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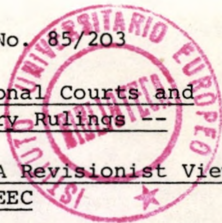

The European Court, National Courts and References for Preliminary Rulings -- The Paradox of Success: A Revisionist View of Article 177 EEC

by
Joseph H. H. Weiler

BADIA FIESOLANA, SAN DOMENICO (FI)

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I. Introduction

It is a commonplace that Article 177 and the tandem relationship it establishes between the European Court and Member State courts has been the most fundamental element in the constitutional architecture of the European Community legal order.

I do not propose to spend time or space in examining the legal rules which determine which national court and in what type of proceedings a reference may or must be made to the European Court. In this regard I think most question marks have been removed save perhaps some fine points in relation to Arbitration.1/

1/ Several commentators have expressed unhappiness with the decision of the European Court in the Nordsee Case, Case 102/81 [1982] ECR 1095, in which the court held that an arbitrator voluntarily appointed by parties to a private contract is not a "court or tribunal" within the meaning of Article 177. The criticism is made on the basis of the following premise: an increasing volume of litigation is conducted by private commercial arbitrators who frequently are in terms of arbitration agreements the final "judicial" instance. It is unacceptable, or undesirable, that such an important segment of litigation, often making recourse to Community law, could not avail itself of the preliminary reference procedure -- at least in those cases where the arbitrator and/or the parties wish to make such a reference. As shall emerge I object to such an extension of jurisdiction on practical grounds. But there would also seem to be a legal argument which would strongly militate against such a suggestion. If private arbitrators were recognized as a "court or tribunal" in the sense of Article 177, the fact that they were in many cases a final judicial instance would render them, unless one adopted the Non-Organic Theory of Article 177(c), *ipso jure*, courts against whose decisions there is no remedy. Under the terms of Article 177 this would mean that such arbitrators would be *obliged* to make

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There is, however, a wider question of policy, a question which relates to the whole pattern of preliminary rulings to the Court which may profitably be discussed in the context of a general debate concerning the experience gained in the practice of Article 177.

II. National Courts and The European Court: The Orthodox View.

In the "early days", the formative years of the Community, the main objective of those favouring the progress of European legal integration was to encourage so far as possible references from national courts to the European Court. Every new national court and jurisdiction in

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preliminary rulings in every instance a question of Community law were raised, save within the narrow exception established in CILFIT. If the above premise is correct there can be but the following two outcomes both of which would really be unacceptable: Either a significant growth of references - which would further increase the burden of the Court and defeat several of the functions of Arbitration rather than judicial settlement; or, a massive violation of Article 177 whereby Arbitrators would not make references despite being courts or tribunals against whose decision there is no judicial remedy which would bring Community law itself into disrepute.

The fact of the matter is that the critique of the principle in Nordsee (though I do not comment on the precise facts in that specific case which are problematic) is ill founded. Final instance arbitration always runs the risk of misinterpreting the law, national or Community. National procedural law should determine when there can be nonetheless a judicial re-hearing in which case the question of Community law may be reopened also by a preliminary reference. Otherwise, there is no reason why Community law should be treated differently to national law. If a discrepancy emerges in arbitration proceedings within the same national jurisdiction or between different national jurisdictions, no long term harm will be created to the Community. Sooner or later, parties will deliberately or by chance raise the same issue in judicial proceedings and the matter could then be settled definitively by a reference to the European Court.

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the Member States which availed itself of the 177 procedure was considered as a "convert to the cause". The constantly growing statistics of references were considered as important steps in fusing the "new legal order". One justifiably frowned upon patently wrong interpretations of 177 and the utilization, under one guise or another, of the so-called _Acte clair_ doctrine as a means of avoiding the need and/or duty to make references. On notable occasions, national courts trying their hand at their own interpretation of Community law were to receive sharp and embarrassing lessons when a reference was eventually made. (The High Court and Court of Appeal in _Henn & Darby_ is but one example of such an incident).

In this evolution, lower, and frequently first instance courts played a decisive role in the spread of the reach of Community law and its remedies. This particular aspect has often been praised, not only because higher courts have shown, at times and in certain countries, a greater reluctance to utilise the 177 procedure, but because in the legal architecture of the Community _all_ national courts, when confronted with Community law issue become, willy nilly, Community courts. Community law has correctly been perceived as "belonging" exclusively neither to specialised courts nor to appeal or constitutional courts.

The result has been the famous tandem relationship and collaborative justice established between the European Court of Justice and national courts.

The advantages this process has yielded hardly need elaboration. Apart from the declared objective of ensuring uniform interpretation and application of Community law, it

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also afforded the European Court with the opportunity, through 177 proceedings, to establish and elaborate the constitutional and substantive jurisprudence of the Community legal order and the European Commonmarketplace as well as rendering European law a living part of the national legal cultures.

What then is the Orthodox vision of the "ideal type", utopian, functioning of the Community legal order?

If we take the Orthodox view to its logical conclusion the following vision appears whereby: each time a national court in any of the Member States is confronted with a "new" question of Community law (i.e. falling outside the CILFIT guidelines) it should make a reference. With the substantive scope of Community law widening, more and more national courts would come within the "network" of the Community legal order. Although reality does not yet come even close to this vision, the growing success of Article 177 in terms of the spread of its utilisation (with of course some exceptions) is beyond doubt.

III. The Paradox of Success

In this success story lie the roots of a future danger and the Orthodox vision is in fact a sure recipe for disaster. The explanation is simple and hardly new: the danger lies in the increased numerical burden of cases which the European Court has to decide.

I am strongly of the view that the number of cases which the European Court of Justice, in some ways the 'Supreme Court of the Community', must dispose of should be

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limited and not be allowed to grow at the current rate.

Certainly, the increased numerical burden cannot be traced entirely to the growing number of preliminary references. And, should the "plans" to create a special tribunal for staff cases and possibly a first instance Community jurisdiction for Competition materialize, this will alleviate the current load of the Court.

But with the growth of Community law, if the pattern of references is to continue this will afford only temporary respite and the Court before long will find itself in the same overloaded position which already today is creating serious strains. The creation of Chambers has been an important and positive development but neither does it solve the root problem.

The reasons for fearing an ever increasing growth in the number of cases are also clear enough; I shall mention only the three most important:

a. Delays: The preliminary reference is part of the national proceedings. Creating a suspension in first instance justice of over one year cannot but be detrimental to the administration of justice. Already the current delays in rendering a preliminary ruling of approximately 14 months seem to many unacceptable.

b. Dilution: One of the main tasks of the European Court is not so much the administration of justice in individual cases, but the function of overseeing the development of Community law in important principled cases. In this respect the

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European Court plays the classical role of some supreme courts such as the House of Lords in the United Kingdom, and several of the Constitutional Courts in Continental Europe not to mention the Supreme Court of the USA.

An inordinate numerical increase in its output is bound to lead to a dilution of the normative effect of such principled jurisdiction. Comparative analysis by Professor Andre Tunc of the University of Paris I has shown the decline in the normative influence of high Courts such as the Cour de Cassation because of the unchecked increase in the run-of-the-mill decisions they must render in the normal administration of justice.2/

The effectiveness and prestige of courts such as the House of Lords, the Bundesverfassungsgericht and the American Supreme Court is in part due to their relatively restricted output. One has to accept what is sometimes a hard truth: there exists a tension between the capacity of a supreme court to act as an unchecked last resort appeal instance in the normal administration of individual justice and its capacity to "oversee" the judicial development of a system and have the appropriate impact on such developments.

In most systems, even without particular

2/ A. Tunc, La cour judiciaire supreme -- une enquete comparative, Rechereches Pantheon-Sorbonne, Universite de Paris I (1978).

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"docket controlling" techniques, supreme courts find themselves as second and even third and fourth instances of appeal, a fact which in itself leads to a certain funneling of cases and a reduced case load.

To sharpen this point to a maximum, my argument is that even if, by some structural magic, it were possible to reduce the time necessary to deal with each case so that the delays were cut down to less than a year, one should view with great caution any substantial increase in the case load of the Court. The problem is not simply delays, important as these may be. What counts also is , to borrow from the world of the natural sciences, the "specific gravity" of each judgment rendered. The more numerous they become, the less "specific gravity" attaches to each of them.

c. In mentioning the the third danger facing the European Court and the 177 procedure by the numerical increase no disrespect is intended towards the Court and its members.

The numerical pressure on the Court might in the future quite simply affect negatively its ability to deal adequately with all cases. Judges, we are all glad to acknowledge, like other mortals have limits on their working capacities. The extremely high judicial standard established to date by the Court might suffer as a result of the pressure to keep up with an ever growing case load.

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This seriousness of this problem of a case load which is getting out of hand is, in my view, the single most important and overriding consideration in any reflection on reform of the Community judicial system. Suggestions such as that calling for a second round of written submissions in 177 proceedings -- meritorious as they may be -- will lead to an even greater work load on the Court. If not linked to other proposals which would reduce the case load or work load elsewhere are simply unacceptable. Likewise, proposals for lengthening the period in which written interventions may be submitted, must be rejected, if nothing else, for the same reason.

And yet, despite the gravity of this danger, about which I do not think there is much controversy, it is not easy to see clearly any ready solution other than a change of the Treaty and the creation of additional jurisdictions.

Here we must recall some of the in built structural problems of the European Court: although it fulfills supreme court functions, it may: a. be approached on any question 3/ of Community law, even the most trivial; 4/ b. it may be approached by any court or tribunal in twelve Member States;

3/ A procedure similar to 177 exists in several national jurisdictions such as the Federal Republic, Italy and, now, Spain; But typically in those jurisdiction the reference to the supreme court is limited to questions which involve a constitutional dimension. See Pescatore, References for Preliminary Rulings Under Article 177 of the EEC Treaty and Co-operation Between the Court and National Courts, Mimeograph, (Luxembourg, 1985).

4/ Naturally, a trivial question of Community law, may be very important for the litigating parties, but in most legal systems such trivial legal questions, important as they may be for the parties, do not normally call for adjudication by the highest court in the system.

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and c. because of the absolutely _imperative_ need for a relationship of mutual trust between the European Court and national courts, the European Court, except in absolute _extremis_, _cannot_ _and_ _should_ _not_ exercise, at this stage in the development of the Community legal system, any of the "docket controlling" techniques which other supreme courts normally do. 5/

If direct "docket controlling" by the European Court is excluded for good policy reasons deriving from the judicial structure of the Community in all but the most extreme cases (such as _Mattheus_ _v_ _Doego_) what can be done towards the solution of that problem?

Although in the current ferment of possible institutional reform one hears more frequently the above mentioned calls for new Community tribunals, both first instance and specialised, I do not propose at this stage to enter into that field and either discuss the options or assess the merits of this or that proposal.

I wish to try and remain so far as possible within the current cosy structures with which we are all familiar and which have proved themselves up to the present. This choice is based not simply on the traditional conservatism of a lawyer - mine is after all a revisionist view, not a radical one... . It is based on the a conviction and a fear: the

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5/ See Rassmussen, A Note on issues of admissibility and justiciability in EC-judicial adjudication of federalism - disputes under Article 177. Paper submitted to Asser Institute Colloquium on European Law (1985). I believe Rassmussen is correct in examining profoundly the problem of docket control in the context of the ECJ. I disagree with some of his practical proposals at this stage in the development of the Community legal order.

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conviction is that remarkable gains made in securing the confidence and trust of national courts in the European Court are due in part to the slow, patient and evolutionary nature of these developments. Radical changes might constitute a set back. The fear is that changes which would necessitate Treaty amendment (other than in the context of a wholesale revision such as that proposed in the Draft Treaty Establishing the European Union) could become a Pandora's Box; who knows what the Member States will "get up to" if allowed to tamper with the judicial structure of the Community?

My view therefore is that what is needed above all is a new, revised, perspective of what the famous tandem -- the collaboration between the European Court and national courts -- ought to look like in the future. Acceptance of this revised perspective by all those involved in the administration of the Community legal system, European Court judges, national judges, and, of no less importance, practitioners (and perhaps even university professors, who educate tomorrow's practitioners and judges...), may in itself create a dynamic which could help redress the problem.

IV. Judicial Europe" -- "Variable Geometry"

Before outlining this perspective, I think it is necessary to mention one more pitfall which tends to plague discussion of these issues. Often, in analysing the problems of Article 177, we make the mistake of jumping uncritically from the normative legal world to the sociological legal world. From the legal point of view the Community and its

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Member States, in the fields covered by European law, is a homogeneous legal order. It is probably on this basis that one hears all to frequently all encompassing suggestions to improve the 177 procedure: 'one should introduce this innovation or that innovation' as if the problems one had with the application of the procedure were always uniform across the board.

Reality is, in fact, quite different. The geometry of "Judicial Europe" is distinctly variable. The point is obvious enough. Differences are clear among the Member States: One cannot compare -- or rather one can compare, but not equate -- the situation as regards Article 177 as between, say, The Netherlands on the one hand and Greece, or, for that matter Portugal on the other. Differences are clear also within or across Member State lines: One cannot equate the situation of some of the fiscal and commercial courts -- the "repeat players" of the system -- called upon to apply Community law as a matter of growing routine, and the "one-shot players" such as, say, a local magistrate faced once, in a career consisting otherwise in fining drunkards and dealing with petty crime, with an issue of Community law.

Even seen through the prism of the increasing case load with which the European Community legal system will have to grapple increasingly in the future, it is clear that we do want more and more references from the newer Member States to allow them to go through the same "formation" as their older partners. And that we should encourage the "one-shot players" not to decide issues of Community law, in which

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they have no experience, without making a preliminary reference.

But in relation to the other segment -- the "repeat players" in the older partners -- we may be justified in revising our views.

V. The Revisionist View

First of all we should describe a revisionist Utopia. In a utopian Community (and one should not forget that Utopia, like the coming, or re-coming, of the Messiah, is something that we must all hope for, knowing that it will not occur), there would be little or no references for preliminary rulings on interpretation! 6/ National courts and national judges will have integrated Community law so well, and the state of homogeneity among national courts will have reached such proportions, that Acte clair, will in fact be the order of the day, rather than an avoidance technique.

Let us describe a somewhat less than utopian Community, one that could one day be a reality. In order to do this I would like to make a brief comparative excursus to the USA.

It is always a dangerous, or at least tricky, venture to compare legal institutions in different systems -- especially when the systems display such great differences as those which exist between federal USA and transnational Europe. In this case there is, however, scope for

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6/ Interpretation on validity are quite another matter. In Utopia, these also will not be needed because the legislator will be perfect! But in any event, for a long time still it would be advisable for national courts to follow the Court's strictures in the ICC case and never invalidate a Community measure without a reference.

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functional comparative analysis between the two systems.

It is of course trite that the Community legal order does not have, as in the USA, a system of "federal" (Community) courts. 7/ But in some way, although the parallel is not exact, when confronted with questions of Community law, national courts and judges become Community courts and fulfil a function which is in some ways similar to that performed, in, say, the USA, by federal courts. In that system, and this is just one major difference, there is of course no preliminary reference procedure. If a lower federal court allegedly interprets and applies federal law wrongly there must be an appeal -- first to one of the federal appeal courts and ultimately to the Supreme Court of the United States.

The functional comparative argument runs as follows. In a federal state, such as the USA, there is, as in the Community, a high value that federal law, as distinct from State law, be interpreted and applied uniformly throughout the federation. At the end of the day, the Supreme Court, as its Community brother, is responsible for ensuring uniform interpretation and application of federal law. But the

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7/ I am not even sure that such a structure of lower federal courts would be good for the Community -- even if the Member States would allow it, which they would not. There is much to be said for the collaborative framework that has evolved in the Community. We may call it "judicial cooperative federalism" and its advantages outweigh its disadvantages. In particular, to mention just one, the decisions of the European Court "transmitted" through the mouth of national courts under the 177 procedure, not only enjoy an enforcement value equal to that of "purely" national judicial decisions, but also have a higher acceptability and legitimacy coefficient.

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absence of a preliminary reference procedure coupled with the existence of a plurality of lower federal courts and even federal appeal courts entails inevitably, that discrepancies in the interpretation of federal law could occur and that occasionally periods of time will elapse before they are uniformised by virtue of a definitive interpretation by the Supreme Court.

Clearly, the fact that the USA <u>is</u> a federal state whereas the Community is a transnational integrating order, displaying only some federal features <u>8</u>/ may mean, somewhat paradoxically, that there can be more latitude in the American system towards discrepancy.

But the critical question, and this for me is the crux of the matter, is whether today, with a better awareness of Community law both among judges and the Bar, is not already the time to encourage lower courts when confronted with Community law problems, and in effect willy nilly sitting as "lower Community courts", to be more active in its interpretation and application.

Whether the pattern should not be one in which in those jurisdictions <u>which have acquired experience in the application of Community law</u>, more responsibility should be taken by the courts, not in avoiding the application of Community law because of its possible inconvenience; or evading a reference to the European Court because of misconceptions of its role and false notions of judicial

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<u>8</u>/ See Weiler, The Community System: The Dual Character of Supranationalism, 1 Yearbook of European Law (1981) for a fuller analysis of the federal and non-federal features of the Community system.

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dignity and pride, but rather in taking charge fully of the function of national courts to be in the final analysis the real administrators of Community law.

It has already been noted, and approved positively, by two judges of the European Court of Justice 9/, that several national courts, especially in Italy and Germany, when making a preliminary reference give the Court of Justice their suggested interpretation of Community law. The step I am suggesting is simply the logical extension of this practice.

In other words, it could be argued that although in the "early days" of the Community a sign of good health would be the frequency of references as an indication of trust and collaboration between the ECJ and national courts, in a "mature phase" one would hope that the dissemination and knowledge of Community law would be such as to instill confidence that national judges would be sufficiently proficient to take a much larger responsibility. Arguably then, there will reach a point where a decrease in the frequency of references will become the sign of good health.

We may rephrase the question and ask whether in the current more "mature days" of the Community we should not favour a gradual shift in emphasis whereby first instance courts and lower courts in general should enjoy a greater autonomy and take a bolder approach and more regularly interpret themselves questions of Community law -- even in the absence of a previous ruling by the ECJ on the issue at

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9/ Koopmans, The Technique of the Preliminary Question - A Look from the Court of Justice, Asser Institute Colloque, id.; and Pescatore, note 3 supra.

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point -- leaving references to be made more regularly in appeal proceedings in those cases where the parties go to appeal.

The revisionist perspective is therefore one in which much more Community law, even on points which have not been decided already by the Court in the sense of Da Costa, (but not of course on questions of validity) and perhaps even extending beyond the guidelines (addressed strictly to courts against whose decision there is no judicial remedy) of CILFIT, will come to be interpreted and applied by those national courts who have gained the experience and confidence to engage in such an enterprise. Mistakes will always occur, but these, according to this revisionist view, could be corrected at appeal stage.

The dangers of such a shift are obvious enough and I shall mention just two:

- We might get a measure of disruption in the uniformity of interpretation and application of Community law;
- We might actually encourage appeals in the national system whereas an early reference could have authoritatively disposed of the case.

VI. Objections to the Revisionist View -- Possible Replies

1. It may be argued then that such a shift will not in fact lead to a decline in references, but simply to a shift in their source from first instance to appeal or final instance courts.

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I have two possible replies to this objection.

Firstly, often the parties are interested in a judgment and the costs and delays of further litigation may deter appeals. This might be especially the case when the national judicial interpretation of Community law seems plausible to the parties thereby increasing the risk of the losing party pressing for an appeal. Here again, with Community law becoming more integrated into the legal culture it is becoming more likely that national courts, with the help of the lawyers, may more easily grapple with the material.

It should be noted that I am not advocating that lower courts should never make a reference; rather that when they feel confident and experienced, and some are gaining considerable experience, it might be a good policy to allow them more room than the guidelines implicit in CILFIT.

Secondly, even if this revisionist policy would simply lead to a shift of more references from appeal and final instance jurisdiction, this might not be altogether negative in the light of our major problem, namely the increasing caseload. References coming from appeal courts enjoy, in this respect, two advantages: a. The likelihood of a further reference at an appeal stage of the proceedings is reduced; and b. more importantly, in appeal jurisdiction the facts typically are already "found" and established as a matter of law. Maybe they can be stated with greater precision when a reference is made to the European Court. Also, in appeal jurisdiction, the questions of national law may be determined with greater definition, so that the relevance -- the "necessary" element of Community law to the disposition

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of the case -- might emerge more clearly and the task of the European Court further facilitated.

2. The second major objection to this revisionist view might be that it would lead to non-uniform interpretation by different national courts. We should not, after all, forget that the main purpose of the 177 procedure is to ensure such uniformity throughout the Community. This of course is correct, but the possible reply to be given is that this phenomenon is known in all federal (and even non-federal) systems and that a mature system can tolerate a certain level of non-uniformity. On the long run, cases raising similar points will go to appeal, references will be made and uniformity will be established. What may have seemed decisive in the "early days" might be viewed today with greater tolerance. (It is although worth remembering that the European Court of Justice itself has tolerated a measure of non-uniformity in the remedies available to individuals for breach of the Community rights. 10/

It would of course be unacceptable if such a revisionist view would lead to Community law not being applied at all, namely that lower courts would not make references but decline to apply Community law altogether.

3. The final objection to the revisionist view which I would mention is that it is not revisionist at all. It could be said that not only has this view already surfaced in certain national decisions, but that in effect it is already an emerging trend. If this is the case my only merit would be

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10/ See Case 33/76 Rewe [1976] ECR 1980 and its well known progeny. See generally, Weiler, Il sistema comunitario europeo, (1985) at ch.11.

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perhaps to render explicit and defend a trend which in some ways clearly goes against orthodox thinking.

VII. Operationalising the Revisionist View

If I am to remain faithful to my earlier stated fear that radical changes might constitute a Pandora's Box, there would be not point in discussing major structural changes to encourage the so-called revisionist perspective. It spread, if at all, should be organic, and depend on changing attitudes by national bars, benches and by discreet signals sent by the European Court itself.

I wish however to depart now from this organic strategy and make one suggestion that could perhaps be discussed in the context of the ongoing debate about "simplified procedures", new instances of European Jurisdiction etc. Mine is termed a proposal for the "Green Light" procedure and it is in some ways an extension of the logic of the revisionist view.

VIII. A "Radical" Proposal: The Green Light Procedure

If I am right to be concerned about the growing caseload of the Court for the reasons mentioned above and other reasons, there might be another way of dealing, partially, with this problem without discouraging national courts from making references.

As I have already mentioned Judge Koopmans explicitly, and Judge Pescatore more implicitly, invite national courts, where this is possible, to state their view of the correct interpretation of Community law.

The Green Light Procedure would be concerned with cases

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of this type. The Procedure would run as follows:

1. The preliminary reference would arrive at the Court according to the normal procedure.

2. At the Court the case would be assigned in the normal way to a Juge Rapporteur and an Advocate General.

3. In those cases in which the national judge will have stated his/her preferred interpretation, if both the Advocate General and the Juge Rapporteur are jointly of the opinion that:

a. the case does not raise a point of Community Law which the Court itself need deal with;

and

b. the interpretation of Community law suggested by the national court is correct in its outcome (quaere: must the reasoning also be correct?);

and

c. neither the Commission nor any intervening Member State demand a full hearing and judgement

the case could simply go back, after a perfunctory oral hearing 11/ without a fully-fledged preliminary ruling, but simply stating that the Court finds no objection to the interpretation suggested by the national court.

Of course this would not preclude the same issue being taken up again if the Court on another occasion wishes to do so; nor should such a "ruling" have the same "precedential" and erga-omnes effect as normal preliminary rulings; thought would have to be given to the appropriate method of

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11/ The perfunctory oral hearing is necessary because it is provided for in the Court's Statute.

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publication.

I see two possible advantages in such a procedure:

a. it would eliminate the necessity of the full-fledged proceedings, hearing and judgement, thereby reducing considerably the workload of the Commission and Court and expediting the reply to the reference both in this type of case but also in all other cases since the overall workload will be reduced.

b. it may <u>encourage</u> courts at all levels of jurisdiction to gain experience at applying Community law.

Under this proposal the 177 jurisdiction would look roughly like this:

Normal references where the national court does not wish to attempt its own interpretation;

Cases where the national court interprets the Community law question, and under the new proposed procedure simply gets a green light to go ahead

Cases where the national court interprets the Community law question, but either the Court, or the Commission or an intervening Member State decide that there should be a normal procedure as we know it today.

I appreciate that this proposal has several weaknesses, and maybe even the advantages are not that great. I have none the less cast it in such a way as to avoid the necessity of Treaty amendment for its implementation.

In some ways it is not so different from the procedure used by many high courts in national jurisdictions in

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deciding whether to accept an appeal. There as well the decision will not be taken in full judicial proceedings, and there as well, the refusal to take an appeal amounts to a tacit acceptance by the high court of the legal interpretation given by the lower court, without committing itself to that particular solution for the future and without necessarily endorsing the reasoning.

IX. Some Further Implications of the Revisionist View

Adopting the revisionist view may give new perspectives with which to reconsider old problems. By way of example I wish briefly to mention some further implications of adopting the revisionist view.

a. Doctrine

A classical doctrinal debate concerns the the duty of a court to make a reference and the meaning to be given to the expression "a court or tribunal of a Member State, against whose decisions there is no judicial remedy" in Article 177(c). According to the "Organic Theory" only courts at the top of the national judicial heirarchy must make a reference -- it being understood that in several legal systems there are, depending on the subject matter, different lines of heirarchy. According to the "Specific Case Theory" one must look at each case and see whether in the specific proceedings the court seised is one against whose decisions there is no appeal and then there will be a duty to refer.

In his recent analysis, Pescatore opts for the Organic Theory. He explains:

By using that expression [in Article 177(c)], the

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Treaty is referring to supreme courts whose jurisdiction extends throughout the territory of a given Member State. It is they which ultimately, lay down the case-law applicable to all matters which fall within their jurisdiction. It is necessary to ensure - and this is the thinking which inspires the system provided for in Article 177 -- that, in matters of community law, case-law does not develop in the supreme courts which differs as between the various Member States. 12/

This view is consonant with the revisionist view; 13/ it implies that no irreperable damage will be done if discrepencies emerge among decisions of lower courts as between the various Member States, provided that eventually the matter could be settled on appeal.

b. Commission Policy of Prosecution

The Commission, from the Jenkins Presidency onwards has adopted a much more vigorous and automatic policy towards Member State infringements and the bringing of actions under Article 169 EEC. There is also an attempt to replicate 177(a) judicial review type cases by 169 proceedings.14/ While one is aware of of the reasons for this policy, one may wonder whether given the case law problem of the Court it should not be reconsidered.

12/ Pescatore, note 3 supra, at 19. If one adopted this view, my legal objection in note 1 supra to references from arbitrators would lose its strength.

13/ I would not wish to imply that Judge Pescatore approves of the Revisionist View, simply that his view on the Organic Theory is consonant with it.

14/ See generally Ehlermann, Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten durch die Kommission, in Europaeische Gerichtsbarkeit und Nationale Verfassungsgerichtsbarkeit, Festschrift Kutscher 135 (1981) and Ebke, Enforcement Techniques within the European Communities: Flying Close to the Sun with Waxen Wings, 50 J. Air L. & Commerce 685 (1985).

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X. Conclusion

We lawyers are by tradition conservative and any proposal for innovation is typically met with suspicion and resistance. But as European lawyers who insist that the national bar and bench change their traditional ways to take account of the (not so) new legal order, we might be more open for discussion of change. Nonetheless, I have put my head on the chopping block and I am sure there will be no shortage of executioners with very sharp axes.

I would not wish to appear as a crusader for either the so-called revisionist view or my self-labelled radical proposal. I have deliberately over emphasised the case for more autonomy of the national lower court judges in the hope of provoking discussion. I do retain however the view that an unchecked increase in the case load of the Court will have far-reaching and not altogether positive effects on its jurisdiction.

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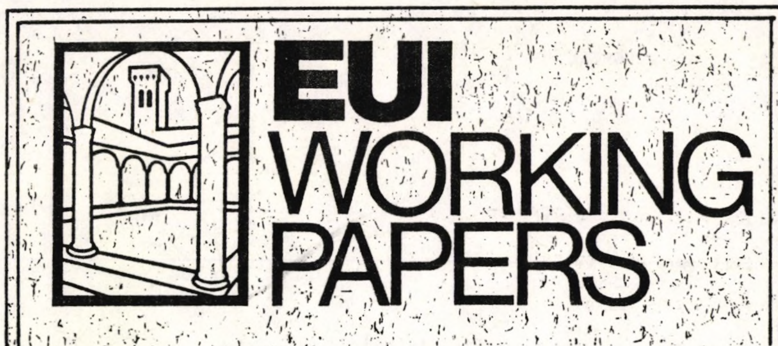

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