied to court cases, most examples are limited to state jurisdictions and one seldom finds particular cases brought from suprastate jurisdictions or considerations relating to supranational legal orders. As regards EC law specialists, they have so far been reluctant to delve into legal theoretical or legal philosophical issues. As a result, the relationships between legal theory and EC law have been unduly neglected.

My first task will be to locate my work amongst the many possible approaches to the study of the European Court of Justice (ECJ) and deal with methodological and theoretical aspects of the justificatory approach (II). Next I shall draw an analytical model for the study of justification of ECJ decisions and I shall distinguish between justification in clear cases and in hard cases (III). Finally, I shall engage in an evaluative discourse which consists in assessing the justifica-

tory work of the court and I shall discuss several standpoints from which it can be judged (IV).

II. The Study of the European Court of Justice

One can analyse the ECJ from different perspectives. Jurists have focused their attention on the analysis of the Court's jurisdiction and of the procedural details of the different actions which can be brought before the Court. These studies have a great technical interest and are primarily addressed to EC law practitioners, but they do not address jurisprudential questions.[2] Social and political scientists have made interesting contributions to the study of the Court as a sociopolitical agent acting in a specific milieu and engaged in the project of European integration. These studies are not made for the practitioners' consumption but they are of great help to anyone who wants to understand the work of the court. Insofar as these works make presuppositions about the judiciary, about judicial function and its limits, they share some common ground with legal theory.[3] Another interesting approach consists in comparing the ECJ with other "federal" courts such as the US Supreme Court, in the understanding that both courts face comparable strategic choices.[4] These comparative studies are also of a pluridisciplinary nature. Finally, there are works which deal with the methods of interpretation used by the Court.[5] This approach has much in common with the study of legal reasoning in legal interpretation, but it runs the risk of being too descriptive. Any analysis of the methods of interpretation has to be combined with a consideration of how the interpreting agent perceives its own role, of the institutional context of judicial decision-making and of the Court's doctrine of justification.

The present paper aims to combine such approaches: it draws its main analytical tools from recent theories of legal reasoning, legal interpretation and legal justification, but at the same time it engages in a dialogue with socio-political approaches to judicial decision-making. The context of analysis of judicial decisions is the context of justification, as different from the context of discovery. But this does not mean that the context of discovery is of no interest to us. In order to understand and explain judicial action one should not forget that there is a basic legal requirement of justification. As regards the ECJ, art. 33 of its Statute provides: "Judgments shall state the reasons on which they are based". This requirement of motivation directs the explanation of judicial action. It is linked to the dominant legal-political culture; judges are expected to apply the law in their decisions.

The context of discovery relates to the psychological and sociological factors which in fact lead to the judicial decision. The emphasis is on how the judge reaches the decision, what leads the judge or court to this or that decision, what factors condition judicial decision-making, whose interests are given preference, etc. By contrast, the context of justification focuses on the presentation of the decision, on the reasons publicly given by the judge or court in support of the judgment. Justification consists in giving reasons. Not just any reason, but reasons that are considered "good" or adequate (richtig). Which reasons are to count as "good" is something which cannot be answered a priori. The answer will depend on the particular legal culture in which justification operates.

The distinction between the contexts of discovery and justification should not be carried too far. After all, although

there is a legal requirement that reasons should be given in support of judgments, it is nowhere stated which they should be; in other words, there is only a general expectation that they should be legal reasons. But there is always a scope for discretion, especially in so-called hard cases. And if we want to understand why the Court chooses certain reasons instead of others, then we might find it useful to address questions typical of the context of discovery: What is the Court doing by choosing these or those reasons? What ends are being furthered? Whose interests are being protected? How will the different audiences of the Court react to the offered justification? ...

To describe the context of discovery as focusing on the factors that in fact lead to the decision might lead to some confusion. In a sense one cannot know which are the real causes of a decision. Art. 32 of the Court Statute clearly reads: "The deliberations of the Court shall be and shall remain secret." Even if one were a judge at the Court one would come across problems of collective will-formation. The factors of the context of discovery are of a hypothetical or postulative nature. Further still, one cannot make a dichotomy between context of discovery: real reasons: context of justification: façade reasons. The reasons publicly given in support of a decision are no less real;[6] they represent a self-conscious effort on the part of the justifying agent towards rationality and they can be controlled by its audiences: it is generally accepted that justifying reasons have to be acceptable to the legal audience.[7]

The methodology chosen for the study of justification is the rational reconstruction of the doctrine of justification operative at the Court. Attention focuses on the justifying arguments offered by the Court in support of its decisions, and

on the deep structure of justification i.e. the need to apply the law, which is framed in general terms (universals) to particular facts. In cases of preliminary rulings on the interpretation of community law there is no application proper and attention focuses on interpretative arguments.

Rational reconstruction is not a purely descriptive method. It is descriptive in that it looks at the arguments offered by the Court in support of a decision; it does not reconstruct normative theories of justification but rather actual judicial justificatory arguments. These arguments are then systematised and discussed from a theoretical point of view i.e. from the standpoint of contemporary theories of legal reasoning and legal justification.[8] Courts seldom make their doctrine of justification explicit by way of judgments. Such doctrine operates implicitly in the work of courts. But the operative doctrine of justification can be rationally reconstructed from certain sources of information:

- some judgments do show a conscious effort on the part of the Court to state its view of justification,[9]

- certain legal norms provide some clues as to justification e.g. EEC Treaty art. 164 and art. 4 and the Court's Statute and Rules of Procedure,

- doctrinal works of judges and other officials at the Court on the methods of interpretation used by the Court;[10] these works can be considered privileged sources of information because, although they are not the official view of the Court, they are representative of the main lines of thought at the Court.

The descriptive import of any reconstruction carried out in this manner can be checked and controlled by scholars of the ECJ in assessing whether it provides any insight into the work of the Court, whether it accounts for the Court's activity as a justifying agent. Reconstructions can further be checked by those who are in close contact with the Court: Court officials and practitioners, those who are well acquainted with its working methods. The test will be whether such reconstruction capture what they see the Court as doing.

If rational reconstruction were a merely descriptive method, in a sense it could not fail for it would simply recast justificatory arguments, but then it would not provide any new insight. But because it is a creative activity it can be more or less successful in its making explicit what is only implicit in the judgments of the Court. Constant testing and criticism of proposed rational reconstructions according to the tests indicated above will eventually lead to more sophisticated accounts of the Court.

But rational reconstruction also has a critical import. By reconstruction the Court's operative doctrine of justification at a more general remove we are at the same time elevating it to the level of a model or a landmark against which particular justifications of the Court can be assessed and criticised. Thus, if we hold that the Court interprets the Treaties according to the principle of effectiveness (effet utile) - which consists in making sure that the rights and obligations laid down therein are to be constructed so as to achieve their full realisation - and according to the accomplishment of democracy and balance of powers in the institutional arrangement of the Community[11] then the Court can be criticised according to its own standards if, in a

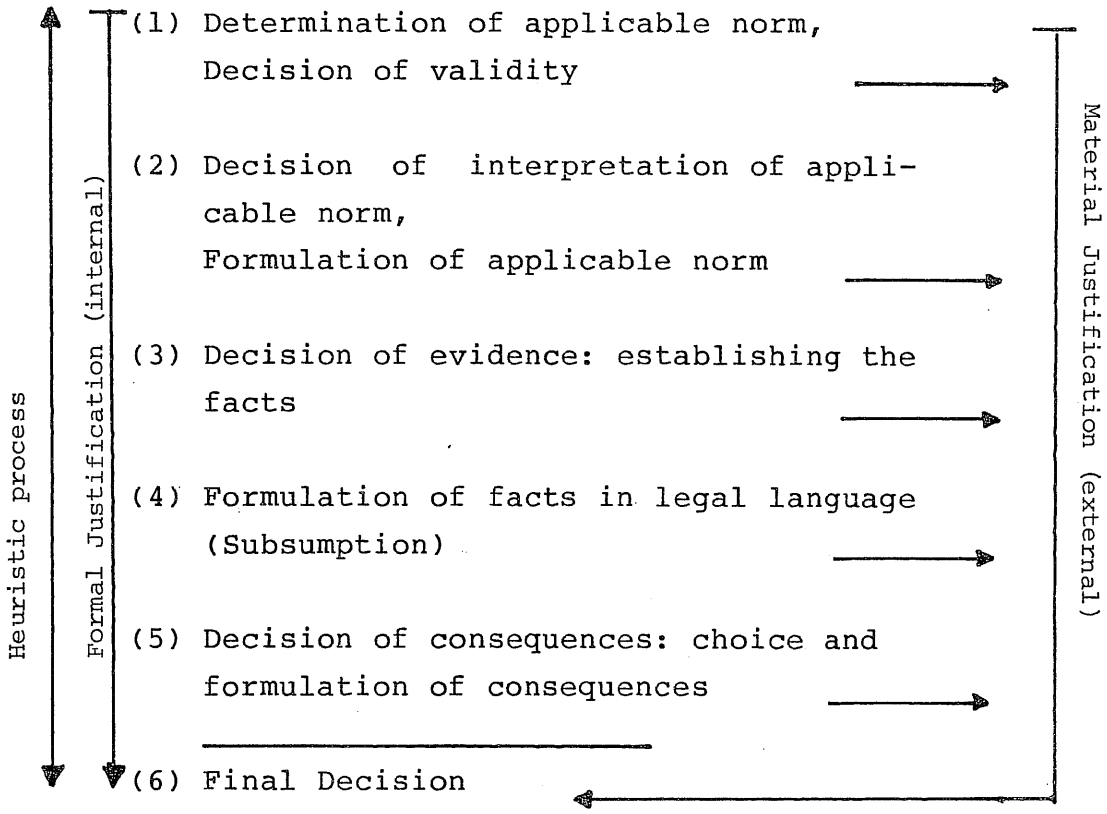
given case, it adopts an interpretation of the Treaties which departs from those principles.[12] Of course, dwelling on this critical task of rational reconstruction presupposes an acceptance of the underlying values of consistency and coherence and universalisability over time and over cases which are predicated of any rational agent.[13] Otherwise any internal systematic criticism would be futile.

III. The Justification of ECJ Decisions

A) A model for the analysis of ECJ decisions

For the sake of simplicity, I shall distinguish two main types of ECJ decisions: Law-applying decisions (full jurisdiction) and law-interpreting decisions (preliminary rulings on the interpretation or validity of EC law in references brought by domestic courts according to art. 177 of the EEC Treaty). In the first case questions of interpretation of the applicable norm may also arise. In the second case the law-applying decision is justified within the law if it can be shown to apply valid law to the particular relevant facts of the case correctly. This process consists of several steps or subdecisions: (1) determining the applicable legal norm and deciding upon its validity, (2) interpreting the applicable norm and giving it an universal formulation with a view to its application, (3) establishing the relevant facts of a case, (4) formulating those facts in the legal language of the applicable norm with a view to their subsumption into that norm and (5) determining the consequences of the decision (see diagram).

Diagram: Analytical Model of the Law-applying Decision



In art. 177 cases the task of the Court only covers steps (1) and (2) but the referring domestic court will normally provide the ECJ with an account of the facts of the case. Although, according to the law it is conceivable to interpret a legal norm in abstracto, in reality there is always an interplay or feedback between interpretation and application, as the hermeneutics-oriented philosophers go on insisting.[15] Yet, art. 177 (preliminary rulings) presupposes that it is possible to ascribe the task of interpreting EC law and of determining the validity of derived EC law to the ECJ and the task of applying EC law - thus interpreted and determined - to domestic courts.

B) Formal and material justification

As the diagram shows, justification is a complex activity. the final decision (6) is justified in the law if it can be shown to follow from the established premises (1-5) - formal-logical justification - and if each of the premises is itself justified - material justification. The formal-logical approach takes no account of the correctness of the premises. It only looks at the correctness of the inference from the premises to the final decision or conclusion regardless of the contents of the premises. It is a matter of dispute among legal theorists whether that inference can be characterised as a classical syllogism, but, in any case, the formal-logical justification only guarantees the correctness of the scheme of reasoning (formal rationality): the conclusion cannot be negated without negating one of the premises, if the premises are accepted as valid then the conclusion will follow. Formal rationality is necessary but not sufficient for the justification of the final decision. The premises leading to this decision have to be justified within the law - material justification.

The guiding idea of material justification in the law is that the law-applying and law-interpreting decisions have to be legally grounded i.e. based on legal reasons, not just on any reason. The premises leading to the final decision have to be justified as legally correct or acceptable premises. The choice of the applicable legal norm (step 1) has to stand the criteria of validity of the legal order which binds the Court and the parties. When the applicable norm is not clear it has to be interpreted (step 2) and the proposed interpretation has to satisfy certain systemic criteria: validity-consistency with the other norms of the legal order and coherence with the principles inspiring the legal order. The major premise

thus obtained is a combination of steps (1) and (2) and it has to be formulated in universalisable terms. The applicable legal norm will usually qualify as a legal rule: a norm containing a protasis or description of legal relevant facts and an apodosis or provision of consequences which apply to those facts. This binary structure of legal rules formulated in universal terms is what makes subsumption of the particulars into the universal norm possible.

Steps (3) and (4) lead to the establishment of the minor premise. There are certain legal norms governing the decision of evidence (procedural rules of process law) and certain extra-legal rules of evidence. The established evidence will be formulated in the legal language of the major premise but referring to particulars. Subsumption is automatically operated: The particulars of the minor premise are instantiations of the universals of the protasis of the major premise. The decision of consequences (step 5) consists in applying the apodosis of the major premise to the particulars of the minor premise. This operation will be straight-forward in those cases where the legal consequences are fixed in the apodosis and there is no scope for discretionary choice of consequences. But in other cases the apodosis only provides guidelines for the decision of consequences and leeway is unavoidable.

One can conceive of a more fundamental type of justification i.e. the justification of the underlying principles of legal justification: The justification of formal-logical reasoning itself and the justification of the requirement that legal reasons be adduced in support of the premises. This more fundamental justification is not essential to the rational reconstruction of operative doctrines of judicial justification: Courts do not deal with the problem whether and how ca subsumption in the law be justified nor do they question th

postulate that legal reasons ought to be given in support of a decision. These discussions are left to legal philosophers.[16]

The analytical model of the law-applying decision drawn up in this diagram also helps to see the difference between the justification of decisions and the heuristic context of decision-making (context of discovery). Justification proceeds on a one way avenue, from the top down, from the major premise to the minor premise and to the decision of consequences. This is how the judicial decision is presented to the public. By contrast the heuristics of decision-making proceeds on a complex plane: The applicable norm is chosen once the court is acquainted with the facts of the case, the foreseeable consequences of applying this or that norm or of adopting this or that interpretation of the norm might determine the way the applicable norm is formulated and even the way the evidence is qualified and formulated. But the heuristic process is not public and it is therefore difficult to control. Those authors who focus their attention on the heuristics of judicial decisions will tend to minimise the difference between validity-interpretation and application. The analytical approach to justification allows us at least to locate the heuristic moments (in an epistemological sense) where extra-legal criteria step in i.e. the domain of axiology.

C) Justification in clear cases and in hard cases

There is no rigid distinction between clear cases and hard cases. Given the appropriate skill and means any case can be problematised even if it seems pellucid: One can try to puzzle the decision-maker as to the determination of the applicable norm or as to its meaning and one can always recon-

struct the facts of a case. But some cases are more prone to be problematised than others. When I talk about clear and hard cases I do not mean that cases are a priori clear or hard; only that there are certain types of cases which are likely to be dispatched as routine and other types which are likely to be considered more important or troublesome. This duality tends to be reflected in the justification of judicial decisions. The justification of a decision in a clear case tends to be straightforward: The decision is presented as the application of clear law to clear facts, there is no dispute as to the content of the premises (especially of the major premise); it is almost as if formal-logical justification were sufficient. The Court says that the applicable norm is clear, the parties agree as to the facts or their differences can be settled without much ado. The decision follows mechanically. By contrast, in hard cases it might be that (step 1) the Court is puzzled as to which norm governs the case - several norms seem to govern it or there is a dispute as to whether the case should be governed by EC law or by domestic law, or there seems to be a gap in the law - or that (step 2) the norm which tendentially governs the case is not clear for purposes of application: It is obscure, ambiguous, vague or imprecise. It might also be the case that (step 3) the facts are hard to establish or hard to interpret - presumptions, fictions - or (step 4) hard to classify - there is a dispute as to whether the particular facts of the case are an instance of the universal factual provision in the protasis of the legal norm. Thus the justification of decisions in hard cases tends to concentrate on the establishment of the premises.

D) Clear cases in EC law

But are there any clear cases in Community law? There are several pointers to the existence of clear cases. In the first place, there is a general opinion that certain cases of EC law are routine and others are more important. This distinction is to be found even in sources of EC law. The distribution of the workload of the ECJ between the full Court and its Chambers reflects this distinction: presently there are four chambers of three judges and two chambers of five judges. At the request of the full Court the Chambers undertake preliminary examinations of evidence in particular cases and they can hear and decide (1) references for preliminary rulings and (2) any action brought by natural or legal persons the nature of which does not necessitate a hearing by the full Court. If a Member State or a Community institution is party to this type of action it can insist on a hearing by the full court (these would presumably be politically "important" cases). The Court may refer to the Chambers any of these cases where "the difficulty of the importance of the cases or particular circumstances are not such as to require that the Court decide it in plenary session ... . At any stage in the proceedings the Chamber may refer to the court a case assigned to or devolving upon it, if it considers that the case raises points of law requiring decision by the full Court".[17]

Further proof of the adequacy of the distinction between routine cases and hard cases can be found in the establishment of the Court of First Instance of the ECJ (Tribunal de Première Instance) which is not "competent to hear and determine actions brought by Member States or by Community institutions or questions referred for a preliminary ruling under Article 177".[18] This Tribunal attached to the ECJ has jurisdiction over staff cases, ECSC cases and competition cases, but the

jurisdiction might be extended to cover anti-dumping cases.[19] There is an implicit recognition that routine cases - which are deemed clear - can be dealt with by the new Tribunal whereas more (politically) important cases involving Member States or Community institutions along with (legally) harder cases involving interpretation on points of law would be decided by the Court. The possibility of appealing to the court against certain decisions of the Tribunal amounts to a recognition of the notion of problematised "clear" cases. This possibility is limited to appeals on points of law on the grounds of lack of competence, breach of procedure and infringement of Community law.[20]

Whereas the distribution of the caseload between the Court and the Tribunal and between the full Court and its Chambers points to the idea of routine versus politically important cases, the acte clair doctrine points to the idea of legally clear versus legally hard cases. This doctrine has it that when a norm is clear, no interpretation is required. The formulation and development of this doctrine constitute one of the most interesting jurisprudential issues of European Community law.[21] The acte clair doctrine is best conveyed by the legal brocard interpretatio cessat in claris, but its ideological significance can be expressed in the following way: justificatio cessat in claris. Some authors have attacked this doctrine on the ground that it is faulty: interpretation is inescapable, there is always interpretation.[22] These authors operate with a very wide concept of interpretation which includes linguistic understanding for purposes of verbal communication. But interpretation in a strict sense is different from direct linguistic understanding. Interpretation takes place when there are doubts concerning the meaning of a text (or a norm) in a pragmatic context. This strict sense of interpretation is more in line with EC law, in par-

ticular with art. 177 of the EEC Treaty which presupposes that Community law does not always require interpretation.

The acte clair doctrine was first recognised in EC law by AG Lagrange in da Costa.[23] This case was almost identical to van Gend en Loos[24] where a Dutch court made a preliminary reference to the ECJ on the direct effect of art. 12 (EEC) within the territory of a Member State and the Court confirmed that the article had direct effect and conferred upon nationals of Member States rights which domestic courts must protect. In da Costa the Court ruled that there was no ground for giving a new interpretation of art. 12: the authority of an interpretation already given by the Court under art. 177 may have the effect of negating the obligation otherwise imposed by this article on the Member State courts of last instance i.e. the obligation to bring a matter before the Court of Justice. The real significance of this ruling is the assertion of the authority of the Court's jurisprudence. This emphasis on authority was also present in the Advocate General's conclusions:

> "Une disposition obscure par elle-même, mais dont le sens a été constamment interprété de la même manière par le juge compétent à cet égard, est assimilable à une disposition n'ayant pas besoin d'interprétation".

But AG Lagrange was also concerned with clarity:

> "Pour qu'il y ait lieu à la mise en route de la procédure de renvoi d'une question préjudicielle pour interprétation il faut évidemment qu'on se trouve en présence d'une question et que cette question soit relative à l'interprétation du texte en cause: Sinon, si le texte est parfaitement clair il n'y a plus lieu à interprétation, mais à application, ce qui ressortit à la compétence du juge chargé d'appliquer la loi. C'est ce qu'on appelle la théorie de l'acte clair"

In CILFIT, the Corte Suprema de Cassazione made a reference to the ECJ for a preliminary ruling on the interpretation of art. 177 (3). The court ruled that even in the absence of relevant case law (authority reasons or sources of law), the "application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved"[25] and thus art. 177 (3) does not constitute an absolute obligation to submit a preliminary question; there are also situations of isomorphy or clarity.

The doctrine of acte clair has two main ideological functions. Its first function is to put an end to disputes: argumentation cannot go forever. Legal justification requires the material justification of the premises of a legal decision. The major premise refers to a source of law, a legal norm. Stating that a given provision or text contains a clear norm is a way of avoiding or terminating argumentation regarding its validity or its meaning; a clear norm counts as an authority reason. The situation of isomorphy between the facts of the case as reconstructed and re-formulated into the minor premise and the universalised factual description in the protasis of the major premise makes subsumption - and thus formal-logical justification - possible.

The other function of the doctrine is to provide criteria for the distribution of the work between domestic courts and the ECJ where interpretation and application are different institutional activities. Several situations arise at this point. The domestic court may have no genuine doubts as to the interpretation or the validity of a provision of EC law or it may try to avoid a given ECJ interpretation relying on clarity as an excuse not to make a reference (this attitude has often been detected in the French Conseil d'Etat and, less

frequently, in the Bundesfinanzhof). There can be situations where the meaning or validity of a provision of EC law was originally a problem, but the ECJ has pronounced on the question and removed the doubts. In such situations, the domestic court might not want to raise the issue new, though this always remains a possibility (in this case the main rationale would be the authority of the Court's jurisprudence). A very serious situation obtains when a domestic court has doubts as to the meaning or validity of a provision of EC law but still decides not to make a reference to the ECJ probably because of the amount of time it will have to wait for the ruling (18 months). The ECJ is aware of this danger, as its recent structural changes demonstrate. If domestic courts capitalise on the interpretation of EC law then the uniformity of its interpretation throughout the Community will be jeopardised, a risk the Court wants to avoid at all costs. The authority rationale of the acte clair doctrine becomes clearer under this light: If the ECJ has already made a ruling on a given point then there is no need for a fresh ruling. It is only in cases of genuine doubts that the Court is eager to retain the sole competence to solve such problems. The Court is no longer jurisdiction-"hungry".

The Court might make three different uses of the acte clair doctrine. It might refer to its own case-law on the interpretation or the validity of a provision of EC law. It might also say that a certain EC law provision is clear and requires no interpretation. This statement has the effect of terminating or avoiding a dispute on EC law. The statement can be felicitous or infelicitous depending on the sincerity conditions of the utterer. If the Court sincerely believes the provision is clear the statement will be felicitous. But there might be situations where the Court itself is puzzled and yet it pretends that it is not in order to avoid having

to give an adventurous ruling which might upset its institutional milieu, or because there might be EC legislation in preparation on the issue. In these situations alluding to the "clarity" of a text is a way of avoiding having to provide a careful justification and of disguising a hard case as a clear case regarding which only a formal rationality control is made possible. These situations tend to erode the legitimacy and acceptability of the Court as a rational justifying agent.

E) Justifying decisions in hard cases

Hard cases occur whenever there is a dispute regarding any of the sub-decisions we have sorted out in the analytical model of the application of the law (steps 1-5). The lack of agreement between the parties (or the doubts of the referring domestic court) make a thorough justification of those sub-decisions necessary. Among the many possible sources of hard case situations in EC law already mentioned I shall here focus on the problems of interpretation because they are the most interesting ones and because the criteria used to solve them do not differ from the criteria used to solve, say, antinomies or gaps.

When one examines the judgments of the ECJ one might be surprised that, on some occasions, the Court itself says how interpretation ought to proceed; in other words, the Court gives directives of interpretation. Directives can also be statutory instead of judicial, but this is not the case in EC law. On other occasions the Court does not state its directives of interpretation but implictly follows them in its interpretative activity. The reconstruction of the Court's doctrine of interpretation can further proceed to the analy-

sis of what the judges at the Court have written on this matter. Such writings count as de facto authoritative statements.

Judge Mertens de Wilmars himself has said that Judge Kutscher's paper at the Judicial and Academic Conference on the court delivered in Luxembourg 1976 can still be regarded as the source for a proper understanding of the Court's jurisprudence: "l'analyse n'a nullement vielli et garde à la fois sur le plan de la doctrine et sur celui de la pratique judiciaire toute sa valeur".[26] Judge Kutscher said that there is a common body of scarcely disputed concepts of the methods of interpreting written law also applied by the ECJ as well as by the Member State courts:

> "You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationships with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration. Considerations based on comparative law are admissible or necessary. In new fields of law the court must feel its way from case to case (continental legal thought is fully conversant with reasoning from case to case)".[27]

The Court's directives of interpretation are authoritatively stated in grounds 18-20 of its already mentioned CILFIT judgment:

> "To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

> It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States.
>
> Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

The first two paragraphs point to linguistic criteria. The second paragraph is interesting in that it reveals a zeal for uniformity of interpretation of Community law: It tries to reaffirm the authority of community law and warns against possible attempts to use arguments from municipal sources which could hinder such uniformity. The third paragraph summarises directives of interpretation found in many a judgment of the court and adds a further criterion: The dynamic approach to the interpretation of community law. In any case, it might be interesting to point out the striking similarity between the two quoted passages.

If we take a look at the interpretation techniques in isolation we may provide a list of interpretative arguments or <u>topoi</u>. This list would give us a lot of technical information. But when we consider courts as socio-political agents, not only as legal technicians, then we see that the types of interpretative arguments used are more than just <u>topoi</u>; they are arguments which fall into some (conscious) programme of action. Some are semiotic or linguistic arguments and they are usually adopted when a provision of EC law has the character of a legal rule with a more or less clear legal consequence and it can thus work as a sufficient legal basis to govern a specific situation. <u>Semiotic arguments</u> operate im-

plicitly in acte clair situations. When the Court has exclusive recourse to linguistic criteria it operates as "the mouth of the law" as Montesquieu said. This strict construction is present in those situations where the technicalities and complexity of the applicable rules is very high e.g. customs classifications, agricultural regulations, etc. and the solution of these problems can be accelerated by the use of Expert Systems.

Other arguments can be grouped under the heading "context-establishing and systemic criteria." In having recourse to these criteria the Court might be engaging in a system enterprise, structuring the available legal information into some form of system. In its pre-interpretative stage (before interpretation by the ECJ) Community law appears as a congeries of norm-propositions contained in different sources of EC law: the Treaties, derived Community law, international agreements entered into by the EC, conventions, Court decisions and general principles of law. Having recourse to systemic and context-establishing criteria, the ECJ orders or reconstructs that body of law into a legal order or legal system. In doing this, the Court is playing a very important systematising role as a rational agent, it is making sense of EC law.

Finally other arguments are of a more dynamic nature: teleological, functional and consequentialist criteria. EC law is trying to achieve certain aims (stated in the Treaties and reaffirmed in the Single European Act). By adopting these dynamic criteria, the Court is sharing the aims or objectives of the Treaties and adopting an interpretation which will further them; it is interpreting EC law according to those aims and objectives and, in so doing, it is furthering the European Community project of integration.

1. Semiotic criteria

Legal acts are seen as special types of speech acts. Semiotic criteria are drawn from the locutionary and illocutionary force of those acts in isolation in order to interpret their meaning for legal purposes. (1) Court commentators have concentrated their attention on the divergences between the different language versions of EC law. In these cases the meaning conveyed by the greater number of versions is preferred and if doubts remain that version is chosen which best coheres with the principles inspiring EC law or which is most effective. (2) The strict textual criterion is only followed in highly technical and complex norms. But adhering to the literal meaning is sometimes a form of self-restraint. (3) Notions which have a specific Community meaning are given this meaning instead of their ordinary or domestic law meaning.

(2) Context-establishing and systemic criteria

These look at the context of a provision of EC law in order to find clues as to the construction of such provision. They are like a static picture of EC law: a figure in the picture is seen in relation to the rest of the picture - the context and l'economie.

The requirements of consistency and coherence can be seen as regulative principles in the justification from systemic-contextual criteria: a provision is to be interpreted in such a way that it fits in its context and does not contradict other provisions of EC law. That interpretation is chosen which best coheres with Communtiy law.

(1) The sedes materiae argument is gradable: the context (se-

des) can range from the article where a provision is found to its chapter or its title or the whole Treaty or piece of legislation, or to a block of legislation (e.g. the whole of the Common Agricultural Policy), or to the other Treaties.

(2) The a fortiori argument and the argument from analogy are based on the ratio of a different norm of EC law, but arguments can also be drawn from other legal orders (a pari argument from comparative law) or even from legal science or dogmatics (conceptual arguments). A contrario arguments lead to the rejection of any hypothesis which is seen as diverging from the solution expressly contained in any provision under interpretation. This group (2) of arguments could be called semi-logical arguments or formal arguments and they usually operate in combination with contextual arguments.

(3) There are also special arguments for the solution of antinomies: the lex specialis, lex superior and lex posterior standards and arguments drawn from the distribution of competences between the Community and the Member States (e.g. the doctrine of pre-emption). These arguments can also be used for the solution of interpretation problems and of gaps.

3. Dynamic criteria

These criteria approach the text under interpretation from a dynamic perspective, they are like a moving picture: arguments are drawn from the value-laden conception that norms are to be interpreted in such a way that they function effectively (functional criteria) or from the objectives which some basic norms of the legal order or the legal order as a whole either formulate explicitly or are seen as pursuing (teleological criteria) and finally from the consequences to

which the proposed interpretation leads (consequentialist criteria). As Judge Pescatore pointed out, "les Traités sont pétris de téléologie", they set out the aims to be achieved - the accomplishment of a common market - the ultimate objective of the founding fathers contained in the Preamble - political union - and the means to bring about those aims - the establishment of autonomous and independent institutions.[29]

Justification based on dynamic criteria usually takes the form of apagogic or ad absurdum arguments. These purport to show that the interpretation proposed by some party leads to undesirable consequences or goes against the objectives of the provision or against the more general objectives of the Community, or that it does not facilitate the useful effect of the provision which is being interpreted, and therefore, it is rejected.

(1) Arguments from the effet utile try to make the rights and obligations which flow from EC law fully effective and operative.

(2) Teleological or purposive arguments: that interpretation is chosen which best furthers the objectives foreseen by the provision in question or by its context.

(3) Consequentialist arguments are of two types: arguments drawn from the behavioural outcomes of proposed interpretations and applications of these interpretations - repercussions in the environment of the legal order. That interpretation is chosen which leads to the best results as evaluated from a given utilitarian axiology where economic considerations are preponderant: stability, efficiency, growth, etc. The dominant axiology from which consequences are evaluated

is one of the most important factors of judicial decision-making. There are contending axiologies: economic liberalism, welfare economics, ecology-conscious economics ... . these axiologies reflect individualistic, communitarian or environmental values. One can also draw arguments from consequences as juridical implications within the operation or structure of the law: that interpretation is chosen the implications of which best cohere with the law as a whole.

(4) Arguments from principles will operate as authority reasons (sources of law) when EC law principles are involved, but there are other extra-legal principles - economic, societal, ecological - which will be balanced or combined in order to support itnerpretations drawn from other arguments, especially from dynamic arguments. Arguments can also be drawn from policies. "Policy arguments are a genre of justification for judicial decisions in which the merits and consequences of competing substantive reasons are evaluated within the limitations which are imposed on judicial freedom of action."[30]

4. Networks of justificatory arguments

Justificatory arguments, as selected and classified above, do not appear in isolation; they mutually support each other. The combinations are legion, but the most important network is that formed by systemic and dynamic arguments intertwined. The final decision is justified not by this or that particular argument but rather by the cumulative weight of all the arguments which justify the establisment of the premises (each of the sub-decisions 1 - 5) and which are brought together by the Court as a coherent whole towards the inference of the conclusion - final decision.

F) Value of the analytical model

The model or reconstruction of justification by the ECJ does not have a predictive value. It cannot predict what the next decision will be or how a case will be decided. The model itself shows that there are too many "black holes", too many possibilities of discretionary judgment, too much scope for leeway: substantive reasons play an important role - economic, communitarian or ecological axiologies, qualification of facts, criteria of acceptability, self restraint by the Court according to the feeling for integration at a given time, etc. But the model works as a straight jacket for discretion: whatever the next decision will be, it will have to be justified in a certain way. If the Court wishes to enjoy legitimacy as the guardian of community law, it will have to justify its decisions rationally. The model sketched in this paper has reconstructed the operative doctrine of justification at the Court and, in this sense, it shows how decisions are justified by the Court and how the Court thinks they should be justified. But the model cannot predict the outcome of a case. All it can do is to show how that outcome can be justified and serve as a basis for criticism if it is not so justified.

IV. Judging the ECJ

Justification consists in giving "good" reasons in support of a decision (or an action or a belief). Legal justification consists in giving legally "good" or "correct" reasons in support of a legal decision. Legal justification differs from other types of justification in that it is a highly institutionalised activity and in that reference to a legal norm is considered to be necessary - and often sufficient - for legal justification. The legal norm itself need not be justified at

the level of the law-applying decision, it will have been justified at the level of law-making by the relevant organs according to a similar version of procedural rationality. Besides, legal justification is a highly institutionalised activity: there is often a legal requirement on courts to motivate their decisions. Procedural legal norms regulate the whole process of argumentation and decision-making. All these factors make legal justification a special case (Sonderfall) of justification in practical philosophy. Special because it is more constrained but also because it is more controllable than other forms of practical justification: ethical, political, policy ... .

Part III of this paper has tried to show how the doctrine of justification operative at the ECJ can be reconstructed from specific materials with a view to capturing what the Court considers to be "good" reasons. But a legal philosopher will not be satisfied with a mere reconstruction of the doctrine. She will enquire whether that doctrine is itself justified. Any criticism of the Court's doctrine of justification will be carried out from a specific (external) evaluative standpoint. Any particular instance of justification by the Court can be criticised from the internal standpoint of the reconstructed doctrine. Let us now deal with external criticism.

(1) From a strictly legalistic point of view, "good" reasons are those based on the law; doctrines of justification require no further (external) justification, they are per se justified, any extra-legal justification is unnecessary.

(2) From a functionalist standpoint one can hold that the Courts's doctrine and practice of justification is itself justified if it is successful in persuading or convincing an audience, if it is widely accepted by the political environ-

ment of the Court, if it achieves legitimacy.

(3) A historicist approach might dilute doctrines of justification into specific traditions where such doctrines have developed. Doctrines of justification could only be justified or criticised from within such traditions. Only an internal criticism would be possible given that no one can step out with the hermeneutic circle. "Good" reasons would thus be historically and culturally determined.

(4) If one adopts a cognitivist point of view (e.g. that of some theories of natural law) one can say that "good" reasons are "good" or "just" reasons. In this case a given doctrine of justification is justified if it achieves goodness or justice. But this approach only manages to postpone the answer to what are "good" reasons. It is circular.

(5) Finally, one could try to justify operative doctrines of justification from a discourse theoretical point of view: such doctrines are justified if they are formulated and they develop in the framework of rational and open argumentation guided by the principles of formal or procedural rationality: universalisability, coherence and the principle of discourse (universal pragmatics). In short, "good" reasons are those produced in an ideal speech situation.

Of all these approaches I would like to discuss the functionalist approach and the discourse theoretical approach. Discourse theory has a transcendental or a priori character: legitimacy lies in transcendental conditions of argumentation. If justification by the ECJ proceeds according to the rules and principles of discourse then it is rational and legitimate. Consensus lies in the followed procedures and in the ideal situation of argumentation: the legitimacy of legal

justification is normative-ideal. By contrast, the functionalist approach focuses on the result of argumentation, on the acceptability of the Court as a justifying agent by its legal-political milieu. This approach has been interestingly taken up by Rasmussen.[21]

Rasmussen's main contribution has been to question the received view that the Court is just a guardian of the Treaties and that it does not engage in law-making but simply finds the law in the Treaties. Rasmussen argues that the ECJ has created law anew and, in some cases, blatantly so. And this is a danger which might erode its own legitimacy both internally - since the Court would not discriminate well enough between cases by adopting effective docket-control mechanisms - and externally - because of the negative policy inputs from some member States regarding some bold decisions of the Court.

The major cost of too much political jurisprudence is the predictable loss of judicial authority and legitimacy. Judicial policy-making must remain within societally acceptable boundaries. But the problem is precisely where those boundaries lie. Rasmussen thinks that the test for judicial activism is the reaction of the Court's countervailing powers - institutions of the Member States and Community institutions - reactions which can be seen in domestic courts refusing to implement the words or spirit of adventurous ECJ judgments, and in political attacks on the ECJ from Member State officials.

Rasmussen does not elaborate on two interesting factors: the positive reception of the Court's jurisprudence by the legal experts throughout the Community (his focus is on the political field) and the fuzzy concept of public opinion. Does the

ECJ capture the attention of the media? Both factors seem to mitigate other policy inputs less favourable to the Court. Rasmussen has criticised the court's activism partly on the ground that the Court has drawn much inspiration from the Preamble and Foundations of the Treaties (especially the EEC Treaty). He thinks these are made for political, not judicial, consumption. I do not subscribe to this point of view. One might distinguish between two legal situations. In some cases there is a legal gap, no legal rule governs a situation either because Community action in a certain area is not explicitly foreseen or because Community institutions have failed to act. In these situations it might plausibly be argued that the Preamble and foundational principles of the Treaty do not provide a sufficient legal basis to decide the case.[32] But there are also situations of interpretation of EC law and of conflict between norms of EC law or between Community law and domestic law. In these situations the Court does - and, in my opinion, correctly so - find inspiration in the principles and objectives of the Treaty toward a systemic-dynamic interpretation of Community law.

Rasmussen advocates that the Court should conduct its policy-making in an overt recognition of its nature and acquire access to socio-economic fact defining the priorities amongst those facts. I could not agree more. After all this is the requirement of sincerity mentioned above in relation to the acte clair doctrine. When the policy process is permitted to operate in disguise, judicial results may be vindicated which in the long run prove to be detrimental to the general Community interset although they might seem to be beneficial at first glimpse. The doctrine of justification which I have reconstructed does tend to show that this policy reasoning may already be in operation at the Court. But in any case, it is no extra-legal reasoning. Policy reasoning and the weighing

and balancing of juridical implications and behavioural outcomes all take place within the framework of legal argumentation where they interplay with other forms of reasoning: systemic reasoning, principle of effectiveness and reasoning from principles.

It is very difficult to provide an exact test for the legitimacy of the Court's decision-making. In my opinion, the Court's jurisprudence will be legitimate on a formal-procedural level if its jurisprudence develops as a result of rational argumentation, and on a substantive level if the Court's decisions are generally accepted. Of course, acceptability largely depends on the availability of rational argumentation as a regulative ideal inspiring the Court's procedures and legal reasoning, but acceptability will also depend on the results or achievements of the Court's jurisprudence: does it further the objectives of the Treaties and respect their structural principles? Does it adapt and re-tune those objectives in the light of changing socio-political and economic conditions: e.g. social Europe, "green" Europe, Human Rights Europe, regionally balanced Europe?

The answers to these questions will be partly determined by the socio-political milieu of the Court: Member State institutions, Community institutions, the legal audience (juridical field), pressure groups and public opinion at large. The Court will have to make compromises between the different degrees of intensity towards integration each of these audiences desires (the general feeling for European integration). The Community institutions will have to make compromises between the different visions of Europe each audience has, and the court is no exception. The Preamble of the EEC treaty and the Preamble of the Single European Act (which speaks about <u>European Union</u>) will be ignored at its own pe-

ril. But in making its decisions, in tempering the different pulls towards integration and towards Member State sovereignty, the Court will also have to take into account problems of practicability, efficiency, viability and enforceability. After all, the Community can only make progress with the consensus of the peoples of Europe.

Notes

1) Interpretation and Justification: The Jurisprudence of the European Court of Justice, Ph D thesis defended at the University of Edinburgh. I am in debt with my thesis examiners, Prof. John Bell and Judge David Edward for invaluable comments on my thesis. I am also indebted to my supervisors Prof. Neil MacCormick, Zenon Bankowski and Dr. R. Lane, and to those who have commented on a draft of this paper, Prof. Jung, Prof. Ress and Assessor Lambert from the Europa-Institut at Saarbrücken.

2) Some examples of studies on the Court's jurisdiction and procedure: Lasok, KPE: The European Court of Justice. Practice and procedure, London, 1984, Usher, John: European Court Practice, London, 1983 and Schermers, Henry: Judicial protection in the European Communities, Leiden, 1983.

3) The first multidisciplinary work of this kind is Clarence Mann: The Function of Judicial Decision in European Economic Integration, The Hague, 1972. The main work of similar inspiration in the 80's is Hjalte Rasmussen: On Law and Policy in the European Court of Justice, Dordrecht, 1986, discussed in Part IV of this paper.

4) This approach is adopted by Rasmussen, op. cit. and by Lenaerts, Koenraad: Le juge et la Constitution aux Etats-Unis et dans l'ordre juridique Européen, Bruxelles, 1988.

5) Lenaerts, op. cit. has carried out such analysis. See also Bredimas, Anna: Methods of Interpretation and Community Law, Amsterdam, 1978 and Guégan, Jean: Les méthodes de la Cour de Justice des Communautés Européennes, doctoral thesis, Université de Rennes I, 1979, and Judicial and Academic Conference, Luxembourg 1976 esp. Judge Kutscher: "Methods of Interpretation as seen by a judge at the Court of Justice".

6) According to art. 34 of the Court Statute, judgments shall be read in open court.

7) Aarnio, Aulis: The Rational as Reasonable, Dordrecht, 1987.

8) Especially the theories of Neil MacCormick: Legal Reasoning and Legal Theory, Oxford, 1978, Ronald Dworkin: Law's Empire, London, 1986, Robert Alexy: Theorie der Juristischen Argumentation, Frankfurt a.M. 1978 and Jerzy Wróblewski: Meaning and Truth in Judicial Decision, Helsinki, 1983.

9) The clearest example is CILFIT, case 283/81 (1982) ECR 3415.

10) There are many such works and I cannot mention them here. Judge Pescatore and Judge Koopmans have been very active.

11) These principles guide the justification of the Court in the Parliament cases: Isoglucose cases 138/79 (1980) ECR and 139/79 (1980) ECR 3396, Parliament v. Council, case 13/83 (1986) 1 CMLR 138 and Les Verts, 294/83 (1986) ECR 1339.

12) This departure can be detected in the recent Comitology case 302/87 Parliament v. Council, judgment of 27-9-87 where the Court opted for a strict literal construction of EEC Treaty art. 173.

13) R. Dworkin, op.cit. see chapter 2 on internal skepticism. These ideas on rational reconstruction have been developed in similiar terms as regards the Europen Court of Human Rights: J. Bengoetxea and H. Jung: "Towards a European Criminal Jurisprudence?", forthcoming.

14) "Il modello teorico della applicazione della legge" in Rivista Internazionale di Filosofia del Diritto, 1967.

15) Gadamer, HG: Truth and Method, London 1979 and Nerhot, P.: Interpretation in Legal Science, forthcomming.

16) Many legal theoretical issues are implied with which I cannot deal here. For a discussion of the concepts of legal norm, legal order, validity, subsumption, etc. see my thesis Interpretation and Justification, forthcoming, Part One.

17) Rules of Procedure of the Court, art. 95, emphasis added.

18) EEC Treaty: art. 168 A introduced by the Single European Act.

19) Decision of the Council of Ministers 88/591, 1988 OJ L319/1 art. 3.

20) Art. 49 of the said decision.

21) I shall not deal with this doctrine in length here. For a more detailed analysis see my Interpretation ... forthcoming.

22) Van de Kerchove, Michel: "La doctrine du sens clair ... textes et la jurisprudence de la Cour de Cassation de Belgique" in idem: L'interprétation en Droit. Approche plur

disciplinaire, Bruxelles 1978 and "La théorie des actes de langage et la théorie de l'interprétation juridique" in: P. Amselek (ed.): Théorie des actes de langage, éthique et droit, Paris, 1986, and H. Rasmussen: "The European Court's Acte Clair strategy in CILFIT", 9 European Law Review 1984.

23) Cases 28-30/62 (1963) ECR 31.

24) Case 26/62 (1963) ECR 1.

25) Quoted above, ground 16, emphasis added.

26) "Reflexions sur les méthodes d'interprétation de la Cour de Justice des Communautés Européennes" in 22 Cahiers du Droit Européen 1986.

27) Op.cit. I. 5-6.

28) For details see chapter 7 of my Interpretation ... where examples from some sixty cases are discussed.

29) "Les objectifs de la Communauté Européenne comme principe d'interprétation dans la jurisprudence de la Cour de Justice" in Miscellanea Ganshof van der Meersch, Bruxelles 1972.

30) Bell, John: Policy Arguments in Judicial Decisions, II-F, Oxford, 1983.

31) On Law and Policy ... op.cit. see also criticisms of this book by Mauro Cappelletti: "Is the European Court of Justice Running Wild?" in 12 European Law Review 1987 and Joseph Weiler: "The Court of Justice on Trial" in Common Market Law Review 1987 and Rasmussen's reply to Cappelletti: "Between Self-Restraint and Activism: a judicial policy for the European Court" in 13 European Law Review 1988.

32) Judge Koopmans has said in "The Role of Law in the next Stage of European Integration" 35 International and Comparative Law Quarterly 1986:

> "In the past the Commission often thought it could rely on the Court's help when its case was likely to strengthen European Integration. In the future perhaps it will only be able to do so when it can show a solid legal basis, as the Court's willingness to construct such a basis on its own initiative may diminish."