

Fordham International Law Journal

Volume 20, Issue 3

1996

Article 4

Legal Interpretation at the European Court of Justice

Nial Fennelly*

*

Copyright ©1996 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Legal Interpretation at the European Court of Justice

Nial Fennelly

Abstract

The object of all interpretation lies in the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators, or drafters of secondary legislation. Its pursuit at The Court of Justice of the European Communities demands of the common lawyer a readiness to set sail from the secure anchorage and protected haven of “plain words” and to explore the wider seas of purpose and context. This Essay is an attempt to enunciate the essential elements of the Court’s approach to legal interpretation, by the only Irish Advocate General to be appointed to that Court to date and to draw attention to some of its most notable practical applications.

LEGAL INTERPRETATION AT THE EUROPEAN COURT OF JUSTICE

*Nial Fennelly**

INTRODUCTION

"Schematic and teleological"¹ are in the view of Lord Denning, former Master of the Rolls, "strange words."² They describe the method of interpretation of legal texts employed by the Court of Justice of the European Communities ("Court"),³ which sits in Luxembourg where the common and civil law traditions meet. The Common Law, of course, prevails in only two of the fifteen Member States, the United Kingdom and Ireland.

The adjustment of the common lawyer to new modes of interpretation and legal reasoning is commonplace and is not perhaps as difficult as Lord Denning's "strange words" might sug-

* Advocate General, Court of Justice of the European Communities. I am deeply indebted to Kieran St. Clair Bradley, Anthony Whelan, and Noel Travers, my *référéndaires*, legal secretaries, at the Court, for many helpful suggestions and for helping my understanding of Community law. I retain responsibility for all errors.

1. The word teleological finds its origin in the Greek word, τέλος, "end". The meaning is "relating to ends or final causes; dealing with design or purpose." OXFORD ENGLISH DICTIONARY VOL. XVII (1989).

2. James Buchanan & Co. v. Babco Forwarding & Shipping, Ltd., [1977] Q.B. 208, 213 (Q.B. Civ. Div.).

3. This remains the title of the Court. It must be distinguished from the European Court of Human Rights with which it is sometimes confused. The Treaty on European Union of 1992 ("Maastricht Treaty" or "TEU") established the European Union. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 81 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)). The jurisdiction of the Court of Justice, however, continues to derive from the founding Treaties, which are: Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 167 [hereinafter ECSC Treaty], as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987), EEC Treaty, *supra*, from which the TEU dropped the word, "Economic", and the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Euratom Treaty], as amended in TREATIES ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITIES (EC Off'l Pub. Off. 1987). References to the Treaty, unless the contrary appears, are to the Treaty Establishing the European Community. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by TEU, *supra*.

gest.⁴ The object of all interpretation lies in the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators, or drafters of secondary legislation. Its pursuit at the Court demands of the common lawyer a readiness to set sail from the secure anchorage and protected haven of "plain words" and to explore the wider seas of purpose and context. This Essay is an attempt to enunciate the essential elements of the Court's approach to legal interpretation, by the only Irish Advocate General to be appointed to that Court to date and to draw attention to some of its most notable practical applications.⁵

I. BACKGROUND OF THE COURT OF JUSTICE

The Court entered the world in 1952, as the Court of Justice of the European Coal and Steel Community.⁶ It has seen enormous accretions to its competences, effected by the successive stages of European integration, most notably, the adoption in 1957 of the Treaty Establishing the European Economic Community ("EEC Treaty"),⁷ by far the most important of the three founding Treaties, and the Treaty Establishing the European Atomic Energy Community ("Euratom Treaty").⁸ The Court's competences have also developed through many subsequent treaty amendments, most notably the Single European Act of 1986 ("SEA")⁹ and the Treaty on European Union of 1991 ("Maastricht Treaty" or "TEU")¹⁰ and through four stages of enlargement via accessions: Denmark, Ireland, and the United

4. See THOMAS F. O'HIGGINS, *A DOUBLE LIFE* 294 (1996). Thomas F. O'Higgins is a former judge of the Court and former Chief Justice of Ireland.

5. The Court consists of 15 judges, each coming from one Member State, and 8 Advocates General, 9 for special temporary reasons. EC Treaty, *supra* note 3, art. 165-66, [1992] 1 C.M.L.R. 684-85. Article 166 of the EC Treaty, provides:

It shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases . . . in order to assist the Court in the performance of the task assigned to it in Article 164.

Id. art. 166, [1992] 1 C.M.L.R. at 685; see Nial Fennelly, *Reflections of an Irish Advocate General*, 5 IRISH J. EUR. L. 5 (1996) (explaining role and influence of Advocate General).

6. ECSC Treaty, *supra* note 3.

7. EC Treaty, *supra* note 3.

8. Euratom Treaty, *supra* note 3.

9. SEA, *supra* note 3, art. 1, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

10. TEU, *supra* note 3.

Kingdom in 1973; Greece in 1981; Spain and Portugal in 1986; and, lastly, Austria, Finland, and Sweden in 1995. In its seminal judgment in *van Gend en Loos v. Nederlandse Administratie der Belastingen* in 1963,¹¹ the Court spoke of the "limited fields"¹² within which Member States had limited their sovereignty. By 1991 this had become "ever wider fields."¹³ Nonetheless, the Court has retained the core of the structure and judicial method which it adopted in the 1950s.¹⁴ The following three preliminary points are worth emphasizing regarding the environment which has produced the Court as we know it today.

A. Point I: French-law Influence

The first point of emphasis is the French-law background from which the Court sprang. Most, not all, of the legal procedures at the Court are forms of judicial review of administrative action. In the early 1950s, the procedures of French administrative law enjoyed a position of pre-eminence among the legal systems of most of the six founding Member States.¹⁵ Consequently, the framing of administrative remedies in the Treaties reflects both the form and grounds for such remedies in French law.¹⁶ The position of Advocate General at the Court is inspired by the role of the differently, indeed inaptly, named "Government Commissioner," *Commissaire du Gouvernement*, at the French Supreme Administrative Court, the Council of State.¹⁷ The early French Advocates General, for many years drawn only

11. *van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] 2 C.M.L.R. 105.

12. *Id.* at 12, [1963] 2 C.M.L.R. at 129.

13. *Re The Draft Treaty on a European Economic Area* (Opinion 1/91), [1991] E.C.R. I-6079, 6102, ¶ 21, [1992] 1 C.M.L.R. 245, 269.

14. In 1989, a Court of First Instance was attached to the Court as a result of Article 168a of the EC Treaty inserted by Article 11 of the SEA, as amended by Article G(5c) of the TEU. EC Treaty, *supra* note 3, art. 168a, [1992] 1 C.M.L.R. at 686.

15. See, e.g., Professor Dr. Ulrich Everling, *Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities*, in *FESTSKRIFT TIL OLE DUE* 55-74 (1996). The six founding members are Italy, France, Germany, Luxembourg, Belgium, and the Netherlands. EEC Treaty, *supra* note 3, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1.

16. Opinion of Advocate General Lagrange, *ASSIDER v. High Authority of the European Coal and Steel Community*, Case 3/54, [1954-1956] E.C.R. 63, 75; *La Communauté Européenne du charbon et de l'acier, Rapport de la délégation française sur le Traité et la Convention signés à Paris le 18 Avril 1951* (Ministre des affaires étrangères, Oct. 1951).

17. Ami Barav, *Le Commissaire du gouvernement près le Conseil d'Etat français et l'Avocat*

from the Council of State, exercised great influence in extracting the legal principles and establishing the procedures which became the norms of the Court, particularly the first French Advocate General, Maurice Lagrange.

B. *Point II: 1957-1973—A Community of Six*

The second point follows from the first. The European Economic Community and its Court of Justice continued without enlargement and free of any common-law influence until 1973. Of course, since 1973, the pool from which both judges and Advocates General are drawn has broadened but, in one view, the "diverse backgrounds of the Advocates General seem to have influenced the style rather than the substance of their opinions."¹⁸ During that first period, from 1957-1973, the Court had established a case law and, at least in outline, some of the central principles of European Community law. In particular, in *van Gend en Loos*, the Court enunciated the radical doctrine of direct effect of Treaty provisions.¹⁹ It is difficult to exaggerate the importance of this decision. The Court concluded that the "Treaty is more than an agreement which merely creates mutual obligations between the contracting states. . . . [it] constitutes a new legal order . . . the subjects of which comprise not only Member States but also their nationals."²⁰ The most effective sanction against Member States that fails to comply with their Community law obligations is the guarantee, derived from the EC Treaty, of a concrete remedy for individuals before national courts, rather than an indirect and unenforceable international condemnation.

This proposition may be tested by a comparison with the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms.²¹ The Irish courts have consistently refused effect in domestic law to that Convention.²²

Général près la Cour de Justice des Communautés européennes, 26 REVUE INTERNATIONALE DE DROIT COMPARÉ 809 (1974).

18. BROWN & KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 69 (4th ed. 1994).

19. *van Gend en Loos*, [1963] E.C.R. at 13, [1963] 2 C.M.L.R. at 130-31.

20. *Id.* at 12, [1963] 2 C.M.L.R. at 129.

21. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ T.S. No. 5.

22. *In re Gearoid O'Laighleis*, [1960] I.R. 93.

Thus, the condemnation by the European Court of Human Rights²³ of Irish laws prohibiting homosexual acts, which the Supreme Court of Ireland considered compatible with the Irish Constitution,²⁴ was ineffective until the necessary amending legislation had been passed. In other words, decisions of the European Court of Human Rights have no automatic internal effect in countries in the dualist camp regarding the application of treaties.

By contrast, decisions of the Court are, as a result of *van Gend en Loos*, directly effective. In *Costa v. ENEL*,²⁵ the Court announced for the first time the doctrine, implicit in *van Gend en Loos*, of Community law supremacy over all conflicting national legal rules, including constitutional rules. It was similarly implicit that, as the Court later decided, national courts are bound to give effect to Community law by setting aside any conflicting national law or practice.²⁶

More particularly, for present purposes, the Court in *van Gend en Loos* also enunciated the essence of the method of interpretation it applies to the Treaties, stating that "it is necessary to consider the spirit, the general scheme and the wording"²⁷ of the provision in question.²⁸

C. Point III: A "Tower of Babel"

The third preliminary issue is language. Originally there were four official languages, French, German, Italian and Dutch, among the original six Member States. There are now twelve official languages.²⁹ Moreover, the EC Treaty is equally authentic in each Community language.³⁰ Divergences in nuance, em-

23. LUKE CLEMENTS, EUROPEAN HUMAN RIGHTS 8 (1994). "The Court's role is to make a final and binding decision as to whether a violation of the Convention has occurred . . ." *Id.*

24. *Norris v. Attorney General*, [1984] I.R. 36.

25. *Case 6/64*, [1964] E.C.R. 585, [1964] 1 C.M.L.R. 425.

26. *Amministrazione delle Finanze dello Stato v. Simmenthal*, *Case 106/77*, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

27. *van Gend en Loos*, [1963] E.C.R. at 12, [1963] 2 C.M.L.R. at 130.

28. It is possible to trace the genesis of the method to the earliest case law of the Court. See Judge Fernand Schockweiler, *La Cour de justice des Communautés européennes dépasse-t-elle les limites de ses attributions?*, 18 JOURNAL DES TRIBUNAUX, DROIT EUROPÉEN 73 (Apr. 20, 1995).

29. Though an official language, Irish is not employed as a working language, and legislative acts are, therefore, only available in eleven languages.

30. The Treaty of Paris is authentic in French only.

phasis, and even substantive meaning are commonplace, indeed inevitable. Translation is an art, not a science. Translations cannot be done by computer because words do not correspond and often their meanings overlap. For example, between English and French, there are many "false friends"—words with the same appearance but divergent meanings.

The Court has explained succinctly the impact of the language problem in the task of interpretation as it confronts national courts, stating:

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 emphasized 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.³¹

If, however, all Community languages are equally authentic, George Orwell might have thought that one was more equal than the others. French is the working language in which all judges' deliberations take place and in which all judgments are first drafted. According to Judge Giuseppe Federico Mancini of the Court, French is "a rigorous and terse language which puts a penalty on the florid and the twisted."³² Noting criticism of the Court, in its French-style judgments, for the Court's "often stunted reasoning and its frequently oracular tone," Judge Mancini emphasizes, nonetheless, their "concision and clarity."³³

31. *CILFIT v. Ministry of Health*, Case 283/81, [1982] E.C.R. 3415, 3430, ¶ 18-20, [1983] 1 C.M.L.R. 472, 491.

32. Giuseppe Federico Mancini, *Crosscurrents and the Tide at the European Court of Justice*, 4 IRISH J. EUR. L. 120, 121 (1995).

33. *Id.*

D. Interpretative Principles and Practices

Before embarking on a more precise formulation of the Court's interpretative approach, two further observations seem appropriate. A distinction must be made between the guiding interpretative principle deployed in search of the meaning of legal texts, on the one hand, and the range of particular techniques and source materials upon which reliance may be placed, on the other.

Principles and practices are not, however, watertight compartments. For example, the willingness to go far afield in the search for underlying purpose opens the door to consideration of some source materials which would not be entertained under a plain-meaning approach. On the other hand, linguistic comparison is dictated by practical rather than theoretical considerations. Texts will vary in the different language versions and a common meaning must be found. It is useful, nonetheless, to identify in the first instance the guiding principle before enumerating individual techniques and practices.

E. The Court's "Mission"

Article 164 of the EC Treaty provides the point of departure for the Court which "shall ensure that in the interpretation and application of this Treaty the *law* is observed."³⁴ Article 166 describes this as "the task assigned to" the Court.³⁵ The word "task" is the translation of the French word "*mission*", and "task" is the primary meaning of the word in French.³⁶ The words are in fact "false friends." "*Mission*" acquires an entirely different flavor when, as is inevitable, it is occasionally mistranslated into the English, "mission". One distinguished commentator was so misled by a mistranslation as to charge, "[a] court with a mission is not an orthodox court. It is potentially a dangerous court—the danger being that inherent in uncontrollable judicial power."³⁷ It is not the purpose of this Essay to engage in that controversy. In truth, a convincing distinction cannot be made between "*mis-*

34. EC Treaty, *supra* note 3, art. 164, [1992] 1 C.M.L.R. at 684 (emphasis added).

35. *Id.* art. 166, [1992] 1 C.M.L.R. at 685.

36. NOUVEAU PETIT ROBERT, DICTIONNAIRE DE LA LANGUE FRANÇAISE (1993).

37. Sir Patrick Neill QC, *The European Court of Justice—A Case Study in Judicial Activism*, at 58 (European Policy Forum, Aug. 1995); see David Edward, *Judicial Activism—Myth or Reality?*, in LEGAL REASONING AND JUDICIAL INTERPRETING OF EUROPEAN LAW: ESSAYS IN HONOUR OF LORD MACKENZIE-STUART 29-67 (1996).

sion" in the English sense and the teleological method, as applied by the Court.

In the absence of a Treaty definition of the word "law" found in Article 164, however, one is permitted to ask how the judges were to perform their function, whether or not that be a "mission".³⁸ In his comic masterpiece *At Swim Two Birds*,³⁹ Irish writer, Flann O'Brien created the character John Furriskey.⁴⁰ Furriskey was born at the age of twenty three, fully equipped with a memory, an education, and defined traits of character, without having undergone the tedium of natural birth and growing up. Similarly, the Court entered the world without birth pangs. It had to look to its collective memory to give meaning to "the law". It was called upon to behave as a Court without delay. Appointments to the Court are, however, restricted to those "who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence."⁴¹ Essentially, appointments are restricted to persons with profound legal training and experience, in short, a legal memory.

The EC Treaty offered explicit guidance that the Court should act "in accordance with the general principles common to the laws of the member-States" in one area only.⁴² This approach had already unsurprisingly been adopted from the inception of the Court under the Treaty Establishing the Coal and Steel Community ("ECSC Treaty").⁴³ In 1954, Advocate General Lagrange, in the first group of cases ever decided by the Court of that Community, engaged in a comparative analysis of the laws of the Member States and extracted sufficient common elements to produce a synthesis capable of being restated as an autonomous principle of Community law.⁴⁴ Over the years, the Court has forged principles of Community law, some based on the

38. T.C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 L. Q. REV. 95, 108 (1996) (suggesting that some unnamed persons, he appears tentatively to indicate Judge Mancini, would allow Court to rely on an undefined source of law higher than EC Treaty).

39. FLANN O'BRIEN, *AT SWIM TWO BIRDS* (1939).

40. *Id.*

41. EC Treaty, *supra* note 3, art. 167, [1992] 1 C.M.L.R. at 685.

42. EC Treaty, *supra* note 3, art. 215, [1992] 1 C.M.L.R. at 710 (discussing non-contractual liability of European Community).

43. ECSC Treaty, *supra* note 3.

44. Opinion of Advocate General Lagrange, *ASSIDER*, [1954-1956] E.C.R. at 72-89.

Treaties, but others inspired by the legal traditions of the Member States, notably those of non-discrimination, equal treatment, legitimate expectation, and proportionality.

II. *THE TELEOLOGICAL METHOD*

The characteristic element in the Court's interpretative method is, as stated at the outset, the so-called "teleological" approach, an expression frequently employed in writings, in argument by parties before the Court, and occasionally by Advocates General, but rarely used by the Court itself. The preferred language of the Court remains close to the *van Gend en Loos* formulation, namely that it is necessary to consider "the spirit, the general scheme and the wording," supplemented later by consideration of "the system and objectives of the Treaty."⁴⁵ In more recent years, the idea of "context" has been added,⁴⁶ and the prevailing wording, varying minimally from case to case, has been that it is necessary when interpreting a provision of Community law to consider "not only its wording, but also the context in which it occurs and the objects of the rules of which it is a part."⁴⁷ This last aspect is also frequently described as the "scheme", as in the *van Gend en Loos* wording.

Occasionally, the Court places emphasis on the ambiguity of a provision, usually by reason of linguistic divergence, when justifying the purposive approach.⁴⁸ In a recent case, where the text in the English language was so unambiguous that the referring judge in the English High Court considered the interpretation clear beyond argument and referred questions to the Court only because the "Court may, when faced with a fresh question, do

45. *Europemballage Corp. & Continental Can Co. v. Commission*, Case 6/72, [1973] E.C.R. 215, 243, ¶ 22, [1973] 1 C.M.L.R. 199, 223.

46. Possibly because of the inclusion of the expression in the Vienna Convention, discussed later.

47. *Merck v. Hauptzollamt Hamburg-Jonas*, Case 292/82, [1983] E.C.R. I-3781, 3792, ¶ 12; see, e.g., *Bosphorus v. Minister for Transport*, Case C-85/95, [1996] E.C.R. I-3953, I-3982 ¶ 11, [1996] 3 C.M.L.R. 257, 293; *Peter Leifer and Others*, Case C-83/94, [1995] E.C.R. I-3231, ¶ 22. By now this has become "the constant case law" of the Court. *E.J.M. de Jaeck*, Case C-340/9430, slip op. at I-5, ¶ 17 (Eur. Ct. J. Jan. 1997) (not yet reported).

48. *Criminal Proceedings Against Gérard Roudolff*, Case 803/79, [1980] E.C.R. 2015, 2024, ¶ 7 ("The function of the words in question must be examined in the light of the intention and purpose of the regulations in question").

something unexpected,"⁴⁹ the Court nevertheless noted divergences among the eleven language versions and concluded that the question could not "on any view be resolved solely on the basis of the wording" ⁵⁰ In the event, the Court, having resorted to "other criteria of interpretation, in particular the general scheme and the purpose of the regulatory system of which the provisions in question form part,"⁵¹ reached the same conclusion as the referring court. *Merck & Co. v. Primecrown, Ltd.*⁵² demonstrates, however, the dangers of relying on strict textual analysis when there are many language texts which are equally binding and authentic but, at the same time, inaccessible to the national court engaged in the interpretative exercise.

No national court is in a position to debate more than two or three language versions, and usually it knows only one. Thus, only the Court has the facilities for researching and comparing different language versions. In this environment of concealed linguistic uncertainty, an approach based on purpose is likely to be more reliable. Linguistic conflict or ambiguity is not, in any sense, a pre-condition for the application of the teleological or schematic approach. Even when it finds a clear meaning in the language used, the Court will often explain that the result so found conforms with the general scheme and object of the provision.⁵³ By way of culminating logic, where the "aims and context" of two international agreements, e.g. the EC Treaty and the European Economic Area agreement, diverge, even textually identical words will not necessarily receive the same interpretation.⁵⁴

49. Opinion of Advocate General Fennelly, *Merck & Co. v. Primecrown Ltd.*, Joined Cases C-267/95 & C-268/95, [1997] 1 C.M.L.R. 83, 95 ¶ 18.

50. *Id.*

51. *Id.* at 96, ¶¶ 21, 22.

52. *Id.*

53. *Hamann v. Finanzamt Hamburg-Eimsbüttel*, Case 51/88, [1989] E.C.R. 767, [1990] 2 C.M.L.R. 383. The Court, in considering whether ocean-going yachts were "forms of transport" so as to render their hiring out subject to value added, i.e. turnover tax, at the place of establishment of the supplier, relied not merely on the tolerably clear meaning of the expression, but also on the fact that yachts "may easily cross frontiers [so that] it is difficult if not impossible to determine the place of their utilization." *Id.* at 784, ¶ 18, [1990] 2 C.M.L.R. at 390-91. Advocate General Jacobs also commenced his analysis with the "purpose underlying the provisions." *Id.* at 777, [1990] 2 C.M.L.R. at 385.

54. *Opinion 1/91*, [1991] E.C.R. at I-6100-03, ¶ 5, 14, 17, 29, [1992] 1 C.M.L.R. at 267-70.

Within this broad interpretative principle, the Court chooses a wide range of sources. Interestingly, it cannot rely on the *travaux préparatoires*⁵⁵ for the Treaties which are not available to it. It extracts the aims and objects of the European Community not only from those proclaimed in the texts of the EC Treaty, but also from declarations by Member States or by Community institutions. As already stated, where appropriate, the Court seeks solutions in the laws of Member States. It frequently relies on legislative history in the form of, for example, an earlier legislative proposal from the Commission of the European Communities ("Commission") including cases where that proposal has been rejected.⁵⁶

The Court, while not normally referring to legislative texts not in force at the time material to a case, will, nonetheless, occasionally do so where it sees those texts as being intended to ensure that a particular regulatory regime is compatible with the EC Treaty.⁵⁷ It may even place reliance on Commission legislative proposals not yet adopted by the Council of Ministers ("Council") to give support to its view that the existing regime does not extend to a particular matter.⁵⁸

The breadth of source material for judicial inspiration is comprehensible and justifiable once the teleological or purposive method is adopted. The context of a legal text is part of the background to its adoption. Many contemporary sources may cast light on the understanding of the legislators. The existence of the teleological interpretative principle is not, therefore, in doubt. It has generated a considerable amount of literature⁵⁹ and provided the subject of a judicial and academic conference as long ago as 1976.⁶⁰

55. The *travaux préparatoires* represent the historical background of a treaty. WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW* 175 (3d ed. 1971).

56. *See, e.g.*, *Gemeente Emmen*, Case C-468/93, [1996] E.C.R. I-1756, ¶ 21.

57. *Eduardo Lafuente Nieto*, Case C-251/94, [1996] E.C.R. I-4187.

58. *Otte v. Germany*, Case C-25/95, [1996] E.C.R. I-3745.

59. *See, e.g.*, Gordon Slynn, *The Court of Justice of the European Communities*, 33 *I.C.L.Q.* 409 (1984); JOXERRAMON BENGOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* (1993).

60. *See* Hans Kutscher, *Methods of Interpretation as seen by a Judge at the Court of Justice (Court of Justice of the European Communities, Judicial and Academic Conference, Sept. 27-28, 1976)*.

A. Teleology and the Treaties

Some personal reflections on the origins of this approach may not be out of place. The Court, with characteristic terseness, did not engage in any process of reasoning or reference to authority when, in *van Gend en Loos*, it announced its approach to Treaty interpretation.⁶¹ Indeed Advocate General Karl Roemer was conspicuously more circumspect in his remarks:

The effect of an international treaty depends in the first place on the legal force which its authors intended its individual provisions to have, whether they are to be merely programmes or declarations of intent, or obligations to act on the international plane or whether some of them are to have direct effect on the legal system of the Member States.⁶²

Individual members of the Court have not, however, been reticent in explaining their views to a broad audience. Judge Constantinos Kakouris of the Court has stated, “[t]he Court constantly uses teleological interpretation. . . . [and] seeks to apprehend the meaning of law in the light of its purpose”⁶³ The Court, he said, “must arrive at criteria by reference to the beliefs and common values of the people of Europe.”⁶⁴ The alliance of the comparative method and the teleological approach has created situations in which “the Court sometimes dismisses the rule of the common denominator and adopts the rule most conducive to the ultimate objective of Community integration.”⁶⁵

In 1995, Judge Giuseppe Federico Mancini⁶⁶ explained how the expression “une certaine idée de l’Europe”, a phrase coined by former Judge Pierre Pescatore and based in turn on General de Gaulle’s “une certain idée de la France,”⁶⁷ encapsulated the “synergy produced by the coming together of men who, though steeped in different cultures and legal traditions, shared a com-

61. *Id.* at I-6 (noting “reluctance to give in its judgments general rulings on problems of interpretation.”).

62. Opinion of Advocate General Karl Roemer, *van Gend en Loos*, [1963] E.C.R. at 19, [1963] 2 C.M.L.R. at 112.

63. Constantinos N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 PACE INT’L L. REV. 267, 273 (1994).

64. *Id.* at 274.

65. *Id.*

66. Mancini, *supra* note 32, at 125.

67. CHARLES DE GAULLE, MÉMOIRE DE GUERRE, L’APPEL 1940-42 [MEMOIRS OF THE WAR, THE CALL 1940-42] 1 (1954).

mon set of values."⁶⁸ Elsewhere he has written of the "preference for Europe" prompted by the EC Treaty objective of "an ever closer union among the peoples of Europe."⁶⁹ With this view, he is echoing the Court's own declaration that "Article 1 of the Single European Act makes it clear moreover that the objective of all the Community Treaties is to contribute together to making concrete progress towards European unity."⁷⁰

Writing in less visionary terms, the late Judge Fernand Schockweiler explained how "the Court had acted as an engine for the building of the autonomous Community legal order."⁷¹ He thought that its most decisive contribution was its choice from the very beginning of the teleological method of interpretation. According to Judge Schockweiler, "by favouring this method . . . [t]he Court gave preference to the interpretation best fitted to promote the achievement of the objectives pursued by the Treaty."⁷² Furthermore, it "allowed a development beyond the literal meaning of the texts in a dynamic direction in the light of the purposes pursued by the [EC] Treaty in its entirety and in its context."⁷³ These are, of course, all personal views, and it is important to note that the President of the Court recently reasserted the role of the Court as a custodian of legality rather than as a "motor of integration," a perception of the Court which he firmly rejected.⁷⁴

B. *Teleology and International Law*

In light of the criticisms or, to say the least, surprise, which the teleological method has engendered, one may also ask whether it is, in reality, entirely novel. International law does not easily reach the common lawyer who is protected from its incoming tide by the dualist doctrine, whereby international agreements, in the absence of implementing legislation, have no

68. Mancini, *supra* note 32, at 125.

69. Giuseppe Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 *MODERN L. REV.* 175, 186 (1994).

70. *Opinion 1/91*, [1991] E.C.R. at I-6102, ¶ 17, [1992] 1 C.M.L.R. at 268.

71. Schockweiler, *supra* note 28, at 73.

72. *Id.* at 74.

73. *Id.*

74. Gil Carlos Rodríguez Iglesias, Address on the occasion of the publication of the work of Professor Jean Victor Louis on the European Union and the future of its institutions (Brussels, Jan. 16, 1997).

effect in domestic law.⁷⁵ Indeed, it is said that some do not acknowledge even the existence of the notion of international law. The Vienna Convention on the Law of Treaties 1969⁷⁶ represents, at least in part, a declaration of existing principles of international law. Article 31.1 of the Convention provides, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose.”⁷⁷ The Court has invoked this provision several times in interpreting international agreements between the Community and third countries.⁷⁸ Such an agreement, it says in its opinion on the draft agreement creating the European Economic Area, “merely creates rights and obligations between the Contracting Parties and provides for no transfer of sovereign rights.” By way of contrast, the Community Treaties established the “new legal order” identified in *van Gend en Loos* and the EC Treaty, though “in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on law.” In 1951, in a context unrelated to European integration, it could be said that there were “three main schools of thought on the subject [of treaty interpretation],” which could conveniently be called the ‘intentions of the parties’ or ‘founding fathers’ school; the ‘textual’ or ‘ordinary meaning of the words’ school; and the ‘teleological’ or ‘aims and objects’ school.⁷⁹ The author continued, stating that the “teleological approach has its sphere of operation almost entirely in the field of general multilateral conventions, particularly those of the social, humanitarian and law-making type.”⁸⁰ In addition, the teleological approach seems also to

75. Article 29.6 of the Irish Constitution, reflecting the English-law, non-continental tradition, expressly provides that international agreements shall not be “part of the domestic law of the State” except by legislative enactment. JOHN M. KELLY, *THE IRISH CONSTITUTION* 295 (Gerard Hogan & Gerry Whyte eds., 3d ed. 1994). Article 29.6 had to be amended by referendum in 1972 to enable Ireland to become a member of the European Communities. *Id.* at 1128-36.

76. Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

77. *Id.* art. 31.1, at 340, 8 I.L.M. at 691-92.

78. *Opinion 1/91*, [1991] E.C.R. at I-6101, ¶ 14, [1992] 1 C.M.L.R. at 268; *Regina v. Minister of Agriculture, Fisheries & Food, ex parte S.P. Anastasiou Ltd. & Others*, Case C-432/92, [1994] E.C.R. I-3087, 3132, ¶ 43, [1995] 1 C.M.L.R. 569, 606-07.

79. [1963] E.C.R. at 1, [1963] 2 C.M.L.R. at 105.

80. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 1 (1951).

be favoured in French courts where primacy must be accorded to "the spirit and not the letter of the text."⁸¹ None of this, however, establishes any more than the prior existence of respectable international law theories of interpretation, of which the teleological approach was one. But, it is difficult to disagree with Judge David Edward's statement that the "insinuation that the Court, in *van Gend en Loos*, 'invented' a new approach to Treaty interpretation is false."⁸²

C. *Aims and Objects in the Treaties*

Viewed as an international agreement, the EC Treaty should be interpreted in light of its entire text, its context, and its declared aims and objects. That the EC Treaty had from the beginning explicit and ambitious formal objectives is incontestable. These objectives have been progressively enlarged and extended by unanimous Member State agreement, particularly in the SEA of 1986 and TEU of 1991. The more highly developed formulations of these objectives cannot, in logic, confer retrospective, legal justification on decisions of the Court in the earlier years, some of which have been subjected to scathing criticism. It is, however, reasonable to interpret the unanimous Member State acceptance of the deepening and broadening of the original objectives as giving some form of implicit approval to prior Court interpretations of declarations of narrower scope.⁸³

If the teleological method permits the Court to interpret the EC Treaty and other instruments in light of EC Treaty aims and objects, it is desirable to consider in general terms what those objects are and to outline the general scheme of the EC Treaty. The Preamble contains the expressed aspirations of the Member States towards "an ever closer union among the peoples of Europe, . . . economic and social progress . . . by common action to eliminate the barriers which divide Europe, . . . the removal of existing obstacles . . . in order to guarantee steady expansion, balanced trade and fair competition . . ."⁸⁴ Article 2

81. *Id.*

82. Denis Tallon, *International Conventions and Domestic Law*, in *THE GRADUAL CONVERGENCE* 133, 144 (Basil Markesinis ed., 1994).

83. Edward, *supra* note 37, at 46.

84. Sometimes this is express, as where Article F.2 of the TEU confirmed respect for "fundamental rights" as based on "general principles of Community law." TEU, *supra* note 3, art. F.2, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728.

lays down "the task" of the European Community as being to establish a Common Market and, thereby, achieve the aspirations mentioned in the Preamble.⁸⁵ Article 3 enumerates the "activities of the Community" in more precise form, indicating the several means to the creation of the common market.⁸⁶ Each of these is matched, in turn, by a program for the achievement of these objectives, particularly with respect to the four freedoms enunciated in the EC Treaty: Articles 9 to 36, the free movement of goods;⁸⁷ Articles 48 to 58, the free movement of persons;⁸⁸ Articles 59 to 66, the free movement of services;⁸⁹ and Articles 67 to 73, the free movement of capital.⁹⁰ In addition, Articles 38 to 47 of the EC Treaty provide for the Common Agricultural Policy⁹¹ and Articles 85 to 94 for Rules on Competition.⁹² Moreover, the SEA and the TEU extended Community competence to several new areas such as the environment, public health, and consumer protection.

The achievement of the common market consists of a programed and intentionally obligatory agenda for change. A novel and unique institutional structure subtends this objective. Article 4 imposes on the Community institutions the duty of carrying out the tasks entrusted to the European Community.⁹³ Article 155 enjoins the Commission to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."⁹⁴ A range of time-tables attends the attainment of each of the objectives, depending on the subject-matter. The institutions of the European Community, however, have broad discretion in the implementation of EC Treaty objec-

85. EC Treaty, *supra* note 3, pmb., [1992] 1 C.M.L.R. at 573.

86. *Id.* art. 2, [1992] 1 C.M.L.R. at 588.

87. *Id.* art. 3, [1992] 1 C.M.L.R. at 589.

88. *Id.* arts. 9-36, [1992] 1 C.M.L.R. at 594-606 (establishing rules on free movement of goods).

89. EC Treaty, *supra* note 3, arts. 48-58, [1992] 1 C.M.L.R. at 612-16 (setting forth rules on free movement of persons).

90. *Id.* arts. 59-66, [1992] 1 C.M.L.R. at 616-18 (listing rules on free movement of services).

91. *Id.* arts. 67-73, [1992] 1 C.M.L.R. at 618-21 (providing rules on free movement of capital).

92. *Id.* arts. 38-47, [1992] 1 C.M.L.R. at 606-11 (establishing framework for Common Agricultural Policy).

93. *Id.* arts. 85-94, [1992] 1 C.M.L.R. at 626-32 (setting forth rules on competition).

94. EC Treaty, *supra* note 3, art. 4, [1992] 1 C.M.L.R. at 590.

tives in many respects. They cannot, of course, override clear EC Treaty provisions such as those held to create directly effective rights for individuals.

In summary, the EC Treaty still consists of an ambitious agenda for change. If the EC Treaty is the source of law, then the Court considers that its task is to assist in the attainment of the EC Treaty objectives. Thus, the judicial role is distinct from that of a neutral arbiter played by the normal court in a Member State whose task is to hold the scales of justice evenly between parties or between citizens and state. In particular, where those scales concern the balance between the governors and the governed, it is reasonable to see the role of the court as being to interpret laws objectively according to the "plain words" used with no particular end in view. Insofar as the common law presumes that what is not regulated is free, courts may choose a narrow or restricted interpretation of laws. In some states, however, laws may need to be interpreted in the light of the Member State constitution, especially constitutionally declared rights of the citizen.⁹⁵ The Irish Supreme Court, in considering the compatibility of the SEA with the Irish Constitution, as already amended in 1972 to permit Membership, described the European Community as:

[A] developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress, both in terms of the number of its member States and in terms of the mechanics to be used in the achievement of its agreed objectives.⁹⁶

III. TELEOLOGY IN OPERATION: THE COURT

The legal remedies and procedures provided in the EC Treaty offer further support for the teleological or purposive approach. Article 177 permits the Courts of Member States to refer to the Court preliminary questions of interpretation of European Community law.⁹⁷ The Court interprets the object of this provision as being to secure a uniform interpretation of Commu-

95. *Id.* art. 155, [1992] 1 C.M.L.R. at 682.

96. See *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General*, [1970] I.R. 317. In Ireland, for example, laws passed by the legislature, *Oireachtas*, must be interpreted, so far as possible, so as not to conflict with the Constitution. *Id.*

97. *Crotty v. An Taoiseach*, [1987] I.R. 713, 770 (Opinion of C.J. Finlay).

nity law throughout all the Member States by assigning to the Court a monopoly of final interpretation. It is universally acknowledged to have played a decisive role in the construction of the Community legal order and the evolution of the common legal heritage of all European citizens.⁹⁸ Articles 169 and 170 permit the Commission and Member States, respectively, to bring Member States before the Court for infringement of EC Treaty obligations.⁹⁹ Frequently, the Commission uses this to insist that Member States give effect in national law to Community directives under Article 189.¹⁰⁰ Article 175 allows for an action against the Parliament, the Council, or the Commission based upon infringement of the EC Treaty by an illegal failure to act.¹⁰¹

A trilogy of cases decided in 1974 concerning three of the four freedoms, freedom of establishment,¹⁰² freedom to provide services,¹⁰³ and free movement of workers,¹⁰⁴ exemplifies the teleological method working effectively with the principle of direct effect. In terms of the EC Treaty, these freedoms were to have become fully effective by the end of the transitional period, the end of 1969, but the Member States had not yet agreed in the Council on a program of prescribed implementing measures. Considering that the freedoms in question represented a precise result to be achieved, the Court held the EC Treaty articles to be directly effective and capable of being invoked by individuals. It is interesting to note that the Government of the United Kingdom, in only its second year of membership in the Community, relied on "the spirit and objective of the Treaty" to argue for a restrictive interpretation of exemptions from the prescribed

98. See Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 *FORDHAM INT'L L.J.* 388, 390 (1994) (discussing interpretation of Community Law and EC Treaty by Court of Justice).

99. Schockweiler, *supra* note 28, at 73; see Jacques Santer, President of the European Commission, Speech on the Occasion of the Opening Session of the World Legal Conference (Brussels Sept. 9, 1996).

100. EC Treaty, *supra* note 3, arts. 169-70, [1992] 1 C.M.L.R. at 686.

101. *Id.* art. 189, [1992] 1 C.M.L.R. at 693.

102. *Id.* art. 175, [1992] 1 C.M.L.R. at 688.

103. *Reyners v. Belgian State*, Case 2/74, [1974] E.C.R. 631, [1974] 2 C.M.L.R. 305.

104. *van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case 33/74, [1974] E.C.R. 1299, [1974] 1 C.M.L.R. 298.

freedoms.¹⁰⁵ In the same vein, the Court has relentlessly insisted on a narrow interpretation to exceptions or derogations from fundamental EC Treaty principles embodied in the four freedoms.¹⁰⁶

A. *Effet Utile: Filling Gaps*

A principal corollary, developed early on, to the teleological method,¹⁰⁷ is the doctrine of "effectiveness", invariably called by its French name, "*effet utile*". The doctrine provides that once the purpose of a provision is clearly identified, its detailed terms will be interpreted so "as to ensure that the provision retains its effectiveness."¹⁰⁸ This constant companion of the chosen method leads the Court to seek above all, effectiveness, consistency, and uniformity in its case law and in the application of Community law. Consequently, the Court either reads in necessary provisions regarding co-operation or the furnishing of information to the Commission, or bends or ignores literal meanings. Most shockingly of all to the common lawyer, the Court fills in lacunae which it identifies in legislative or even EC Treaty provisions. Returning to the words of Lord Denning:

When they [the Court] come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking to the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation.¹⁰⁹

For example, Article 228(6) of the EC Treaty permits the Council, the Commission, or a Member State to "obtain the opinion of the Court of Justice as to whether *an agreement envisaged* is compatible with the provisions of the Treaty."¹¹⁰ It might have been thought that the Community institution seeking such

105. *van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1.

106. *Reyners*, [1974] E.C.R. at 639, [1974] 2 C.M.L.R. at 310.

107. *See, e.g., Bauhuis v. Netherlands*, Case 46/76, [1977] E.C.R. 5.

108. *See, e.g., Grad v. Finanzamt Traunstein*, Case 9/70, [1970] E.C.R. 825, 837, ¶ 5, [1971] 1 C.M.L.R. 1, 23.

109. *Saarland v. Minister for Industry*, Case 187/87, [1988] E.C.R. 5013, 5042, ¶ 19, [1989] 1 C.M.L.R. 529, 542 (citing *Grad*, [1970] E.C.R. at 825, [1971] 1 C.M.L.R. at 1; *Simmenthal*, [1978] E.C.R. at 629, [1978] 3 C.M.L.R. at 263)

110. O'HIGGINS, *supra* note 4, at 213.

an opinion would be required to identify the "agreement envisaged" and its terms. The Court has, however, in a series of cases, given great latitude to that notion, perceiving its own role as being to "forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community."¹¹¹

In 1996, the Court admitted a request of the Council for an Opinion on the compatibility of the accession by the Community, as such, to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹¹² ("European Convention"), even though negotiations had not even commenced and, indeed, such a step necessitated the unanimous agreement of the Council, which was divided on the issue. The Court believed that Article 228 provided "a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the Member States on the other" ¹¹³ Relying on its earlier case law, it considered that "where a question of competence has to be decided, it is in the interests of the Community Institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiation and even before the main points of the agreement are negotiated."¹¹⁴ Therefore, the Court held that it had jurisdiction to rule on the Community's competence to become party to an "envisaged agreement", which did not exist even in outline. In this event, its view on competence was negative, which was sufficient to dispose of the matter. It could not, as it acknowledged, have ruled on compatibility of the envisaged agreement with the EC Treaty in the absence of its terms.

In *European Coal and Steel Community v. Acciairie e ferriere Bussoni SpA*,¹¹⁵ the Court noted that Article 41 of the ECSC Treaty, as distinct from Article 177 of the EC Treaty, "contains no express provision governing the exercise by the Court of a power

111. EC Treaty, *supra* note 3, art. 228(6), [1992] 1 C.M.L.R. at 715 (emphasis added).

112. Opinion 3/94, [1995] E.C.R. I-4577, I-4595 ¶ 16.

113. 213 U.N.T.S. 221, Europ T.S. No. 5.

114. *Re* The Accession of the Community to the European Human Rights Convention (Opinion 2/94), [1996] E.C.R. I-1763, I-1784, ¶ 6, [1996] 2 C.M.L.R. 265, 287.

115. *Id.* at I-1784-85, ¶ 10, [1996] 2 C.M.L.R. at 288 (citing *Re* The Draft International Agreement on Natural Rubber (Opinion 1/78), [1979] E.C.R. 2871, 2909, ¶ 35, [1979] 3 C.M.L.R. 639, 673).

of interpretation."¹¹⁶ The first provision entitles national courts to make references for preliminary rulings only on the "validity" of Community acts. The Court ruled, nonetheless, that "different though their actual terms may be" the respective provisions "all express a twofold need: to ensure the utmost uniformity in the application of Community law."¹¹⁷

B. *The Community of Law*

The Court has not, however, acted merely as an engine for European integration. It sees itself as concerned with establishing a Community of law, and the Treaties as guaranteeing rights to individuals extending beyond their merely economic objectives. By invoking the principle of effectiveness, *effet utile*, the Court has given qualified, national direct effect to Community directives which Article 189 envisages as requiring prior implementation by Member States, on the basis that a Member State which has failed to do so cannot rely on its own failure to act.¹¹⁸ The Court has also declared a right to damages for individuals suffering a loss as a result of such failure to implement a Community directive. In these and other ways, the Court has developed its own concepts of its duty to see that the "law is observed" and has proclaimed the existence of the "Community of law" and the objective of comprehensive judicial protection.

In a 1986 decision, *Partie Ecologiste "Les Verts" v. European Parliament*,¹¹⁹ the Court admitted a challenge by the French Green Party to a decision of the European Parliament regarding the allocation of electoral expenses which favored the existing membership of the Parliament. The principal legal difficulty was that the Parliament was not named in Article 173 of the EC Treaty as one of the Community institutions, the legality of whose acts could be subjected to judicial review. Advocate General, now Judge, Mancini advised, "whenever required in the interests of judicial protection, the Court is prepared to correct or complete the rules which limit its powers in the name of the principle

116. *European Coal and Steel Community v. Acciaierie e ferriere Busseni SpA*, Case C-221/88, [1990] E.C.R. I-495.

117. *Id.* at I-523, ¶ 11.

118. *Id.* at I-523, ¶ 13.

119. *van Duyn*, [1974] E.C.R. at 1337, [1975] 1 C.M.L.R. at 1.

which defines its mission."¹²⁰ The Court founded its answer and its own jurisdiction on the proposition that the Community is one "based on the rule of law" and, introducing the concept for the first time, that the EC Treaty is its "basic constitutional character."¹²¹ The Court continued:

In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the Institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty.¹²²

Later, the Court, using similar logic, admitted, if only conditionally, the Parliament's own right to bring annulment proceedings under Article 173. It explained the need to fill a "procedural gap" by reference to "the fundamental interest in the maintenance and observance of the constitutional balance laid down in the Treaties"¹²³ One of the most striking aspects of the manner in which the Court's method of interpretation, in reliance on the laws of Member States, led to the adoption of substantive principles of law is in the area of fundamental rights. Article F.2 of the TEU entrenches "as general principles of Community law" the respect for "fundamental rights, as guaranteed by the European Communities"¹²⁴ This culmination was the result of a gradual process. The Court commenced cautiously in 1969 by referring to "protection guaranteed by fundamental rights . . . assumed by various provisions in the Treaty . . . supplemented by unwritten Community law, derived from the general principles of law in force in the Member States."¹²⁵ In 1970, it saw fundamental rights as "inspired by the constitutional

120. *Partie Ecologiste "Les Verts" v. Parliament*, Case 294/83, [1986] E.C.R. 1339, [1987] 2 C.M.L.R. 343.

121. *Id.* at 1350, [1987] 2 C.M.L.R. at 358. This is the passage criticised by Sir Patrick Neill. See Neill, *supra* note 37, at 580.

122. *Partie Ecologiste*, [1986] E.C.R. at 1365, ¶ 23, [1987] 2 C.M.L.R. at 372.

123. *Id.*

124. *Re Radioactive Food: Parliament v. Council*, Case C-70/88, [1990] E.C.R. I-2041, 2073, ¶ 26, [1992] 1 C.M.L.R. 91, 116.

125. Paradoxically this Article dealing with "Community law" is, by Article L of the same Treaty, placed outside the purview of the Court of Justice.

traditions common to the Member States," but stressed that the EC Treaty was an "independent source of law."¹²⁶ Subsequently, upon the ratification of the European Convention by all Member States, the Court was in a position to add it to its sources of inspiration.¹²⁷ It has been generally accepted that the development, inspired as it was by the common legal and constitutional traditions of the Member States as well as international treaties, and one in particular, to which they adhere was in response to the danger that the German or Italian constitutional courts, concerned with the lack of human rights protection in Community law, would commence their own process of review of validity and compatibility of Community law provisions with national constitutions.¹²⁸ Thus, although the Court has ruled that the Community is not competent, without an EC Treaty amendment, to accede to the European Convention,¹²⁹ it has enshrined its principles as a source of Community law and will occasionally refer to the case law of the European Court of Human Rights.¹³⁰

CONCLUSION

In summary, it can be said that the Court adopted the teleological method of interpretation of the Treaties and other Community texts from an early date. It employed this method to give priority to the proclaimed objectives of the EC Treaty, particularly that of European integration. It interpreted the EC Treaty as establishing a new legal order going beyond an international agreement between sovereign states. This order encompasses not only the Member States but their nationals and, thus, a number of EC Treaty provisions have direct effect so as to confer rights on individuals which is the duty of national Member State courts to protect. The Court interprets the EC Treaty as creating a Community governed by the rule of law and defined its own

126. *Stauder v. City of Ulm*, Case 26/69, [1969] E.C.R. 419, 423, [1970] C.M.L.R. 112.

127. *Internationale Handelsgesellschaft v. Einfuhr*, Case 11/70, [1970] E.C.R. 1125, 1134, ¶ 3-4, [1972] C.M.L.R. 255, 282-83.

128. *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219, [1976] 1 C.M.L.R. 140; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

129. *Mancini & Keeling*, *supra* note 69, at 187.

130. *See supra* note 113-15 and accompanying text (providing Court's reasoning in Opinion on Community accession to European Convention).

task under Article 164.¹³¹ Where texts are silent, it supplements them by principles of law derived from the laws and constitutions of the Member States and the European Convention of Human Rights. Ultimately, it has constructed a complete system of judicial protection of individual rights in those areas governed by Community law.

Essentially, however, the Rubicon was crossed in 1963 in *van Gend en Loos*. The choice is well expressed by a former President of the Court:

Either the Community is for individuals (physical or legal persons) an attractive but distant abstraction which is only of interest to the governments who apply its rules to them at their whim, or it is for them a concrete reality and consequently the originator of rights.¹³²

131. P v. S. and Cornwall County Council, Case C-13/94, [1996] E.C.R. I-2143, [1996] 2 C.M.L.R. 247.

132. EC Treaty, *supra* note 3, art. 164, [1992] 1 C.M.L.R. at 684.