An Analysis of the Public and Private Purposes of the Court of Justice of the European Communities

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1. Let me first of all express my delight at finding myself addressing a group of colleagues in the seat of a Law Faculty. As you probably know, I have myself been a professor of law for over 25 years and, while I do not regret the choice, which I made in 1982, to accept my Government's invitation to move to Luxembourg as a member of the European Court of Justice, I still pine for that time and its three great pleasures: conversing with my fellow academics, passing on some of my knowledge to bright (and not so bright) students and, of course, carrying out full-time research. This nostalgia is so evident that, without being requested to do so, my law clerks and my secretaries don't call me "Judge"; they call me "Professor". There are many reasons why I should be grateful to the University of New South Wales; but by far the most important, the one which has most warmed my heart, was its decision to make me a member of this Faculty. I feel I have gone back to where my roots are and perhaps to where I really belong.

   My intention today is to explore the tasks and the purposes of the European Court of Justice with reference, in particular, to their public and private nature. In attempting to apply this classification, I shall take the liberty of drawing on a long-running American debate on the distinction between the "dispute resolution" and "public action" models of litigation. The former model refers to the traditional role of the courts as the authorities endowed with the power to determine particular, ongoing disputes between identified litigants. By contrast, the "public action" model regards courts as institutions with a distinctive capacity to declare and explicate public values - norms that transcend individual controversies and that are concerned with the conditions of social and political life. I hope, however, that you will allow me to begin by addressing a topic which is close to my heart and which, in any event, I regard as an essential preliminary or perhaps the foundation of any meaningful discussion of the European Court of Justice and its purposes. The Court is usually defined as an international or supranational body. My first question is: are these terms still accurate?

   Coined in 1853 by Friedrich Nietzsche, the word "supranational" has a long history, but its application to the European Communities and their institutions was the work of one of their founding fathers, Robert Schuman. He claimed in the 1950s that the term "supranational" is situated at an equal distance from, on the one hand, international individualism which regards national sovereignty as intangible and which only accepts as limitations of sovereignty obligations which are contractual, occasional and revocable; and, on the other hand, the federalism of states which subordinate themselves to a super-state - a benign Leviathan, one might say - endowed with its own territorial sovereignty. The great success with which Schumann's definition met proves that he had indeed identified a reality not only unprecedented but one unable to fit into the classic models of international and constitutional law without straining some of its features.

   In more recent times, however, the heuristic value of "supranational" has been impaired by a

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variety of factors: the most important of which lies in my opinion in the evolution of the EC. To be sure, the EC is not yet a federal state; in particular its basic law is not the fruit of a constitutional convention but is found in treaties of which, as the German Constitutional Court claimed in its 1993 decision on the compatibility of the Maastricht Treaty with the German Basic Law, the Member States remain "masters". Yet, if it is indisputable that treaties are inherently different from constitutions, history has surely taught us that treaties may be converted into constitutions or constitutions into treaties and that in the course of these processes there comes a time when deciding which is which is a thorny and sometimes dramatic problem. It should not be forgotten, for example, that till the end of the American Civil War, the nature of the document produced by the Philadelphia Convention was controversial. A host of American statesmen, including Thomas Jefferson, regarded it, in the words of the 1798 Kentucky Resolution, as "a compact under the style and title of a Constitution" and hence susceptible of being altered or denounced by the states which had acceded to it.

I suggest that in the history of European integration, the time has come when the balance may be said to have shifted towards a constitution-like document. The acquiescence, even if sometimes grudging, of all Member States to the primacy of European Community law, the progressive extension of majority voting in the Council of Ministers, the election of the European Parliament by universal suffrage and its growing participation in the legislative process, the proclamation of Union citizenship, the forthcoming acquisition of monetary sovereignty and the faculty of indenting almost all the core functions of the nation state, are all clues that a major change has occurred or, at the very least, is in the offing. The EC has leapt beyond the stage when it could be regarded as an international organisation endowed with institutions and decision-making mechanisms so singular as to justify the rediscovery of "supranational" in order to grasp its essence.

Moreover, a clear reflection of this new situation is detectable in the jurisprudence of the Court of Justice. Its path-breaking van Gend en Loos ruling of 1963, where the Court held that the Treaty of Rome was capable of granting Member State citizens rights which they could invoke before national courts, still described the Community legal system as a branch of international law, albeit characterised by features of its own. But a judgment of 1986, Les Verts, which concerned the allocation of funds designed to cover the cost of preparations for elections to the European Parliament, referred to the same Treaty as "the basic constitutional charter" of the EC. Indeed, this reference reappeared five years later in terms even more significant when the Court - unconsciously, I believe - inverted the language of the Kentucky Resolution as follows: "the Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law." [On that occasion it was handing down an Opinion, pursuant to Article 228 of the Treaty, on the "constitutionality" of the European Economic Area Agreement which was the means by

which other states were being invited to participate in certain aspects of the internal market.]

It may of course be argued that the Court of Justice has been indulging in a series of metaphors; nobody could deny, however, that these metaphors were used with the clear awareness that, particularly in the civil law tradition, the word "constitution" postulates statehood - not necessarily a full-blown statehood, but at least an embryonic or dawning one. Is it worthwhile then to follow in the footsteps of Schuman and crystallise this phase in the evolution of the EC by means of some new neologism? The German Constitutional Court believed that it is indeed worthwhile and in the decision which I have mentioned above it held that today's EC is a Staatenverbund, namely a compound both qualitatively different from a Bundesstaat, or federation, and more closely-knit than an orthodox Staatenbund, or confederacy. But the failure of this exertion, which one scholar regarded as a mere "play on words", proves that taking a snapshot of what can only be filmed is a waste of time. Reverting to our point of departure, it will therefore suffice to say that the germ of statehood characterising the present fabric of the EC, though not conferring on the judges in Luxembourg the same legitimacy and self-assurance enjoyed by their brethren in states such as Australia, the U.S. or Switzerland, entitles them to feel and act as members of a domestic or municipal Court. In any event, to borrow from John Locke, "so the thing be understood, I am indifferent as to the name".

2. Turning to our central issue, the tasks and purposes of the Court of Justice, I shall begin by observing that, as a brief perusal of academic journals and the press will reveal, the Court is often accused of having been - and, to a more limited degree, of still being - exceedingly activist. It is, according to Sir Patrick Neil, the former Warden of All Souls in Oxford, a Court with a "mission" and hence "unorthodox". More crudely, other critics described it in the 1970s and 1980s as a Court portraying signs of a "morbid megalomania," running "wild" and indulging in "revolting judicial behaviour." Some of these charges are dictated by sheer Europhobia or by raw domestic interests; others, coming from politicians and scholars educated - I am thinking of Lord Devlin - in countries where the Parliament reigns supreme, reflect more or less consciously an understandable misgiving about the "countermajoritarian" nature of a judicial body wielding the power to review legislation.

Whatever their motives may be, the Court's critics do not err when they point to the creativeness of its jurisprudence. Their weakness, I suggest, lies in their failure to recognise that the seeds of such creativeness and the soil necessary for it to flourish were contained in the Treaty. First and foremost in this respect is Article 164 which provides that "The Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed." In other and less beguilingly simple words, this provision lays down a principle which signals a radical break from the theory and practice of international organisations and one which is teeming with far-reaching implications: the Community is founded on the rule

of law and the Court must see that this rule is enforced. What the Court did was to bring to light those implications; in fact, it took this task so seriously as to retouch or update the Rome Treaty itself (which in any case had not been devised as a static instrument), whenever the evolution of the European Community threatened the central position held by the rule of law in its system of values.

Thus, when the legislation enacted in Brussels began to jeopardise certain fundamental rights of European citizens, the Court of Justice concluded, after a long period of soul-searching, that the nature of the Community as a Communauté de droit, or Community based on the rule of law, would be impaired if those rights were not protected and an open-ended catalogue thereof read into the Treaty. In the same vein, when the European Parliament ceased being a talking shop and was vested with some tangible powers, the Court considered that the most (or perhaps only) democratic institution of a Community based on the rule of law should be granted locus standi in order both to protect the individuals from an illegal exercise of those powers and to have the latter protected from any onslaught by the Council of Ministers and the European Commission - the Community's law-making and executive bodies.

In its seminal decisions of the 1960s and 1970s the importance attached by the Court to the notion of "Communauté de droit" plays perhaps a less crucial, but still quite visible, role. This was certainly the case in the van Gend en Loos and van Duyn rulings, which both dealt with the direct effect of Community law, whether Treaty provisions or secondary legislation. As Article 189 of the Treaty clearly shows, the possibility for Member States' citizens to rely on European law was an inherent and fundamental aspect of the Community legal order from the outset. The two judgments applied this principle to Treaty rules and provisions of Directives conferring rights on individuals in so clear-cut a form as to make enabling measures unnecessary. The citizens of the Member States were thus raised to the rank of "guardians" of the Treaty - a function till then performed by the European Commission alone - with the result that the demand for "observance of the law" and therefore the thrust of the rule of law itself were increased enormously via the mechanism of Article 177.

No less telling, however, are the examples of the decisions in Costa v ENEL in 1964 and Simmenthal in 1978. In proclaiming, as it did in those judgments, that Community law takes precedence over national legislation, including constitutions, the Court was chiefly motivated by the need to hold in check the powerful centrifugal forces already at work in the new polity. There is no doubt, however, that it was also driven by the prospect of the discrimination to which European citizens would fall victim in the event that European law, if devoid of primacy, were not uniformly enforced throughout the Community and thus overwhelmed, to quote the late Justice Frankfurter of the U.S. Supreme Court, by a "crazy-quilt of state laws." In a Community based on the rule of law such a possibility would indeed be intolerable.

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Underrating the pregnancy of the language used in Article 164 and its decisive impact on the philosophy of the European Court is, in conclusion, a serious mistake. It must be admitted, however, that all of the decisions to which I have referred were influenced by a further element: the Court's acute awareness that the Rome Treaty was but the foundation stone, as affirmed in the opening words of its Preamble, of "an ever closer union between the peoples of Europe". The recitals of a Preamble may not be prescriptive; but, as we all know, no Supreme Court can afford to ignore them, if only as parameters governing its interpretive operations. This obligation is therefore at the root of the preference for Europe, the "when-in-doubt-opt-for-Europe" attitude which characterises such a large portion of the Court's case-law. The Court has been hauled over the coals (and threatened with the curtailment of some of its powers) for this sin more than any other; but, once again, essentially because of its critics' disregard for the normative context within which it had been called upon to act.

Of course, not all of the reprimands addressed to the Court were and are unjustified. By and large, however, even the most level-headed critics seem to forget that, with the possible exception of the Australian High Court before the Engineers' judgment of 1920, supreme courts have generally played a unifying role in the formative years of the states whose constitutions they were required to uphold and that their contemporary foes have not gone down in history for bashing them. Thomas Jefferson and James Madison did not conceal their intense dislike of Marshall's Court on which, according to a number of scholars, the European Community court was consciously modelled. Today, Justice Antonin Scalia and Judge Robert Bork, the most outspoken advocates of "strict constructionism" in North America, acknowledge that Marbury v Madison and McCulloch v Maryland were indispensable for the survival and the development of the American Union. Perhaps a similar destiny is in store for the European Court of Justice.

3. Having analysed the Treaty definition of the purposes of the Court, let me turn now, briefly, to the Court's jurisdiction and to the conditions for recourse to it. First of all it must be stressed that its scope is wide and multi-faceted. European civil lawyers not conversant with EC law, used as they are in their own countries to see the powers embodying that jurisdiction shared among different specialised courts, find this fact particularly bewildering. It may come as less of a surprise to those familiar with the quirks and peculiarities of the common law.

The review of national legislation which the Court exercises at the request of the European Commission under Article 169, reflects in its procedural weakness the origins of the Community as a variation, however novel, on the type of international organisations then in existence. If at issue is a measure enacted or kept in force by a Member State and the Court finds it incompatible with the Treaty, that measure cannot be annulled. If the State is accused of failing to comply with a Treaty obligation - the implementation of a Community directive, for instance - and the charge is substantiated, no means are available to force the

State into compliance. All that the Court can do is to declare it in breach of the Treaty and only if the State ignores this judgment will it be liable to a fine. In the light of such provisions, the Court's powers can be equated with those of a constitutional court only in a very rudimentary sense.

By contrast, the Court can be said to exercise the functions of a full-blown constitutional court on the basis of Article 177. As a consequence of the doctrine of direct effect, this preliminary reference procedure, which requires the Court of Justice to interpret Community law while leaving to the referring national court the task of applying that interpretation to the facts of the case, has evolved, for all practical purposes, into a powerful instrument for reviewing the compatibility with the Treaty of Member State legislation. Indeed, the inborn frailty of this instrument - the fact that it relies almost entirely on the goodwill of the national judiciaries - has proved to be its strength, since the very fact that "their own" courts make the reference to the Court of Justice compels governments to juridify, as it were, their arguments against the claims of the Community and shift to the judicial arena in which the Court is pre-eminent. Moreover, when the referring court accepts the ruling, which happens most of the time, the compliance pull of Community law becomes irresistible.

The Court also controls the conformity of Community secondary legislation with the Treaty by means of the annulment procedure in Article 173 and the preliminary reference procedure under Article 177, if its object is not the interpretation but the validity of a Community measure. This review is explicitly regarded by the Court as having a constitutional character. But the Court also acts as a constitutional tribunal when it gives binding Opinions on the compatibility of international agreements to be concluded by the Community with the provisions of the Treaty and, of course, when it resolves disputes between the Community institutions involving their competences.

I must add that prior to 1989 and 1993, the Court acted as an "industrial tribunal" for the resolution of staff cases and as an administrative court along the lines of the French Conseil d'Etat when hearing actions for annulment and damages introduced by individuals on the basis of Articles 173 and 215. As we shall see later in more detail, these fields now come within the jurisdiction of the Court of First Instance, but the Court of Justice still deals with them on appeal, albeit solely with regard to points of law.

4. Turning to the conditions imposed on plaintiffs for recourse to the Court of Justice, I shall note that their more or less restrictive character depends on the form of action in question. Article 169, for example, implies that the persons affected by a national measure which they deem to be in breach of the Treaty may ask the European Commission to bring an action. They may, however, not rely upon it doing so because the Court has interpreted the Article as facilitating the exercise by the Commission of its function as guardian of the Treaty and has

accordingly conferred on it complete discretion in deciding whether or not to initiate proceedings against a defaulting Member State. It remains to be seen if, under pressure from the European Ombudsman who is acting in the context of Europe's current obsession with all things transparent and accountable, that discretion will become more limited with time.

On the other hand, in actions before national courts, private litigants may request that a preliminary reference be made to the Court of Justice; but unless the court or tribunal hearing the case is one of last resort, there is no obligation to bring the matter before the Court of Justice. In fact, although, as we have seen, the whole Article 177 edifice relies on the utmost cooperation from the Member State courts, this condition has so far been largely complied with in terms both of quantity and quality. It is almost gospel that the part of Community law by which individuals have most benefitted has resulted from rulings given by the Court of Justice in answer to references from lower national courts.

On its face, Article 173, paragraph 4 appears to be the means of judicial recourse par excellence for individuals wronged by Community measures. It provides that "Any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation ... , is of direct and individual concern to the former." However, before cases brought by private litigants were transferred to the Court of First Instance, this provision was interpreted by the Court of Justice in an extremely restrictive way: a regulation - the Court held - must single the applicant out and affect him more seriously than others in a similar position if his action is to be deemed admissible. As a consequence, a regulation may be patently and outrageously unlawful, breach the principle of non-discrimination, violate fundamental rights, inflict huge financial losses on a large number of persons and yet be unamenable to direct challenges. All that a person injured by the act can do is to defy it and wait till an attempt is made to enforce it against him in the national courts, where he may contest its validity and succeed in having the issue referred to the Court under Article 177.

Obviously, this case-law was devised as a floodgate with the aim, in the absence of certiorari or similar docket-control mechanisms, of avoiding the type of chaos which can often be seen at national level in systems which shun this technique, the Italian Court of Cassation - I must gloomily admit - providing a particularly pertinent example of such in Europe.

Much of what has been said about the Court's jurisprudence on the restrictive notion of standing for private litigants can be extended to its no less restrictive approach to the award of damages to individuals who claim loss or injury pursuant to Article 215 as a result of unlawful Community legislative or administrative measures. Under this provision, which is now initially the concern of the Court of First Instance, the Court of Justice would only have awarded compensation for damage caused by normative acts if the victim of the illegality

proved that, in enacting them, the Council or the Commission had committed a sufficiently serious breach of a "superior rule of law" for the protection of the individual. In other words, it was not enough for their conduct to be knowingly unlawful, although this would suffice no doubt in the majority of the Member States; instead it must verge on the arbitrary or the capricious. The effect of such a construction was to deter individuals from recourse to this remedy; surely the result that the Court wished to attain, thereby avoiding the flood of cases with which, as we have seen, it feared it would be unable to cope.

5. The time has now come to satisfy the most challenging aspect of today's presentation, namely, to explore the private or public nature of the Court's purposes. To this effect, however, a premise in order. When speaking about the Court of Justice one is struck by an ambiguity in that, as a Community Institution, it covers, in the words of the Treaty itself, both the Court of First Instance and the Court of Justice proper, while, as a judicial body, only the latter is intended. So far I have mostly dealt with the Court of Justice in the judicial sense of the word, but, for reasons which will become obvious, I shall refer to the Community institution, and hence to both courts, in the analysis which follows. Having entered this caveat, let us revert to the two American models which I mentioned at the outset - public action and dispute resolution. Can echoes of them be detected in the purposes both in law and fact, of the Court of Justice and the Court of First Instance?

Clearly, Article 173, paragraph 4, could be said to require the Court of First Instance to act as a dispute-settler. This provision, as you might remember, states that natural and legal persons may institute proceedings against an act addressed to them or which affects them directly and individually. Consider, for example, a situation in which company A complains to the European Commission that the distribution system operated by company B is in breach of Article 85 of the Treaty, one of the basic provisions intended to guarantee undistorted competition. Its claim having been rejected by the Commission, company A resorts to Article 173 in an attempt to have this decision annulled. Similarly, when the Court of First Instance acts in staff cases, it is resolving a dispute or controversy between a Community civil servant and a Community institution. A further example is Article 215 which, as we have just seen, governs the Community's non-contractual liability. Here again, when damages are sought by a farmer for losses he claims to have suffered as a result of the implementation of the Common Agricultural Policy, the purpose of the same Court is simply to achieve substantive justice according to the law for the parties concerned.

By contrast, the "public action" model is inherent in the system of preliminary references under Article 177. As I have repeatedly pointed out, the purpose of the Court of Justice in this context is simply to provide a ruling which interprets Community law in order to aid the national court in its resolution of a particular case. Any meddling on its part with the situation preceding or following the reference is excluded. The Court has indeed stressed that Article

177 is based on a clear separation of functions between itself and national courts and that it does not have the power to investigate the facts of the case or to criticise the grounds and purpose of the request for interpretation.

What is the effect of this division of labour? Let me give you what I feel is a most eloquent example. In a case I have repeatedly mentioned, van Gend en Loos, the Court was requested to interpret the notion of customs duties existing before the coming into force of the Treaty, which it did, its interpretation being subsequently applied to resolve the dispute pending before the national court on the reimbursement of duties imposed by the Dutch authorities. Yet, on spotting large van Gend en Loos lorries on the high-speed motorways of Europe, few students of Community law remember or are concerned with the actual outcome of the case in the Netherlands. Rather, they remember van Gend en Loos for the principle which, in accordance with the definition of the public action model I gave at the outset, transcended the individual controversy and which was concerned with the direct effect of Treaty rules, namely with a public value of supreme importance for the constitutional architecture of the EC.

Likewise, when the Commission seeks to establish on the basis of Article 169 that a Member State has failed to fulfil its Treaty obligations, the Court of Justice is not being called upon to operate as a dispute-settler. This remark may appear to be in substantial, if not formal, contrast with the fact that the bulk of Article 169 actions originate, as I have said, in private complaints. Nevertheless, once it has filed its application with the Registrar, the Commission does not stand proxy for the individual who spurred it into action, nor does it have an interest of its own in the outcome of the case; it simply acts in its capacity as guardian of the Treaties and the decision of the Court relates accordingly to the uniform application of EC law, the protection of Community and national interests and the prevention of abuse. Even more clearly, when adjudicating interinstitutional disputes concerning, for example, use of the appropriate legal basis for the enactment of a regulation or a directive, the Court does not aim to achieve justice between the parties (indeed, how could substantive justice be achieved in such cases), but to secure, through the correct interpretation of EC law, a proper functioning of the Community's legislative process.

6. It must be observed, however, that, as several transatlantic - or in your case transpacific - scholars point out, the distinction between dispute resolution and public action models does not involve watertight compartments; in fact its application to particular cases reveals that the two models may intertwine. This is no less true of the distinction between the private and public purposes of the European Court of Justice as they flow from the Treaty: the jurisprudence of the Court itself clearly demonstrates its often fluid nature.

Thus, although the annulment procedure for natural or legal persons and the Treaty

provision on the Community's non-contractual liability may appear to be carriers of controversies from civil society to the Court of Justice viewed as an institution, I have suggested, as you may remember, that in its development of restrictive doctrines on the standing of private litigants and the conditions for the award of damages, the Court of Justice as a judicial body has had certain public interests in mind, such as the need to stem a flood of litigation which it regarded as capable of disrupting a balanced performance of its tasks. Similarly, in staff cases, when resolving disputes between two parties the same Court has had occasion to discover certain general principles which have later inspired its case-law in other areas. This breakdown of what on paper looks like a safe application of the distinction between private and public purposes is not surprising, however, if one considers that the French notion of administrative law litigation, on which many Community "forms of action" are based, was not conceived as a system of dispute resolution, but was designed instead as a means of controlling the administration.

Finally, theory and practice also diverge as regards the public action model of the Court's role. Although it is charged by Article 177 with the task of interpreting European Community law and not with applying it to the facts of individual cases, in recent years the Court has vigorously insisted on a detailed presentation by the national courts of such facts, with the obvious consequence of getting objectively closer to participating in dispute resolution. Apart from this development, which could be regarded as another surreptitious device intended to control the Court's docket, the jurisprudence of the Court teems with judgments drawing heavily on the facts of the case. I shall give you one example which seems to me particularly telling: the case of Cristini v SNCF. The widow of an Italian migrant, who had worked and resided in France, sought to avail herself and her large family of the type of fare reductions offered by the national railway company to French citizens in similar circumstances. In deciding that reductions of this type constitute a "social advantage" for migrant workers within the meaning of Article 7(2) Regulation 1612/68 and that their widows should benefit therefrom, the Court could be said to have determined the actual dispute pending at national level. Although it may have been reaffirming the fundamental principle of free movement of workers and non-discrimination and clarifying Community law in this respect, it was clearly willing, in both a real and literal sense, to defend, as the French say, "la veuve et l'orphelin".

By way of conclusion, it seems evident that as regards the jurisdiction of the Court of Justice, again viewed as an institution, public purposes outweigh private ones, both in law and in fact. However, in the strategic area of preliminary references where, in principle, the public action model is all-pervading, a gradual but clear shift towards dispute resolution is discernible. Is it conceivable that this movement signals the Court's progressive awareness of its own conversion into a fully "domestic" supreme court? If this were the case, the upshot of the first part of my presentation could be said to be empirically verifiable, or, rather, verified.