I

The Function of General Principles in the Practice of the European Court of Justice:

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SUMMARY

The use by the European Court of Justice of General Principles of Law is the subject of this study. It relates to the way the Court refers to and the extent to which it relies upon General Principles. On occasion, the Court refers to General Principles as synonymous with rules, at other times as separate but not clearly defined entities. Equally noteworthy, the Court, despite its aforementioned reliance on General Principles, elaborates little on the functions General Principles fulfil. To sum up, the Court acts in an intellectually provocative manner.

The major part of this thesis concerns the analysis of a number of cases involving General Principles from which certain contentions are derived and examined; that General Principles are an important source of European Community Law; that their use by the European Court of Justice has had a profound effect on European Community Law; that this area of law is an example of the dynamic tension between institutions and Community members, such tension being a natural consequence of a developing new legal order.

This analysis is preceded by a basic explanation of General Principles and a survey of their use in various systems of municipal law and international law, such analysis providing a framework in which it is possible to analyse the work of the European Court of Justice.

The thesis concludes with the observation that the above contentions are, in greater part, borne out and that General Principles are still and continue to be for the foreseeable future, an important source of European Community Law.

LIST OF ABBREVIATIONS

AC	Appeal Cases
AG	Advocate General
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
All ER	All England Law Reports
BYIL	British Year Book of International Law
CLJ	Cambridge Law Journal
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
EC	European Communities
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EURATOM) EAEC)	European Atomic Energy Community
ECHR	European Convention on Human Rights
ELR	European Law Review
FR	Fundamental Rights
GP	General Principles
ICJ	International Court of Justice
ICJR	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ILR	International Law Review
JCMS	Journal of Common Market Studies

JO	Journal Officiel (of the French Republic)
KB	Kings Bench (English Law Reports)
KC	Kings Council
LIEI	Legal Issues of European Integration
LQR	Law Quarterly Review
LR	Law Reports
MS	Member States
NJW	Neue Juristische Wochenschrift
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the EEC
PCIJ	Permanent Court of International Justice
QC	Queens Council
QB	Queens Bench (English Law Reports)
RCJB	Revue Critique de Jurisprudence Belge
REC	Recueil de la Jurisprudence de la cour de Justice des Communoutes Europeenes
WLR	Weekly Law Reports
YILC	Year Book of the International Law Commission
YWA	Year Book of World Affairs

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CHAPTER I - INTRODUCTION

CHAPTER I

In readings in the area of law before specific work was undertaken for the present dissertation, the author's attention was attracted by the ambiguity with which the term "general principles" was used. This initial interest in "general principles" was later strengthened when reading cases decided by the ECJ.[1] The Court referrred to GP sometimes as interchangeably synonymous with "rule" and sometimes as a separate but not quite clearly defined conceptual entity. Responsible for the elaboration of Community law with particular reference to its interpretation and application (Article 164, EEC) the ECJ quoted or referred to GP in an intellectually provocative manner : it mentioned implicity or explicity GP and their various functions without supplying however, in its reasoning, any exhaustive analysis or explanation as to the functions which the specific GP in question fulfilled in the progressive elaboration of Community law[2] This observation was the starting point for the choice of the topic for the present dissertation.

Indeed, an examination of the text of cases decided by the ECJ reveals many references to GP of law, and one may date such references as points to an underlying fuudamental question relating to the nature of Community law, and the function of such principles in the context of the Community legal system.[3] Community law, and in particular the law of the EEC, is based on broadly formulated texts.

Historically, this is due to a necessity, so common to international agreements, (and the Community Treaties are international agreements)

of compromise between the interests of individual states and the need to co ordinate them as contractual (treaty) rights and obligations.

Not infrequently, in such situations, treaty texts are drafted in such a way that they represent the lowest common denominator, that is, a basis of agreement as a starting point which may be developed through subsequent interpretation and application including application by judicial authorities. With reference in particular to EC law and its broadly formulated texts, it is evident that it would have to be articulated with reference to a number of sources, including GP of law.

Going beyond the immediate confines of Community law, that is in a more comprehensive survey, the term GP is mentioned frequently in literature relating to jurisprudence, legal theory, Municipal law, International law and, as indicated above, in the practice of the ECJ. In such contexts GP seem to fulfil an important function in the development and substantiation process towards a defined corpus of legal rules, that is, legal rules may draw from the sphere of GP, new substance for their consolidation and concretisation. But the corresponding functions of GP may respectively vary and indeed do vary from one sphere of law to another. As the general function is not limited to the sphere of Community law and a better understanding of it in the system of Community law would be enhanced by a comparative approach, the present dissertation concentrates on its main topic in Chapters V to VIII, i.e. after introductory Chapters II to IV which deal with the concept of GP, their application in the Municipal law,

and no less, the importance attributed to them in the specific structure of International law. For this reason in the present study the main core of the dissertation represented in Chapters V to VIII, dealing with GP in the context of Community law, will be introduced and treated against a background relating to GP in law in general, that is, a jurisprudential and theoretical approach (Chapter II); Municipal law (Chapter III); and International Law (Chapter IV). It is thus intended to discuss the function of GP in Community law against a contrasting background of respective comparable functions in the above-mentioned areas of law, that is moving (1) from a conceptual level in Chapter II; (2) to the sphere of Municipal law, in which GP, by virtue of de facto codefied law (rules) have a narrow functional margin to fulfil and (3) to International law, which by its incomplete, not systematically codified and relatively dynamic nature offers, at least theoretically, a wide functional margin for GP.

Chapters V to VIII examine in detail the functions of GP in Community law and more specifically in the practice of the ECJ. In order to ascertain the limits of the concept GP in Community law, Chapter V looks at the latter in the light of questions resulting from its specific nature as a new legal order or a legal order sui generis.

Chapter VI constitutes the core or the focal point of the study by analysing the function of GP specifically in the practice of the ECJ. Thereby questions such as the following will be considered: Has the Court adopted a considered approach to use of GP? In which specific

context or otherwise does the ECJ resort or refer to GP? Which specific functions do GP fulfil in those contexts? To what extent do GP in the practice of the ECJ clarify the nature of Community law as to its details and to what extent do they contribute towards its consolidation as a system?

Given the relative frequency with which the ECJ has referred to Fundamental Rights within a number of cases in the last ten to fifteen years and also with reference to the fact that in the framework of FR and Human Rights the ECJ has referred to GP, special reference will be made to principles and FR in the practice of the Court in Chapter VII.

Chapter VIII is a conclusion summarising the results of the study and trying to integrate them into a few basic points for an evaluation of GP and their application in the judicial practice of the ECJ and, therefore, in the progressive elaboration of EC law.

In terms of method underlying the present study, the title implicity indicates that, in the first place the study is based on an analysis of cases decided by the Court, or opinions formulated by the Court.[4]

As a result, reference to treaty and to statutory texts is of secondary importance.

The author hopes to show in this dissertation, using the above methods, that, through use of GP in cases, the ECJ has made an important contribution towards the development of EC law.

Furthermore, it is desired that this thesis may contribute towards a better understanding of the nature of GP and more specifically their function in the new legal order, European Community Law.

NOTES - CHAPTER I

1. Hereforth, the term general principles will be abbreviated to GP in the text.

2. See Chapter VI for an analysis of the possible reasons behind this action of the ECJ.

3. See Chapter VI for an examination of cases involving reference to GP.

4. Further reference to the writings of the judges in their individual capacity is also studied, where possible, as a secondary source.

CHAPTER II - GENERAL PRINCIPLES

Section 1 - Definition of GP

This dissertation, while dealing in the main with European Community law, also touches upon International law and various systems of Municipal law. Writing about Municipal systems that are the product of differing European cultures, about International law, which in comparison with the former is still at an early stage of development and of course, about the relatively sophisticated supranational order, European Community law, the need arises for a basic definition of GP which is equally applicable to all legal orders.[1] The first aim of this chapter is to provide such an explanation by giving a brief jurisprudential analysis of the concept "GP".[2]

As jurisprudence is a universally recognised area of legal research any conclusions reached here are to be considered as applicable to all legal orders. Further, the concept GP lends itself well to such usage. Cheng; speaking of the principles of salus populi suprema lex, good faith, responsibility and GP pertaining to judicial proceedings stated, "It is of no avail to ask whether these principles are GP of International law or of Municipal law, for it is precisely the nature of these principles that they belong to no particular system of law, but are common to them all".[3] It will be shown that the above phrase can, in fact, be extended to every GP, that is, that all principles irrespective of whether or not they are actually present in more than one system of law, contain within them the germ of universality.

A useful starting point for analysis is a basic definition of the

actual words. The Oxford English Dictionary, for example, supplies copious meanings for both general and principle.[4] The word "general" means in essence not specialised, universal. It thus has a meaning that is both easily comprehensible and narrow in scope.

This is in direct contrast to the word "principle". It is a word which functions merely as a convenient means to encapsulate a concept of limitless scope. Its definition recites many words and phrases which, without of course fully explaining the concept, make it more clear. Only through further definition of a number of these secondary phrases is an explanation of principle possible; the three phrases that are most helpful with such definition are "source of action", "a source of action", and "the source of action". Before going on to analyse these phrases, two points should be noted. First, despite their similarity these expressions illuminate three distinct aspects of principle. Second, the word "action" in all phrases is taken to mean any fact situation where a positive act of will is required by a person or persons.[5] Such an act of will may be either action or deliberate inaction.

"Source of action" has been analysed by Walker to show that GP of law operate both inductively and deductively. His lucid explanation is hard to better, "Inductive inference consists in drawing a GP from a number of similar observed instances, deductive inference is the process of applying GP to suitable particular instances. Both are illustrated repeatedly in the way the Courts handle previous reported

decisions, to help them solve a new problem before them".[6]

It is submitted that the phrase "GP are a source of action" infers that GP need not always be the only source of action. Thus they may be only one of a number of sources. As such, principles may be not a compelling source of action but only a useful tool in decision making. Used thus, principles seem to have at best an influential but not decisive role. An analysis by Hevener and Mosher shows that, in a legal order, GP are most frequently used in this way, that is, in conjunction with other sources. They conclude that "although GP may alone provide the grounds for the Court's reasoning, they are usually cited in combination with other sources".[7]

"GP are the source of action", this phrase means that GP can, on occasion, be either the main reason for action, or as Hevener and Mosher state, the only reason for action. This could be interpreted to mean that GP act as gap fillers, to be used as a primary source only when no rule is available or when other sources of law are scanty or of little relevance. This, indeed, is probably a correct definition but not a complete one. For, on occasions when GP are the source of action they may be serving as ultimate or fundamental precepts: i.e. whether GP are cited by themselves or in conjunction with other sources they may be serving as ultimate or fundamental precepts. This relatively scarce latter function of GP is extremely important for it reveals the depth and complexity of the concept of GP which, while present when GP are used in the other ways previously

mentioned, normally remains hidden. As such a further explanation is needed of GP as "the source of action", when GP function as ultimate precepts.

"GP as "the source of action" means that GP function as a concept phrase for the deepest motivation that prompts human action. Such motivation forces are termed values. To have a clear understanding of GP when they act, or more correctly stand in for, fundamental reasons for action some characteristics of the concept "values" must be understood. Before such characteristics are examined, however, a basic explanation of values is given.

An interesting definition of values is given by de Bono.[8] He states that values are converters, that is they act as the link between the need for action in a given situation and emotion. His explanation of values also includes a comprehensive classification which he labels the Four-M system of values; Me, Mates, Morals, Mankind. Me relates to the individual and includes all values that bear upon the self-image, status or ego of every individual. Mates concerns values that affect the relationship of the individual with those close to him. They include family, friends, groups of people, classmates and clubs. The third classification of values contains all those values that mankind relates to morality e.g. justice, ethics, religion. Mankind, the newest indentifiable grouping concerns such values relating to concern for the environment e.g. pollution, ecology. De Bono further states that the final group Mankind is at present the

focus of world attention, but that the third group Morals is the most important.[9]

In relation to law, the values most cogent are those that could be classified under morals. As such law comes within de Bono's classification.[10]

This is not to imply that the above explanation and classification is either unique or correct. It is doubted that there is only one correct explanation or classification of values. It is also thought unlikely that any one explanation can be totally correct or comprehensive. A further subjective explanation is that values could be seen as a formless mass of ultimate moral premises. This second explanation leaves open the question of whether values are converters.

A third evaluation does away altogether with this property of values. It suggests that values can be seen purely as perfect models (for conduct); ideal states which have no direct link to facts or action.

Leaving open the question of definitions of values, it is however possible to show how they operate as ultimate moral premises. For example, a value of interest to law is justice. Some shades of its meaning can be illustrated by showing how different individuals perceive justice; Daniel Webster wrote that, "Justice is the highest interest of man on earth".[11] His notion of justice gives it precedence over all other values. St. Thomas Aquinas wrote that an unjust law is a corruption of legality.[12] In his opinion it seems

that law and justice are one; any law which he believes unjust, despite its legal status is not law. As such, justice must be rated higher than man-made law. The views of both men, taken together, show that values are placed above the law. GP based on values may therefore be more important than rules of law. Sir Edward Coke, for example, judges law by an equally relevant value; he wrote, "How long soever it hath continued if it be against reason it is of no force in law".[13] Collectively speaking, the above views show that values rank higher than law. If so, then GP closely linked to their value bases may be more important than rules of law.

Having stated, however loosely, what values are, their major characteristics are now listed. The first, and principal characteristic of such basic motivations for human behaviour is that they cannot be arrived at by purely logical reasoning. The work of Hume and Reid has demonstrated that there are no statements of pure fact which we can give to back up whatever we set forth as our ultimate premises in moral arguments.[14] These conclusions find an echo in the work of de Bono who has frequently stated the impossibility of decision making without the use of emotion.[15] He has also written that emotions and values are the most important part of the thought process.[16]

Another important characteristic of values is that they possess both a stable and a dynamic aspect. Values are stable in that, throughout history, justice, truth and morality, for example, have remained the

standards to which mankind aspires. As such, justice, for example, is stable geographically as an ultimate moral premise worldwide, and stable historically, from the beginning of civilisation until the present day. The dynamic aspect is the necessary complement to the former, for while the abstract concept justice is aspired to, the definition of what constitutes justice is constantly evolving. As society advances, human beings both on an individual and on a collective scale absorb new experiences which shift the current acceptable standards to a new form.[17]

This last characteristic of values has three important overlapping consequences. First it means that values can never be precisely defined; there can never be a final and complete definition of e.g. justice, that is acceptable to the entire world as a whole, to all possible groupings, or even to a single individual, that will stand for all time or even at any precise time. Second it must then be the case that values cannot be limited by definition to a given number of actual and potential fact situations. Third due to this abstract nature of values, they cannot (for law at least) apply directly to most fact situations.

It is this final consequence that provides the link between GP and values. GP are the expression of values in a form concrete enough to apply to a given fact situation. If so, then de Bono's explanation of values as converters that link action to emotion is in reality also an excellent definition of GP.

Another way to state this could be to say that a GP is situated between two spheres. The first sphere is the sphere of ideal order, a perfect model, This encompasses all values. Here, in this area where pure ideas exist without relation to facts, GP begin. They too exist without relevance to the second sphere; fact situations. Concurrent with this mode of existence GP are also the source leading to action, i.e. they bridge the gap between the two spheres.

This inter-relationship between GP and values provides the key to understanding the nature of GP. Due to their direct link both to fact situations and values, GP have several novel features which make them unique legal tools of importance, both in a practical and a theoretical sense, to law. As GP are directly linked to values, the following statements can be made. Any GP that is relevant, in the opinion of the judge, to a fact situation whether it is a source or the source of judicial action, can be traced back to a value. It is impossible to give an exhaustive definition of a GP that will cover all actual or potential fact situations. As values constantly shift new GP will be created as a natural consequence of such movement. No GP will, in relation to actual or potential fact situations, have a constant theoretical definition or weight. GP will have constantly varying weight in relation to each other. A GP may well be traced back to more than one value, including values outwith the purely legal sphere. As values are universal, GP are, in theory, also of universal application.

Section 2 - The Relationship of GP to a Legal Order

Having given a basic explanation of the concept GP, the second aim of this chapter is to deal with the question, "What is the relationship of the concept GP to a legal order?" The broad answer is that GP are a source of law. As Silving has noted the word "source" may be used either in a causitive or normative sense.[18] A causitive source of law answers the question how law came to be. A normative source is an answer as to why it ought to be. As GP are based upon values which, in the opinion of the majority of philosophers, have been shown to be fundamental reasons for behaviour that are not ascertainable, that is, behaviour which defies totally logical explanation, GP more closely correspond to the category normative sources of law.

Having established the basic relationship of GP to a legal order, the next step is to identify their major functions in that legal order. It is suggested there are four major functions that GP perform - justification and/or explanation, clarification and two forms of interpretation.[19] As all four functions relate to language in certain ways, this subject is briefly elucidated.

It is possibly more accurate to say that GP relate to the defects of language for it is this point, the imperfection of language that is here stressed. As language serves, above all, as a means of communication, if it is flawed, then it must be an imperfect form of communication.[20] To some extent this is shown in its inability to give a generally agreed meaning to justice, religion and other values. Such flaws however, are not the result of human error in the

construction of language but are inherent in the device itself. As human beings, we receive through our five senses so much information from the world around us that it cannot be encapsulated by words alone. Further, all information received from sight, hearing, smell, touch and taste is processed by the emotional/intellectual complex of the human mind. Part of such information is collectively processed and then shaped into standards and rules for conduct designated by governments as law. As law contains complex abstract ideals as well as rules which themselves are by no means simple, it is impossible that it can satisfactorily be communicated by written and spoken words. To state this simply, words are insufficient to express all that is contained in law. GP have as their function the task of interacting with law to overcome, as far as possible, such problems. Though they are, of course, expressed as words themselves they have, as has been shown, a partly abstract nature through their direct link with values. As such they aid law in the following ways.

The first use of GP is that of explanation and or justification. Law, both written and oral suffers from an inability to express its relationship or link with the society that created it. Law is composed mainly of rules. Once a rule of law has been created, it attains a force or legality of its own, that is, it is not dependent upon GP or any other rule creating organ. It exists free from ties with society. Principles perform the task of keeping law linked to society. They perform this function for law as a whole, for groups of rules and for individual rules. For example, a rule concerning parking regulations viewed on its own may appear harsh and

nonsensical. Relating that rule to others on traffic control may show up principles of public policy or public safety which explain the rule.[21] These principles may also justify the rule, though this function is of a more subjective nature. For example, for Thomas Aquinas explaining a rule as coming under a principle would be meaningless if that principle could not be linked to the value justice.[22] Whether justification of a rule is necessary for that rule to be acceptable to an individual must depend upon that individual's perception of law.

The above shows GP acting as the link from law to society. Equally they may link society to law. That is, starting from a value or GP pertaining to that value, one could examine a rule or rules and check if they conformed to these GP, and therefore to that value. Thus it might be said of, for example, Scots rules on censorship that they are explained or justified by the present interpretation of freedom or morals by the majority of the Scots people.[23]

The second function of GP is clarification of law. This function comes about when law, of necessity, includes concepts that defy total elucidation. In other words, GP are used to express the abstract in law. A pertinent example, to be seen in greater detail later is the preamble of the EEC. This contains fundamental GP concerning the spirit of the law. GP here act as a link that relates directly to values yet are concrete enough to be put in a legal text.

This function differs from the first in that, whether or not the GP used here justify or explain any rule or rules, they definitely help law to state more clearly its intention in this given area. They thus help the law to operate. In a sense such GP are, more so than any principles mentioned in the first example, GP of law. That is they can more easily be found directly within the legal order. Thus GP have a utility which makes for a better understanding for the system and structure of law. This means that GP are decisive for the unity or homogenity of a system of law.

The third function of GP is to interpret the rules where, due to the fallibility of language and/or the complexity or uniqueness of the fact situation, their meaning is in doubt. Even apparently straightforward rules can result in complex cases to determine their meaning.[24]

A fourth use of GP is to allow the formulation of a rule where none previously has been articulated. Such a situation could arise due to the fact that the potential area of dispute was not thought of by the legislator at the time. Equally it may well be that, as society is constantly evolving, new interpretations of rights and duties have arisen. In this latter situation it is impossible for legislation to cover (or indeed try to cover) every contingency.

Section 3 - GP and Rules

Having stated both what GP are and what they do in a legal system, it still remains to show that they have a separate and unique identity within that legal system. This constitutes the final aim of this chapter and is achieved by differentiating principles from rules.[25] Possibly this is overstating the case as Positivism accepts that rules and principles do differ and that each has a place in the legal system. Instead, the positivist approach is to show that such differences are miniscule.[26] This, of course, has much the same effect as the original argument for if GP have little distinction from rules then, in effect, they cease to have any sort of independent function. The analysis that follows will deal with the problem in this manner. Several differences between rules and principles will be noted, after each, any relevant positivist counter-argument will be given. Conclusions will then be drawn as to the validity of such arguments. Finally, an evaluation of the situation will be stated.

In the first division between rules and principles which Tur labels as the traditional view, rules are held to be detailed and principles to be general.[27] The distinction, one of generality, was well put by Paton who stated "There is a vast gulf between the elasticity of a GP such as Public policy and the rigidity of a detailed rule".[28] The counter to this argument is that many principles are detailed and some rules are of general character.[29]

The latter statement is true but is, it is believed, inadequate for these reasons. In the vast majority of cases, principles are general

and rules are detailed. This is admitted by the positivist Tur, who wrote "There is an element of truth in the view that principles are less detailed than rules"[30] Thus, as the distinction of generality need not apply in every case and in fact does apply in most instances, it is submitted that it is a correct (and important) distinction.

A second traditional view is that GP are the reasons behind the rules. As such they are again broader than rules and as Walker puts it "justify and explain rules".[31] There are, in the main, two positivist attacks on the second statement on the difference between rules and principles. The first counter argument can be stated thus.

Both Walker and Tur agree law is a science, and as Tur says; "It is not the function of a science to justify legal rules".[32] The second counter-argument is that even if it could be shown that GP did justify rules it proves nothing, that is, no concrete conclusions follow. For example, rules which cannot be related to GP are still rules. Further, rules that are justified by GP are no more legal than rules not so legitimised, that is, they have no supralegal standing.

As to the legitimacy of the first counter-argument, that the function of science is not to justify rules, the following point should be noted. It is not universally accepted that law is indeed a science.[33] For example, Bailhache, in Belfast Ropewalk Co. v Bushell, stated "unfortunately or fortunately, I am not sure which, our law is not a science".[34] There are in fact so many adverse

opinions on the nature of law that no-one can say with any certainty what law actually is. If it is accepted that law has not yet been categorised as a science then moral justification is a valid expression for the relationship of GP to rules. As GP have values as their basis, and, as the work of Hume and Reid showed, values cannot satisfactorily be explained by logic alone, GP may be seen as a moral, or at least as a non-scientific justification for rules.

The second counter-argument seemed to foreshadow the above conclusion when it stated that even if it could be proved that GP justified rules, it meant nothing. In fact, there are also several ways that this latter criticism can be refuted. For those lawyers, theorists and academics that hold to the natural law viewpoint, the criticism becomes invalid.[36] This is freely admitted by the positivist Tur, who stated that such a viewpoint would explain the inconsistencies he believes GP possess for the legal system.[37]

For those who fail to agree with the natural law position however, it is suggested that, even so, it is still possible to believe that GP are part of law and also that GP can in fact validate any rule. If so, then all rules are equally legal in the legal order.

The third distinction between rules and principles is the more recent view that GP, whether or not it is believed they justify a rule, also serve as the explanation for that rule. Thus this third division relates to explanation not justification and therefore deals with the function of a rule, for, by classifying the great mass of legal

rules according to function, their rationale becomes clear. The action of GP in this instance was well put by Harari who wrote; "By looking for principles, one is looking for the very essence of the law".[38] To put it another way, rules tell us about the what of the law, principles tell us about the why.

The counter-argument to this seems particularly strong. If a principle is incapable of stating the conditions of its own applicability it is hard to see how it can function to determine the applicablity of a rule. This statement is given weight by the opinion of Paton who confirmed that: "The most accurate expression of a principle may still leave its application to particular circumstances in doubt".[39]

Again there are several comments that can be made here. One argument could be the pragmatic statement that, whether or not it is theoretically sound, judges do frequently gauge the applicability of a rule to a novel fact situation by use of GP.[40] This argument however must be seen as insufficient as it fails to refute the validity of the basic counter-argument.

Further Dworkin makes it clear that no formulae exists to make a principle a legal principle.[41] That is, no conditions of applicability exist for the general case. His statement reflects the abstract intangible nature of principles; "We argue for a particular principle by grappling with a whole set of shifting, developing and

inter-acting standards (themselves principles rather than rules)". In fact, the most positive statement that may be made is that a GP of law is one which officials must take into account, if it is relevant as a consideration that inclines the decision in one direction or another.

A refutation of the counter-argument is the statement that if a GP may determine its own applicability it would, in effect, become a rule. It is again Paton who makes it clear that vagueness "is a characteristic inherent in all principles"[42] In effect therefore, the positivist argument critises principles for not being rules. If there is a recognised procedure (as opposed to a scientific formulae) for determining the applicability of GP to rules in given fact situations, which in a legal system are the tasks of the judges and the legislators, then this argument of the positivists can be overcome.

The above in fact helps to lay down a further division between rules and principles. Thus the fourth distinction is that principles do not purport to lay down the conditions of their own applicability while rules do.

The fifth distinction is that principles have different weight in given fact situations. That is, that where two or more principles are relevant to the one fact situation, they are judged against each other and the principle most fundamental to the case will prevail. This comes about without in any way diminishing the importance or legality of the other principles in this case or in future cases. A further

point is that the weight of every principle is a constant variable for every fact situation, i.e. each fact situation is unique and requires an assessment of the importance of a GP or GP to that particular situation. By contrast where two or more rules are in conflict in a case, all but one must fall, that is be judged illegal for all time.[43] (All rules being equally legal).[44]

The sixth distinction is one given by Dworkin in relation to the above, he writes that rules are applicable in all or nothing fashion while principles only incline towards decisions but their determination is not conclusive.[45]

The seventh distinction is that rules are written while GP (in the main) are oral.

An eighth distinction is that rules are relevant only to one legal order, while principles are relevant to them all. When a rule is taken to another legal order it is taken under the guise of a principle - a function unique to GP.

The above does not purport to be a complete catalogue of all arguments concerning rules and GP. Nor is it claimed that there has been exhaustive coverage of all the arguments which have been outlined in the preceeding pages. It does however, it is suggested, present enough evidence to support the claim that GP differ from rules.

A further important point that should be brought home is that the above debate, unlike the current positivism versus principles debate, was not a conflict type of debate where one viewpoint alone must prevail. This debate did not attempt to make value judgements as to whether GP were better than rules or whether rules were more valuable than GP. In fact it is submitted that the above debate had several positive aspects. It showed that both GP and rules each have a place in any legal order. It further showed that GP and rules each have certain unique characteristics, such analysis contributing towards a better understanding of both GP and rules. By having as much knowledge as possible of GP and rules society is in a position to make the best possible use of rules and GP, both individually and collectively, for the benefit of all individuals within that society.

Having analysed the important question of whether rules differ from principles, a lesser question is now answered.

Section 4 - GP and Policy

Are principles different from policies? At the simplest level of argument, the answer would seem to be yes, that is principles are norms while policies are "is" statements. On a more sophisticated level, the argument becomes more complex. Dworkin for example devoted much thought to the problem before concluding that there is indeed a distinction, with arguments of policy justifying a political decision, "by showing that the decision advances or protects some collective goal of the community as a whole", while arguments of principle justify a political decision by showing the decision respects or secures some individual or group right.[46]

It is not argued that this analysis by Dworkin is incorrect but rather that its emphasis is placed incorrectly, that is, he searches for a tenuous distinction between policies and principles while devoting less space to the similarities between the two. It is contended that what unites is greater than what divides. As Dworkin himself notes the justification of a complex proposed action "will ordinarily require both sorts of arguments".[47] Even action that seems primarily to come under the heading of policy "may require strands of principles to justify its particular design"[48] Unlike the preceding paragraphs which argued that, though similarities exist between rules and principles the differences between them are important it is suggested here that the theoretical division between policies and principles, if any, be disregarded in practice. As Dworkin stated: "rights conferred may be generated by principle and qualified by policy or generated by policy and qualified by principles".[49]

With regard to community law, this loose explanation of GP and policies is adhered to. In particular, when the word policy is used it should not be assumed that GP are excluded from the areas dealt with at that point.

NOTES - CHAPTER II

1. It should be noted that this dissertation also deals briefly with the law of the United States of America (Chapter III).

2. The second and third aims are to determine the relationship of GP to a model legal order and to list their functions within that order; to state and evaluate the differences between GP and legal rules.

3. Bin Cheng, "General Principles of law as applied by International Courts and Tribunals" (1953), p.390.

4. A selection of such meanings is given here both for "General" and "Principle":-

   General - adjective; relating to a genus or whole class; including various species; not special; not restricted or specialised; relating to the whole or to all or most; universal; nearly universal; common; prevalent; widespread. The above are only a sample of definitions - see the Oxford English Dictionary for the full version.

   Principle - (1) origin, source, source of action; beginning; fountainhead; original or initial state (2) that from which something takes its rise, originates or is derived (3) in the general sense; a fundamental source; a primary element, force or law which produces or determines particular results; the ultimate basis of the existence of something; cause (4) an original tendency or faculty, a natural disposition.

Fundamental truth, law or motive force. A fundamental truth or proposition on which many others depend. A fundamental assumption forming the basis of a chain of reasoning. A general law or rule as a guide to action. Sir J.A.H. Murray (Editor), "Oxford English Dictionary" (1884-1928 Edition with supplement).

5. The word "action" is a concept word that covers a specialised area of legal research. See Alan R. White (ed), "The Philosophy of Action" (1968) for a selection of essays on this theme.

6. David M. Walker, "The Scottish Legal System" (3rd Ed., 1969), p.5. See also p. 30 "Principles are not commonly laid down by Statute or case but more commonly arrived at inductively by jurists from consideration of the particular decisions of various cases laid down in textbooks".

7. N.K. Hevener and S.A. Mosher, "General Principles of Law and the U.N. Covenant on Civil and Political Rights" (1978), 27 ICLQ, pp. 596-613 at 599.

8. Edward de Bono. He made these statements during the course of his Television Lectures, "De Bono's Thinking Course" (1982). Further see his various books for a fuller exposition of his ideas generally. His quotations given in this dissertation should be seen only as an interesting point of view intended to provoke further debate rather than as an authoritative definition of

values.

9. Edward de Bono (fn. 8).

10. Other theorists e.g. R.M. Dworkin and Sir H. Laterpact seem to agree with this classification of law under morality. Dworkin defined a principle (of law) as a "standard to be observed ... because it is a requirement of justice or fairness or some other dimension of morality". Ronald M. Dworkin. "The Model of Rules I" p. 22 in "Taking Rights Seriously" (1977, 3rd Impression with a reply to critics 1981). Laterpact defined law as the maximum allowable morality - Vol. I "The General Works" (1970), p. 13.

11. Daniel Webster, in Rhoda Thomas Tripp (compiler) "The International Thesaurus of Quotations" (1973), p. 516.

12. St. Thomas Aquinas, "Summa Theologiae" (1964 translation), Volume XXVIII, Iazae, 90-97 at 96,5 p. 133: "The argument is about a law which inflicts an unjust grievance on its subject ... in such cases a man is not obliged to obey". Mohandas K. Gandhi in "Non Violence in Peace and War" (1948), 2, 150 also strongly condemned such laws by stating: "An unjust law is a species of violence". The quote is in Tripp (fn. 11).

13. Sir Edward Coke, "Institutes" commentary upon Littleton First Institute 62a, "Oxford Dictionary of Quotations" (3rd Ed. 1979) p. 154 no. 17.

14. David Hume "A Treatise of Human Nature" (1978). T.E. Jessop, "A Bibliography of David Hume and of Scottish Philosophy from Frances Hutcheson to Lord Balfour", (1938). The book by Jessop is the standard bibliography of Hume's work. More recent books also of interest are Roland Hall, "Fifty Years of Hume Scholarship: A Bibliographical Guide", (1978) and David Fate Norton, "David Hume" (1982). Thomas Reid "Essays on the Power of Human Mind (1819), "An Inquiry into the Human Mind" (1970).

15. Edward de Bono (fn. 8).

16. These statements are to be found in many of his works see e.g. "The Use of Lateral Thinking" (1961). De Bono's attack on the importance attached to logic as the main ingredient of the thinking process is, as note 8 stated, given as a basis for discussion not as a statement of authority.

17. The quote by U.S. Supreme Court Judge Benjamin N. Cardoso, "The Nature of the Judicial Process" (1921), p. 29 seems relevant: "For every tendency one sees a counter tendency; for every rule its autinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless becoming. We are back with Heraclitus".

18. H. Silving, "Sources of Law" (1968), Introduction.

19. The statement that GP fulfill four functions in a legal order is, of course, subjective. J. Raz for example in "The Role of General Principles in the Law", pp. 839-40, 81 Yale Law Journal (1972) gives the following five functions. He states that GP are grounds for (1) interpreting laws, (2) changing laws, (3) for making particular exceptions in laws, (4) making new laws, (5) act as the sole ground for action in the particular case.

20. The imprecision of language and the problems that result from it are manifold. See e.g. Robert Thoulness, "Straight and Crooked Thinking" (1930 revised edition 1974), for an account of the abuse of language by individuals and organisations.

21. See Neil MacCormick "Legal Reasoning and Legal Theory" (1978) pp. 19-73 on deductive justification.

22. St. Thomas Aquinas (fn. 12). It is suggested that justification is necessary, e.g. Cicero said: "The good of the people is the chief law" De Legibus III, ii, 8. "The Oxford English Dictionary of Quotations", (fn. 13) p. 151 no. 17. Thus he submits law to the test of the ultimate good of human beings. In this manner, the law is justified. Presumably if law were to the detriment of the people, in Cicero's eyes it would not be justified (and therefore not law).

23. It may also be the case that examination of the law and or society shows that the link has been broken e.g. if views of society

change and the law remains, the rule, thought it is still a legal rule, loses its justification. Possibly this may result in pressure on parliament to change (or judges to re-interpret) the rule.

24. E.G. take a rule that concerns the number of witnesses needed to sign a will to ensure its validity. What does sign mean? Would printing be adequate? Is a mark made by an illiterate person sufficient? Are initials only acceptable? See the case of Riggs v Palmer 115 N.Y. 506 N.E. 188 (1899).

25. It should be noted that the rules versus principles issue is part of a larger debate concerning legal positivism. See H.L.A. Hart, "The Concept of Law" (1961), for the basic exposition of the theories on the nature of rules. See also J. Raz, "The Authority of Law" (1979), generally for an up-to-date account of the views of a positivist. For the purposes of this dissertation the most relevant Chapters in Raz are Chapter 4 "Legal Reasons and Gaps" and Chapter 7 "Kelsen's Theory of the Basic Norm". Further the books and articles by Hans Kelsen are also of interest in this debate e.g. "The Pure Theory of Law" (2nd edition, 1967), "The General Theory of Law and State" (1949). "What is justice? Justice Law and Politics in the Mirror of Science" (1971) see especially pp. 350-375 of this work where he discusses the distinction between positive norms and non positive norms which Tur (p. 67 see note 26) argues parallels the distinction between rules and principles.

For a "refutation" of the above views see, as the major work Ronald M. Dworkin, Chapters II-III The Model of Rules I, The Model of Rules II in "Taking Rights Seriously" (fn 10). It should be stated here that several ideas discussed in the dissertation text are from this source. It would be pointless repetition to acknowledge each individually. See also the important counter to the above article, by Raz, "Legal Principles and the Limits of Law" (1972) 81 Yale L.J. p. 823 and the reply by Dworkin contained in Chapter III. (The book being the latest printing of the original theories by Dworkin which were originally published as a separate article in (among others), 35 University of Chicago Law Review 14. See especially pp. 71-80, "Are Rules really Diffirent from Principles", and more generally pp. 291-369 "A Reply to Critics". Also of interest is the article by Colin Tapper, "A note on Principles" (1971), 34 MLR p. 628 which again attacks Dworkin's theories.

26. See the article by Richard Tur, "Positivism, Principles and Rules" pp. 42-78 in "Perspectives in Jurispruence", (1977); Editor, Elspeth Attwooll, hereinafter cited as Tur. His article deals with the differences between rules and principles. It does not argue that GP are not part of the legal order. See the article generally and also see p. 72 in particular, where Tur summarises his progress and lists his conclusions. Note especially point 9, "There is a distinction between rules and principles".

27. Tur (fn. 26) p. 45 uses the phraseology "modern view" and

"traditional view".

28. G.W. Paton, "A Textbook on Jurisprudence" (1946), pp. 176.

29. Tur (fn. 26) pp. 45-46.

30. Tur (fn. 26) pp. 56-57.

31. Walker (fn. 6) pp. 29-30.

32. Walker (fn. 6) pp. 3-6. He is of the opinion that the law is a true science. Tur (fn. 26) p. 46, states the same view.

33. There have been so many definitions of law given by various legal theorists that it is probably best for the individual to formulate his or her own. Thus it is suggested law is part art, part science, part struggle. The quote by barrister Gerald Abrahams, "The Chess Mind" (3rd edition 1975), p. 135 seems to lend this view support. He wrote that the part of any science which is not completely controlled or articulated is an art.

34. 1 K.B. 210-215 (1918), p. 213.

35. Hume, Reid (fn. 14).

36. For a basic definition of natural law, see e.g. "Salmon on

Jurisprudence", (12th edition, 1966), p. 15. "The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it confers to these principles. These principles of justice and morality constitute the natural law".

37. Tur (fn. 26), p. 47.

38. Abraham Harari, "The Place of Negligence in the Law of Torts" (1962), p.2.

39. Paton (fn. 28), pp. 171-177.

40. Tur (fn. 26), p. 48 notes this as an undoubted sociological fact.

41. Dworkin (fn. 10), p. 40.

42. Paton (fn. 28), pp. 171-177.

43. Dworkin (fn. 10), p. 26.

44. Dworkin (fn. 10), p. 27.

45. Dworkin (fn. 10), p. 24.

46. Dworkin (fn. 10), p. 82. See also his earlier analysis pp. 22-23.

With regard to EC law (Chapter VI) it should be noted that one can construe a policy as containing a principle and that a principle may state a social goal. If so then Dworkin admits (p. 23) that "The distinction can be 'collapsed'".

47. Dworkin (fn. 10), p. 83.

48. Dworkin (fn. 10), p. 83.

49. Dworkin (fn. 10), p. 83.

CHAPTER III - GP AND MUNICIPAL LAW

Section 1 - Introduction

Since both Municipal law codes and courts refer to GP, the question arises; what kind of functions are GP expected to fulfill in a legal order, what purpose do they serve? Is there, in this respect, a differentiation between one legal order and another? As the subject of the dissertation concerns GP in the context of EC law any observations in this present chapter are, with one major exception limited to the municipal legal systems of the MS.

Before going into details, reference should be made to the historical differences between the municipal law systems influenced in the first place by Civil law on the one hand, and on the other hand the municipal systems which have more dominantly followed the Common law, or Anglo-American tradition.

This differentation appears all the more meaningful as reference explicit or implicit, to GP is relatively more frequent in judicial practice than in statutory codification and judicial practice has had an important part to play in the development of common law countries, whereas statutory codification has in Civil law in the first place provided for the development of the law. Thus the Continental Civil law system and the Anglo-American system are the subjects of this chapter.

As to the continental system, the following remarks can be made. Firstly, as to how judges find the law, Zweigert and Kotz, whose book on comparative legal systems is both comprehensive and authoritative

stated: "The rule, applied all over the Continent, which determines how a judge must find the law when all else fails, is formulated in the Swiss Civil Code, Article 1, paragraphs 2 and 3, as follows; "If no statutory provisions can be found, the judge must apply customary law, failing which he must decide according to the rule he would, were he a legislator, decide to adopt - in doing so the judge must follow accepted doctrine and tradition".[1]

Secondly, the continental legal system is the root of the Community Legal Order.[2] When the Community was formed there were six original member states, the Federal Republic of West Germany, France, Belgium, Luxembourg, Italy and Holland. The legal systems of these states can be classified under the broad heading of Civilian systems.

Though the Community is a new legal order, it has strong affinities with these legal orders. No new legal entity can arise, complete, out of nothingness.[3]

Most of our ideas have roots in the past. Tradition is the storehouse for many apparently original ideas. To apply some thoughts from Kant's "Critique of Reason", legal experts seeking to evolve a coherent corpus of law for the Community may be said to be caught in something deeper than logic and which may best be expressed as "Meta-logic"[4] This transcends immediate categories of their reasoning and, in a similar way, transcends the foundations of legal traditions which have evolved in the past.

Thirdly, the major point about the civilian systems is their adoption of a written code as the basis of their legal orders.[5] There is in this an obvious affinity to Community law in that the Treaties are at the heart of the Community Legal system.[6]

It can therefore be said that, in keeping with the logic of Civil law tradition and with due regard to the broad form of EC law texts, the legal drafters of the original six MS had, more or less, a codification approach. In spite of its traite cadre nature, the EC treaties fall, in a categorical evaluation, more into the sphere of Civil law than Common law.

Section 2 - United States Law - The Marshall Cases

As to the Anglo-American system, its influence on Community law is overall of a lesser degree. This influence however, should not be underestimated. For example, for over a decade the United Kingdom has been a full member of the EC. The constitutional system of the United Kingdom is based on evolution through customs and conventions and constitutes, in the opinion of experts on constitutional law, a system that bears comparison with any other constitutional framework.[7]

Of equal interest, and possibly greater relevance to EC law, is the legal system of the United States. In certain specific areas United States' law has had a major influence on Community law.

First, modern United States' law and practice has provided valuable specialised information on Anti-Trust Law, the results of which may be seen in the formulation of Articles 85 and 86 EEC and subsequent case law relating to these articles. Second, the Supreme Court of the United States is comparable in its role and structure to the ECJ. Advocate General Lagrange has stated that the Supreme Court is the closest legal relative of the ECJ.[8]

Third, it is suggested that the present stage of EC development is comparable to the United States law of the early 19th century. A study of the Supreme Court cases of Chief Justice Marshall are the most relevant examples.[9] The main issue in Marshall's cases was how trade should be regulated among states. In Friedmann's opinion "The Supreme Court, with other important political factors believed that

the country should be governed as a single large free trade area".[10] The major case on this issue was Gibbons v Ogden, 1824 where, for the first time the court was confronted with the problem of interpreting the commerce clause.[11] Johnston commenting on the case wrote that: "In terms of the economic growth of the United States, Gibbons v Ogden liberated interstate trade from trade barriers erected by the various states.. Upon the holding and dicta of Gibbons v Ogden the entire body of federal regulation over interstate commerce is based."[12] In fact, McCloskey went so far as to say that on the answer to the questions in Gibbons v Ogden "the future of America as a nation depended".[13]

It seems clear that the above case is, for United States' law, the magna carta of free trade law. Yet before examining aspects of Gibbons v Ogden in detail, it should be noted that the foundation on which such a forthright judgement was made were laid in earlier cases. McCloskey noted the important facts that "the judges have been deviled by uncertainty about their own status in the young American polity", and also, "the constitutional agreement of 1789 was inexplicit about the nature and scope of judicial authority."[14] In brief, this meant that the court itself was responsible for drawing up its own commission.

In the case of Marbury v Madison 1803, the doctrine was established that the Supreme Court will interpret and construe the constitution and that any law in derogation or contrary to the constitution is

unconstitutional and null and void.[15]

Marbury v Madison dealt with the division of powers within the branches of the federal government. It provided a strong statement of the nature of federal law at a critical time in United States' history, when, as Johnston put it, "the seeds of dissention over slavery were beginning to sprout".[16]

Another relevant case that laid down a base for later judgments was Cohens v Viginia. [17] This case involved the authority of the Federal Supreme Court to review the judgements of the judicial systems of various states. Because Cohens upheld the federal supremacy, it was far more significant than the previously cited case of Marbury v Madison which, as stated, dealt with only the division of powers within the federal government. In fact, of this case Johnston said: "One cannot overstress the importance of Cohens v Virginia" [18]

Having shown how the Marshall court first took upon itself power to judge the issue in Gibbons v Ogden, its use of GP in this and subsequent cases, e.g. Brown v Maryland is now examined.[19] Once again, the statements made here should be seen in relation to Chapter VI.

As Johnston noted when Marshall took up his position as Chief Justice there was "substantially little constitutional law to be consulted for precedents".[20] The actual clauses to be examined, the contract

clauses were, at that time, drafted in a much broader fashion than their modern equivalent. The technical rules of contract were only beginning to be evolved.

In plain language, the Marshall court decided the cases, of necessity, on GP. Marshall set forth what Frankfurter and Holmes both characterised as "guiding principles" and entrenched these in a position "above the reach of Statute and State".[21] Further, Marshall, in using GP as the means had a clear aim in mind "to combat an incipent state oriented mercantilism on the one hand and legislative supremacy on the other. Even in these areas, the balance of federal state power was to be maintained".[22]

The results of the Marshall cases are these; the unification of the commercial law of the country;[23a] the development by American commercial law of its own substance and style, the curtailing of the power of the State to pursue independent policies on trade.[23b]

A final point to note on this chapter of United States' law is that the Marshall cases did not, as might be deduced from this brief discussion, produce a total solution to United States trade problems. As McCloskey noted Marshall felt he had failed to resolve the great problem of nation state relationships.[24] McCloskey's own analysis on this point bears out, once again, the correctness of a Marshall opinion. He also takes his analysis one further step to make a most important point which is equally relevant to the European Community Court, that no court could, on its own, finally settle an issue of such dimensions.[25]

Section 3 - Civil Law and Anglo American Law

The Anglo-American system, though overall of lesser influence on EC law than the civilian system, warrants, as has been shown, a full explanation. By a comparative analysis both systems of law will now be seen in sharp focus, with their fundamental differences clearly outlined.

As to a basic comparative explanation of the two legal systems and the positions of GP, both in legal theory and judicial practice in Anglo-American law and Civil law, the exposition given by Lord Cooper is hard to better. As a Scottish judge he deals with a legal order that has elements of both systems interwoven in its fabric. His statement is the distillation of both theory and practice. Lord Cooper wrote: "A Civilian system differs from a Common law system much as rationalism differs from empiricism or deduction from induction. The Civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The Civilian puts his faith in syllogisms, the Common lawyer in precedents. The first silently asking himself as each new problem arises, "What should we do this time?", and the second asking aloud in the same situation, "What did we do last time?" The instincts of a Civilian is to systematise. The working rules of the Common lawyer is solvitur ambulando". [26]
The basic distinction between the respective legal systems can be summed up thus, in Common law, inductive problem-solving, Civil law; systematic conceptualisation. As to principles it is clear that both systems make use of principles. The basic difference is that, in Civil law the principles are there, implanted and or implicit in the

code waiting to be used, while Anglo-American law has present the rules and cases, waiting to be analysed to discover the principles.

As regards the use by the ECJ of GP, the Civil law methodology should prevail. If so, a major part of the dissertation, Chapters V to VII, must be to find the principles that are present in EC law. Once this is done their use can then be analysed.

This statement, that the Civil law methodology is the major influence on ECJ practice, is a major point that should be made in order to understand the workings of the ECJ and their use of GP. Yet to stop here, stating only that Civil law and Anglo-American law are different and that the major influence in the Community both in formulation of the EC and ECJ methods is the former, would be a shallow analysis of the situation. While this statement is broadly correct, the Civilian and Common law systems have since evolved from the clear cut position previously outlined.

The present situation is that the two legal systems are moving closer together, that their major conceptual differences are eroding. Though Lord Coopers's definition of the systems is correct as such, every statement that seeks to fix the meaning of a legal system or any part of it must always be subject to later review.

As Zweigert and Kotz note in their important statement: "To sum up; On the Continent the days of absolute pre-eminence of statutory law are past, contrariwise, in the Common law there is an increasing tendency

to use legislation in order to unify, rationalise and simplify the law. On the Continent, law is increasingly being developed by the judges into a systematic order, so as to make it easier to understand and master. There are therefore grounds for believing that although the Common law and the Civil law started off from opposite positions, they are gradually moving closer together even in their legal methods and techniques".[27]

In attempting to construct a frame of reference by which to examine (or judge) the work of the ECJ with regard to their use of GP, the above statement has several points of interest. As the Community is a new legal order such a frame, ideally, should be constructed purely on the basis of European Community law. Yet in a new legal order at an early stage of development, it is in the foundations, rather than in the structure itself that materials for a frame of reference are found.

The most obvious place to start the construction of the frame of reference is by reviewing Community judicial activity purely in the light of Civil law. Such review would be insufficient however as Civil law as was noted noted above is steadily growing closer to Anglo-American law. Some account of this latter system would need to be included. Given the built-in influence of Anglo-American law in the EC, this trend is dramatically accelerated in that legal order.

A further factor that increases the influence of Anglo-American

methodolgy is the present state of EC development. As a relatively young legal order the rules are few. Thus the code of the EC is sparse and the work of the judges seems more to follow the Common law practice, from instances to principles rather than from principles to instances.

The later chapters of this dissertation, having examined a number of ECJ cases involving GP, will give a more exact account of the methodology of the Court. It can still be noted at this point however, that the EC judge, while still (broadly speaking) a Civil law judge has greater scope than his Civilian counterpart.

For all practical purposes, therefore, the frame of reference for "judging" the work of the ECJ is in constant flux, for, though its base is in Civil law, changing circumstances both in comparative law and within EC law result in a progressively greater amount of Anglo-American methodology being added to the frame of reference.

To sum up, this makes for greater difficulties in constructing any satisfactory sort of reference by which to analyse the use of GP by the ECJ. Civil law and Anglo-American law are in a state of progressive harmonisation while Community law is, as yet, too new to possess the authoritative identity by which such precise judgements can be made. Thus, in the final instance the onus falls on the judges themselves to evolve a code of practice.

Section 4 - English Law

Having given a brief outline of the schools of law, individual legal systems are now examined. With Scottish law being, as previously stated, somewhat of a hybrid system, English law is the major common law influence on the EC. This system will now be examined. Edward Wall stated English law was an "interaction of Roman law, Canon law, Common law, Statute and Administrative law as well as custom and usage".[28]

Nowhere in this relatively complete definition is GP mentioned. The major task of this section is therefore to find GP, if they exist, in the English legal system.

English law, unlike the majority of Member State legal systems, has no developed doctrine of GP. As will be shown, it is nevertheless the case that GP exist in English law. It is probable that principles have always been present in that system, though under a different label. Professor Lawson, writing during the 1950's showed that English law had a strong element of rationality, or, in otherwords a strong base in GP.[29] However, the words used were "general character" rather than GP, when dealing with English law as a whole. As Duhamel and Smith correctly noted, English lawyers at that time did not normally think of GP at that level.[30]

The situation at the present time is being altered, through English interest in French administrative law, an early example being the 1951 lectures by Hamson.[31] A more modern indication of the changing face

of English law was given by Brown, who has analysed English law in all its main branches, and has found certain key doctrines which may be identified as GP.[32] These are present both in substantive law and legal techniques, and judicial practice.

It is further argued by Brown that as well as English law having GP present within the system, the English legal system is well able to develop GP.[33] For example, recent cases show that reasonableness has become a pervasive notion that may absorb the concept of proportionality; the GP, "the right to be heard", is being refined into a GP of administrative due process.[34]

If Brown is correct in his surmise, then it bears out the opinion of Zweigert and Kotz that the major systems of law are converging, for here the continental notion of GP is clearly being recognised as an independent source of law. No longer is it hidden under broad statements such as "general character".

Section 5 - German and French Legal Orders

The following sections now examine briefly the individual legal codes of Germany and France. This is done in order to show that, even within systems under a common tradition, (Civil law) there are still differences of approach as regards the drafting of such documents and the use of GP's consequent upon this. Further, this will serve to show that, even though the EC follows along Civil law lines, in the drafting of its constitution and subsequent use of GP by the ECJ, this body reserves to itself a marked degree of individuality. In general it is mistaken to be over-zealous in classification of all aspects of a legal order.

The major point to note about the German Civil Code, the B.G.B., is its solidity. Though many areas have of course been altered by legislation, a prime example being family law, Zweigert and Kotz correctly state that "the structure of the B.G.B., taken by and large, looks very much the same today as it did seventy years ago"[35] The maintenance of the structure of the B.G.B. is the work of the courts.[36] Such has been the weight of case law on the B.G.B. that parts of it "are covered by a heavy gloss of judicial decision often to the point that a mere reading of the text will not disclose what the law actually is".[37]

An example of such patina is labour law. In labour law a study disclosed that the courts imposed a general duty of fidelity on the employee and on the employer a general duty of care for the safety and welfare of his employees, and a duty to treat them equally. This was

done mainly by use of GP. Though such judicial action had little statutory basis, the principles the courts evolved are often used to solve the many and varied concrete problems arising out of the contract of employment.

The main statutory tools by which the courts have performed such actions have been the general clauses of 138, 157, 242 and 826 of the B.G.B. Zweigert and Kotz suggest that these "clauses have acted as a kind of safety valve, without which the rigid and precise terms of the B.G.B. might have exploded under the pressure of social change".[38]

The explanation by Zweigert and Kotz needs but little elucidation. It can, however, be further stated that by action as a safety valve GP are a link between a given system and social political substance which will evantually crystalize in the form of a rule, GP being the given essence of many rules.

Thus all these clauses contain fundamental principles, for example, 242 B.G.B. states, in general terms, that everyone must perform his contract in the manner required by good faith, in view of the general practice in commerce.

In German law therefore, GP have, and do play, a vital role in the maintenance of the law.

A reading of the French Code reveals clearly the depth of thought

behind its drafting.[39] This point was also noted by Zweigert and Kotz who wrote, "Beyond doubt the French Civil Code is intellectually the most significant, and historically the most fertile".[40] Having its foundations in the creed of the Enlightenment and the law of reason, it upholds the convention that social life can be put into a rational order if only the rules are restructured according to a comprehensive plan.

A major point to note is that the rules are not too detailed. This was a deliberate policy of the draftsmen who realised that even the most ingenious legislator could not foresee and determine all the possible problems which might arise. Thus room was left for judicial decisions to make the law applicable to unforeseen individual cases. The wider implication of such far-seeing action is that it can be stated that the French Civil Code is suited to the changing circumstances of society.

The writings of the 19th century French jurist Portalis clearly reflected this trend of thought. Equally impressive, his views foreshadowed the current view that the dichotomy between Statute law and Common law is not as fundamental as previously thought. He wrote, "The task of legislation is to determine the general maxims of the law, taking a large view of the matter. It must establish principles rich in implications rather than descend into the details of every question which might possibly arise .... We shall leave gaps and they will be filled in due course by experience".[41]

As to the use made of these principles "rich in implications", GP of law, as the term is understood in France, are not used as directly applied rules but as guides to the lawmaker, the legislator, the judge, and the interpreter of existing legislation, e.g. rules that statutes are presumed not to be retroactive nor take away common law rights or remedies are seen as GP of law being brought to bear on the interpretation of statute.

The question, on what legal basis do such GP rest? has been investigated by Jenneau.[42] He rejected the preambles of the 1946 and 1958 constitutions and also the 1789 Declaration des Droits de l'Homme as the source of GP of law. They were, he suggested, only the crystalisations of GP not their source. Custom was also rejected as the basis of GP. Jenneau concluded GP could only be understood as the products of the norm creating activities of the courts.

A further point of some import as regards GP in French law is that judges draw conclusions from principles and not authority. The validity of such conclusions rests, not on the source from which it eminates but on the correctness of the reasoning. Conclusions are less important than correct reasoning. Thus, for French law, reasoning and not rules is the ultimate judicial tool.

In comparing the German and French codes, each has principles which are fundamental to that code embedded into its very fabric. Further, even where principles are used in the less important sense, as gap fillers, they advance the development of both German and French law.

All this, of course, both results in and is the result of, the active role played by their respective courts in making use of these principles, that is, the legal climates in these countries are favourable for principles to flourish. The differences in the method of draughtsmanship of the codes, however, lead to a divergence between use of principles. The German Code has a terminological exactitute, a scientific precision, while the terms of the French Code are often (to an extent intentionally) inexact, incomplete or ambiguous.[43] This means that the French Code gives greater scope to the activities of the judiciary.

In Community law, it is submitted, the treaties read as closer in spirit to the French than the German Code, that is, study of the EC Treaties reveals that the terminology of EC texts is, as in French law, broadly, vaguely and here and there ambiguously formulated. Further Portalis's ingenious phrase "principles rich in implications" strikes a chord with the fundamental principles which embody the spirit of EC law. These are discussed in detail in Chapter V and VI.

Section 6 - Conclusions

To conclude this chapter five points should be noted.

Firstly, Municipal law, whether Anglo-American or Civil law, clearly has GP as a fundamental part of its structure. Further the Municipal law has a definite need for GP, and this provides a receptive atmosphere for the judiciary to make use of GP to help integrate law and society.

Secondly, if, as suggested, the EC is clearly related to municipal law systems, GP should have a role to play at least as important as that in any municipal system. In view of the relatively youthful state of EC law at present, use of GP in EC law should be at its peak in this century.

The third point concerns the frame of reference by which to analyse the work of the ECJ with regard to GP. If Zweigert and Kotz are correct, and the systems of Anglo-American and Civil law are gradually converging then the frame of reference must be constructed from a base of Civil law, with gradual additions of Ango-American legal methods.

The fourth point is the reminder that, as the EC is a new legal order, it is of course not bound by the traditions of any or all municipal legal systems, not even by the French Civil Code. Thus, in essence (even at this early stage of EC development) the rules of EC law are the only true frame of reference by which to judge the judges. Yet as EC law has, as its sole official interpreter, the Court of Justice, a

great responsibility falls upon that body to use its powers in a responsible fashion. Thus a point is made here which will be emphasised throughout the course of this dissertation. In the end, for the EC legal system to work, we must trust the judges.[44]

The fifth point is that, in surveying all the various cases mentioned implicitly in this chapter, all, with the exception of the United States Marshall cases, could be termed micro cases. Chapter VI deals in detail with the definition of these terms micro and macro, but it can be noted here that macro cases involve a constitutional element and, once decided, have a major effect upon the law. Micro cases, though important in themselves, have an influence only over the particular area of law arising in the case. From this fact statement the following points are deduced. All systems that featured micro cases are highly developed legal orders. As such it is the norm that for advanced legal orders macro cases should be rare. The United States legal system, at the time of the Marshall cases, was, it is suggested still at an early stage of development as regards the workings of the constitution. This resulted in a natural surge of macro cases to determine the important issues mentioned in the survey of United States law.

Further, as was noted, these decisions had a great influence on the development of United States law. This leads to an important analogy with EC law. As a new legal order it is to be expected, as a natural phenomena, that a relatively high number of macro cases will arise during the first decades of ECJ practice.

NOTES - CHAPTER III

1. Zweigert and Kotz, "An Introduction to Comparative Law", (1977), p. 14. For a detailed study of the Swiss Federal Court, see the article by Fred L. Morrison, "The Swiss Federal Court; Judicial Decision Making and Recruitment", pp. 133-162, in "Frontiers of Judicial Research", edited by Joel Grossman and Joseph Tanenhaus (1969). See also Christopher Hughes, "The Federal Constitution of Switzerland" (1954).

2. Anna Bredimas, "Methods of Interpretation and Community law" (1978), p. 127, wrote; "Community law has an affinity in its tenor and legal technique with the municipal systems".

3. As Lucretius said: "Nothing can be created out of nothing". (Nil posse creari De nilo", De Rerum Natura I 155 of Epicurus), in "The Oxford Dictionary of Quotations", (3rd edition 1979), p. 320 Notes.

4. See generally Immanuel Kant, "Critique of Pure Reason", (Revised edition 1944). See also "Kant on Pure Reason", (1982), and "A Commentary to Kant's Critique of Pure Reason", by Norman Kemp Smith, (1918).

5. See Zweigert and Kotz (fn. 1), pp. 68-177 for a history of the evolution of the various European Codes. See also Arthur Engelman, "A History of Continental Civil Procedure", (1928).

6. It is still an open question whether the Treaties constitute a Community constitution.

7. See e.g. S.A. de Smith, "Constitutional and Administrative Law", (4th edition, 1981), for an account of United Kingdom constitutional law. See also H.W.R. Wade, "Administrative Law", (4th edition, 1980), and "Constitution Fundamentals", (1977).

8. Advocate General Lagrange in AJCL (1966/67), p. 711 wrote: "There are definite analogies between the ECJ and the United States Supreme Court. Both constitue the highest judicial power in a political structure that is federal in the USA and is clearly "pre-federal" in Europe. The two Courts are each part of the government structure, and not international in character. Each discharges a two-fold function; first to ensure respect for the individual component states as well as for the group as a whole. Second in cooperation with the judiciary of the member states to guarantee that the laws will be administered for the benefit of the individual citizens as well as the member states".

9. The history of the Supreme Court of the United States, and in particular the Marshall cases is, in itself, a fascinating area of study on the judicial function generally. See the article by Edward D. Re, "The Judicial Role in the U.S.", pp. 227-249, in "Law in the United States of America in Social and Technological Revolution", edited by John N. Hazard and Wenceslas J. Wagner, (1974). See also Robert G. McCloskey, "The American Supreme

Court", (1960). On the Marshall court, see as the main source, "John Marshall", by Herbert Alan Johnston, (hereinafter cited as Johnston), (pp. 285-351), Vol. I in "The Justices of the United States Supreme Court - Their Lives and Opinions", Vol. I-IV, edited by Leon Friedmann and Fred Israel, (1969). See also Lawrence M. Friedmann, "A History of American Law", (1973); Felix Frankfurter, "The Commerce Clause under Marshall, Taney and Waite", (1979). Philip B. Kurland (editor), "Felix Frankfurter and the Supreme Court", (1970) especially pp. 533-557; "John Marshall and the Judicial Function"; Robert G. McCloskey supra pp. 54-80, "The Marshall Court".

10. Friedmann (fn. 9), p. 230.

11. Gibbons v Ogden 9 Wheat 1, (1824).

12. Johnston (fn. 9), p. 295.

13. Robert G. McCloskey (fn. 9), p. 69. He also noted the questions, "First, what is interstate commerce? Does the term cover only buying and selling or does it apply to such activities as navigation? Second, once we have determined what interstate commerce is, what is the extent of the power to regulate it? Third, what is the effect on the states of this growth of power to congress? Must they stay out of the field altogether or do they have a concurrent right to control it? It is not too much to say

that the future of America as a nation depended on the answers that were given to these questions".

14. Robert G. McCloskey (fn. 9), p. 54.

15. Marbury v Madison 1 Cranch 137, (US 1803).

16. Johnston (fn. 9), p. 297. The case of Marbury v Madison is also worthy of study for the far sighted opinion of John Marshall on the consequences of slavery.

17. Cohens v Virginia 6 Wheat 264, (1821).

18. Johnston (fn. 9), p. 297, it is suggested that these acts of the Supreme Court in Marbury v Madison and Cohens v Virginia bear comparison with the early judgements of the ECJ which also tended to give a shape to their somewhat loosely defined power granted by Article 164 EEC (See Chapters VI and VII).

19. Brown v Maryland 12 Wheat 419 (1827). Here Marshall gave powerful practical application to the possibilities intimated in Gibbons v Ogden, see also Wilson v The Black Bird Creek Marsh Company 2 Pet, 1829.

20. Johnston (fn. 9), p. 297.

21. The original opinion is in Oliver Wendell Holmes "Collected Legal Papers", 1921, p. 270. It is quoted by Felix Frankfurter in "Felix Frankfurter and the Supreme Court", (Editor - Philip B. Kurland) (fn. 9), p. 537.

22. Johnston (fn. 9), p. 299.

23. The Supreme Court moved to unify the commercial law of the country. It hoped that a single body of law would emerge under federal hegemony. Swift v Tyson 16 Pet. 1 (1842) decided that federal courts, in ordinary commercial cases had the right to apply the "general" law of commerce even if this was different from the law of the state in which the court was sitting, and even if no "federal question" was presented and the case came to a federal court solely because plaintiff and dependant were residents of different states. See also the further cases of Eire Railroad v Tompkins 1938 302 US 671, and Klaxon Co. v Stentor Electric Mfg. Co. 1941 312 US 674 which overrule Swift v Tyson In Eire Railroad it was said, "In a diversity case the federal court is obliged to apply the common law as it exists in that State and not the federal law". Klaxon went on to state that, "The prohibition of Eire extends to the field of conflict of Laws". Thus taking the two cases together, it could be said the Supreme Court is now backing down from federalism.

23b."The decision (in Gibbons v Ogden) hammered a few more nails into State sovereignty", McCloskey (fn. 9), p. 71.

24. McCloskey (fn. 9), p. 79.

25. McCloskey (fn. 9), p. 79.

26. Lord Cooper, "The Common Law and the Civil Law" - A Scot's View, 63 Harvard Law Review 468, 1950 p. 470. It is of interest to note that Neil MacCormick, "The Principles of Law", Juridical Review 1974, pp. 217-226, at p. 217 disagrees with this view. With respect to Lord Cooper the distinction to which he alludes seems, to MacCormick, to be more a matter of the generality of the premise from which reasoning proceeds, than a matter of deductive or syllogistic as against other forms of reasoning. This statement shows, once again, the subjective nature of all such statements which give definition to aspects of law.

27. Zweigert and Kotz (fn. 1), p. 274.

28. Edward Wall, "Europe: Unification and Law", (1969). The statement is on the back cover of the book. See also on English law generally the well-known text by Sir Geoffrey Cross, "The English Legal System", (6th edition, 1977).

30. Duhamel and Smith, "Some Pillars of English Law", (1959)

31. Hamson, "Executive Discretion and Judicial Control", (1953).

32. See the article by L. Neville Brown, "General Principles and the English Legal System", pp. 171-193 in M. Capelletti (Editor), "New Perspectives of a Common Law of Europe" (1978) hereinafter cited as L. Neville Brown (1978).

33. L. Neville Brown (fn. 32), pp. 177-185.

34. L. Neville Brown (fn. 32), pp. 185-190.

35. Zweigert and Kotz (fn. 1), p. 152.

36. For a more detailed look at the Federal Court see the article in Grossman and Tanenhaus, "Frontiers of Judicial Research, (1969), by Donald P. Kommers, "The Federal Constitutional Court in the West German Political System", pp. 73-133. Of particular interest are pages 74-76 on the History of the Court. See also Hans Rupp, "Judicial Review in the Federal Republic of Germany", 9 AJCL (1959), pp. 29-47: Edward McWhinney, "Constitutionalism in Germany and the Federal Constitutional Court", (1962).

37. Zweigert and Kotz (fn. 1), p. 150.

38. Zweigert and Kotz (fn. 1), p. 150.

39. See Kahn-Freund, "A Source Book on French Law", for a detailed and up-to-date (1979) introduction to French law. See also M.S. Amos and F.P. Walton, "Introduction to French law", (3rd edition,

1967), L.N. Brown and J.F. Garner, "French Administrative Law", (2nd edition, 1983). A series of essays on the Code Napoleon in B. Schwarz (editor), "The Code Napoleon and the Common Law World", (1956) is also of interest e.g. Andre Tung, "The Grand Outline of the Code", pp. 19-45.

40. Zweigert and Kotz (fn. 1), p. 78.

41. Fenet, Recuil Complet de Travaux Preparatoires du Code Civil (1836), p. 68 1 p. 470, 475. An abbreviated version is also quoted in Zweigert and Kotz (fn. 1), p. 82.

42. Kahn Freund (fn. 39), p. 155.

43. Zweigert and Kotz (fn. 1), state the German precision of detail is inherited from the Pandectists. See generally pp. 133-156 on the history of the Germany Civil Code.

44. B. Cardoso, "The Nature of the Judicial Process", (1921), likewise makes this point in a more general sense. He also quotes, p. 17, Erlich: "In the long run there is no guarantee of justice except the personality of the judge" who makes the point more directly. It is suggested that this notion is of great importance both for EC law and for law in general.

CHAPTER IV : INTERNATIONAL LAW AND GP

Section 1 - Definition of International Law

This chapter has three basic aims. First, it will show the relative importance of GP, as applied by the ICJ, to a specific legal order, Public International law.[1] This will cover both the theoretical and practical impact of GP in this sector. Second, a case will be made out for the view that there is a strong analogy between International and Community law. Third, the question; "What relevance have the problems that concerned the use of GP by the ICJ for EC law?" will be analysed. A necessary preliminary to these issues however, is to give a basic explanation of the meaning of International law.

What is International law? The words themselves suggest the meaning of the concept they embody. International law, inter-nation law, law among nations, the law in question consisting of a body of rules and principles governing powerful independent entities called nations. International law is law created by, and to some extent binding upon, sovereign states[2] This view of the nature of International law corresponds to the classic definition of the legal order among nations.[3]

There is also a further, more modern definition of International law. There is no single form of words that precisely encapsulates this definition. All such expositions however, stress the position of the individual within the International legal order.[4] It is suggested that these two definitions can be seen as complementary, that is, that the former still contains the essence of the meaning of International law while the latter points out the direction in which International

law is slowly moving.

In order to facilitate explanation of International law it may, for this purpose, be seen as consisting of two distinct branches, the law of treaties and relations between states where no previous agreements on conduct, save loose customs, exist. The major points to note on the law of treaties is that in ratifying agreements, states agree to be bound only within that limited area of agreement. Further, the extent of such restriction is usually clearly defined as falling within certain limits. Finally, such treaties bind only the contracting parties.[5]

As to relations between states where no treaties exist, this is by nature an area where previous experience cannot be called upon to lay guidelines, save in the vaguely defined area of customary International law.

Section 2 - Article 38(c)

Having stated in a basic form what International law is, it can now be ascertained precisely what relationship GP has with this system of law. The statute of the ICJ supplies the answer that GP is a source of law. Article 38(c) states the sources of International law the ICJ will apply (a) International Conventions, (b) International Custom, (c) The General Principles of law recognised by civilised nations, (d) writings of highly qualified jurists. Before Article 38(c) is analysed as to its exact meaning, it should be recognised that GP constituted a source of law long before Article 38(c) was drafted. The article serves only as written evidence of this fact.[6] It should also be noted that GP may be used by the ICJ as a tool for the interpretation of treaties as well as in its own right as a source of law. As such GP have relevance for both parts of the International law classification, treaty law and non-treaty law.

Article 38(c) has been of the utmost interest to commentators upon International law. Much has been written upon all aspects of Article 38(c), from accounts of the meetings that led to the precise formulation of the final draft, to various views as to the exact meaning of the phrase itself.[7] Some of these views on the meaning of Article 38(c) are now examined.

In brief, there are three major explanations of Article 38(c). The first was well elucidated by Virally who held that the words "civilised nations" referrred to all systems of law that had achieved a comparable state of development.[8] Further the words "GP" were

derived from Municipal law and especially from private law.[9] The second explanation concentrates solely upon the meaning of the words GP. It believes that GP refers to GP of justice, linked closely to the Western World's interpretation of natural law. Von Glahn outlines this as the process of "the transformation of broad universal principles of a law applicable to all mankind into specific rules of International law".[10] He added the rider however, that in his view the law of nature, legally speaking, is a vague and ill-defined source of International law.[11]

These two explanations may be classified as the major schools of thought on this subject and the third view, which follows, as the minority view. It is that Article 38(c) as a whole is a kind of subheading under treaty and customary law and incapable of adding anything new to International law. A well-known representative of this camp, the Russian legal theorist Tunkin, thought GP only reiterated the fundamental precepts of International law which had already been set out in treaty and customary law.[12]

Which, if any, of these above views is the correct one? To deal with the minority view first, it can be seen as an echo of the positivist arguments outlined in Chapter II. Again as in Chapter II, there is a measure of truth in this argument for here there is a close link between GP and custom. Waldock pointed out this fact when he wrote that "GP that have made a large contribution to the development of International law tended to become absorbed in customary law".[13]

The arguments against GP being a part of rules and customs of International law are as follows. It should be made clear that the fact this is only a minority view in no way detracts from its correctness or otherwise. As such this does not constitute a counter-argument. More to the point, however, are the arguments in Chapter II concerning rules and principles. As stated there, the arguments countering the view that GP are a sub-group of rules hold, in the main, in any legal order. If so, then the conclusions thereby arrived at are held to be valid for treaty rules in International law.

Concerning custom, the arguments again come from the definition of GP in Chapter II.

As Tunkin stated, and Waldock confirmed, many GP's have become absorbed in customary law.[14] However there is possibly some semantic confusion in the actual statement by Waldock. His words are a form of shorthand that hide what actually happens when GP are used. When a GP is used in a concrete situation, a case law rule emerges from that particular situation.

The role of GP in a parallel situation is thus ended. The rule has now taken its place. Where many different examples concerning a single GP are tried in court, a good part of that GP is thus absorbed in customary law. If this situation occurs with many GP's it can be said, in a concise way, that many GP's have been absorbed in custom. The full statement however, is rather that many instances of many GP have been absorbed in custom.[15] As Chapter II pointed out, no GP

can be completely defined or exhaused by use in fact situations. Thus it is a fallacy to suggest, as Tunkin does, (and Waldock seemingly does), that a GP can become completely absorbed, and thus completely defined, by custom. Rather, it is the case that so many instances of a GP have been settled in court that the case law is almost sufficient to deal with potential closely related instances. It is believed however, that no principle can thus be totally eradicated. As such, GP remain an independent source of law.[16]

For the two major schools of thought on the meaning of Article 38(c) the correct view, it is suggested, is not to see them as incompatable but to regard them as complementary to each other. This is confirmed by Jennings in a major analysis on International legal practice. He concluded that "both approaches are interwoven in the entire fabric of the historical developments of International law".[17] This conclusion also fits in well with the jurisprudential ideas stated in Chapter II, that is, that GP's are not condusive to rigid definition or classification.

Section 3 - The Use of GP by the ICJ

Having given a basic explanation of the meaning of Article 38(c) and having established that it is an independent source of International law derived both from Municipal law and the law of nature the contribution of GP, both in a theoretical and a pratical sense, towards the development of International law may now be examined. Within the confines of this dissertation, the extent of such contribution is limited to the use of GP by the ICJ.

As regards practice, an analysis by Cheng has shown that relatively speaking, the ICJ has handled few cases involving GP.[18] The possible reasons for this are examined later. The starting point, however, must be theory. The widest and most comprehensive account of the possible implications that Article 38(c) had (or indeed have) for International law was given by Schwartzenberger. His views reiterate some theories given earlier in Chapter II.

Schwartzenberger stated that the creation of Article 38(c) had the following seven consequences.[19] "First, they enabled the court to replenish without subterfuge the rules of International law by principles of law tested within the shelter of more mature and closely integrated legal systems. Second, they opened a new channel through which concepts of natural law could be received into International law. Third, they held out to other international judicial institutions a set of rules they might adopt, as a last resort, into their own practice. Fourth, they made it possible for the world court to strike out a bolder line in its application of International law

than, in the absence of such wide reserve powers, the Court might have found it possible to take. Fifth, they prevented the failure of International adjudication through non liquet. Sixth, they re-introduced the standard of civilisation into International law and divided nations into civilised and uncivilised. Finally, they threw out a challenge to the Doctrine of International law to sail into new and unchartered seas".[20]

This statement by Schwartzenberger is of great relevance both for International law and Community law. It is taken as the basis of one of the major points of this dissertation, that is, the major dynamic impact of GP on the EC. The reasons for this belief will be given later in this chapter. Further as much of that explanation overlaps with International law, it is only noted here that Schwartzenberger's belief in the importance of Article 38(c) to the International legal order was shared by the eminent jurists Brierly and Lauterpacht. Brierly wrote (of article 38(c)), "It is an authoritative recognition of a dynamic element in International law, and of the creative function of the courts which administer it"[21] Lauterpacht made a similar point, "Finally, it gives express sanction and encouragement to the continued enrichment of International law from the accumulated experience of the legal development of the nations of the world".[22]

Thus, the ICJ has a major tool which affords it freedom to uphold and evolve the law of nations.

A further point of Article 38(c) is that its creation helped refute the extreme positivist doctrine, which is that only rules to which states have given their consent, constitute a source of International law. Lauterpacht wrote, "It definitely removes the possibility, asserted by the extreme positivist school of writers, that International tribunals may have to decline to give a decision because of the apparent absence of an applicable rule of law - a contingency unknown to the internal state of the law. It successfully challenges the mistaken view that the will of sovereign states is the only source of International law".[23]

The last sentence of the statement by Lauterpact brings forth an obvious yet vital point. If the will of sovereign states is being changed by Article 38(c) from "the" source of law, to "a" source of law then, in effect, the doctrine of sovereignty is challenged by GP. To put this in a more jurisprudential mode, the GP of sovereignty which by virtue of its long establishment in the International legal order has atrophied into the rigidity of an all or nothing rule, is being forced to revert to the truer, more elastic, form of a GP, that is, a source of law which, on occasion, may be the source of action. This should be noted as a further major point both for International law and EC law. Its implications are seen both throughout the course of this chapter and this dissertation.

Thus, in theory, the ICJ has, through Article 38(c), great freedom of action and consequently great power. Has either facility been realised in practice? To check on the actual development of

International law by the ICJ a thorough and authoritative study of cases involving principles is needed.

The most comprehensive analysis of this kind was by Bin Cheng in 1953.[24] Cheng chose four principles and studied them in detail. He analysed the principles of self-preservation, good faith, responsibility and GP of law in judicial preceedings. Many cases relating to specific instances of the above were examined. His conclusions were as follows:-

In general, Schwartzenberger's contention that principles were of theoretical importance is bourne out. As Cheng wrote, "GP's lie at the very foundation of the legal system and are indispensible to its operation".[25] He also wrote that this premise held good for any legal orders.

As to the practical application of principles by the ICJ (and other tribunals) he concluded that GP served three definite functions. First, they constituted the source of various rules of law, which are in reality only the expression of various principles. Second, they are the guides of the juridical order according to which the interpretation and application of rules are oriented. Finally, in International law where rules are few, the function of GP of law acquires special significance and has contributed greatly towards defining the legal relations between states.

It could be said Cheng's work shows that GP hold a position of

practical importance in International law while never really reaching the theoretical heights expected of them by Schwartzenberger. Later studies on GP in International law echo this conclusion that GP are an area of unrealised promise, a field of unfulfilled potential. The authors of these studies cited three possible reasons for this state of affairs. It is suggested that two of these reasons are of relatively minor importance and these are now dealt with briefly. The first cause is of a technical nature, namely the difficulties of the comparative law investigation. Bishop states there difficulties plainly, "at one time it was sufficient to examine the Anglo-American Common law and some of the legal systems based upon the European Civil law. Now Japanese law, Islamic law, Chinese law, Soviet law, Hindu law and other legal systems have to be taken into account".[26] Such factors complicate the comparative law analysis to such an extent that doubt is cast on the practical worth of the GP's that result from such a search.[27a]

A second reason is that a part of International law, the law of diplomacy, is already comprehensively filled out by rules and has few gaps requiring the attentions of GP.[27b]

The third and main reason for the comparative failure of the ICJ to make full use of GP is difficult to express in purely legal terms as it has political overtones.

The problem is that International judicial institutions depend upon the consent of states both for their jurisdiction and for the

acceptability of their opinions and decisions.

Friedmann clearly stated the consequences of such a situation, "They (The ICJ) therefore have to exercise great caution in the application of GP of law, lest they be accused of unauthorised exercise of international legislation".[28] A close analysis of the cases contained in the study by Bin Cheng shows precisely this restrained use, by the ICJ, of GP.[29]

Nevertheless, the ICJ has, despite its caution, failed to avoid the wrath of its clients for, as a recent study by Prott noted, "Its history is full of examples of defiance of its judgments and opinions.[30] This leads naturally to a fall in the prestige of the ICJ against other units of International social system, a fact also confirmed by Prott in his analysis.[31]

If this is so, then the next pertinent question must be "What are the reasons for such actions on the part of states?" There are two possible explanations. The first is that, as Friedmann noted, the fear by states of judicial legislation. This argument, it is believed, is not theoretically compelling. The logical counter to it was pointed out by Lauterpacht who wrote that "use of GP may be a necessary, and indeed inevitable way of filling a lacunae in the interpretation of a specific question".[32]

The crux of the matter does not rest with the somewhat spurious argument that judges legislate. The source of this apparently

political problem stems from the legally cogent point that International law is still, relatively speaking, a recent phenomena.[33] The recognition of the study of International law as a topic dates from the latter part of the 16th century. Historically speaking, therefore, the work needed to shape law among nations has just begun.

Thus both International law itself, its Institutions, and more importantly, its major subjects, states, (as regards their external relations), are still in a primitive stage of development.[34]

It is not argued that International law is not law as such for as Lauterpacht says, "the inadequacy or even the absence of any of the constructive elements of law need not detract decisively from the legal character of a system of rules of conduct".[35] However, the absence of a superior authority endowed with legal power to impose new rules of law binding in all states; the lack of a sovereign executive capable of enforcing International law and no regular tribunals gives weight to the previous contention that International law is relatively backward.[36]

As to the states, their handling of external affairs leaves much to be desired. In particular, there is a marked contrast between the sophisticated internal structure of a state and its conduct in external relations. The main evidence for this primitiveness of states is the universal strength of the GP of sovereignty. This leads to an unsatisfactory state of affairs for, as Lauterpacht stated,

"Within the community of nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of states".[37] In International law, the doctrine reveals itself mainly in two ways, first as the right of the state to determine what shall be for the future the content of International law by which it will be bound; second, as the right to determine the content of existing International law in a given case.[38]

It was Virally who bluntly stated the major truth regarding the development of International law, that without some weakening of the doctrine of sovereignty further progress in International law is impossible.[39]

The above arguments lead back directly to the ICJ and its lack of use of GP, for the doctrine of sovereignty manifests itself here in two ways; in the reluctance to grant any form of real authority to the ICJ, and in the refusal to accept its decisions in certain cases. The argument can be summed up thus. Due to the lack of development in the external structure of states, they fear and mistrust International institutions. Their power vis a vis such institutions is too great for International law to develop smoothly. As GP are, by definition a dynamic legal tool that takes law in a new direction, states are reluctant to allow the Court the use of GP. For fear of losing their control over the law states fear the use of GP by the ICJ.

To sum up what has been said this far, GP are a source of International law, theoretically capable of bringing major benefits to

International law. They also provide the ICJ with a certain freedom of action. In practice, the ICJ has used GP on comparatively few occasions, and then in a conservative manner. Even so, such action has resulted in some judgments being virtually disregarded with two consequences, the stunted development of International law; the loss of prestige by the ICJ. The root cause of the problem was identified as the GP of sovereignty. To some extent, the action of the states in upholding sovereignty has been cloaked by their unjustified counter allegation of judicial lawmaking.

Section 4 - Affinites between International law and EC law

The subject of International law is one of great importance for the future stability of the world. It is a cliché but true nonetheless that the world is shrinking and becoming more interdependent. Harmonious inter-state relations are thus imperative. As, however, the topic of this dissertation is the use of GP by the ECJ, all that has been written so far, while interesting in itself, is to be seen primarily as an aid to understanding and explaining the main theme of GP in EC law. Thus it is believed that this chapter contains much of interest to EC law. Before going into detail, it is necessary to establish a definite link between International law and EC law.

First, and most importantly, the EC is at base yet another agreement between states.[40] Second, despite its many novel features, the EC still confirms closely in structure to an International law model, e.g. a major EC institution, the Council, as ECJ Judge Pescatore stated, "remains, from the point of view of its legitimacy, within the traditional framework of inter-state relations".[41]

Third, the Community, as an entity, conducts its external relationships under the rules of International law. Fourth, it is believed that, as in International law, despite the existence of Institutions, states are important subjects under the EC law. The father of Europe, Jean Monnet, was of the opinion that the EC was concerned with relations between people.[42] This, as will be argued later, is a correct theoretical viewpoint but, at this early stage of EC existence, states have an undue importance in Community

affairs.[43]

The last statement leads directly to the fifth point, the evolution of EC law. Unlike Municipal laws which have evolved slowly and spasmodically over a long period of time, EC law has, relatively speaking, suddenly been created whole. It therefore resembles International law both in its origins and in its lack of maturity and development.

At this point it could be said that a close link between International law and EC law has been established. There is however, a further more subjective point to make. It is that International law, not Municipal law is the basis of European Community law.

It is suggested that EC law is a positive sign of the continuing development of International law. EC law should be seen, not as a Municipal law system writ large, but as an advanced sub-group of International law and as the logical progression of inter-state relationships. Vis a vis Municipal law, International law is the base, Municipal law the superstructure of EC law.

Section 5 - The Theoretical Impact of GP on Community Law

Having established the basic position as regards International law and Community law, the theoretical impact of GP on Community law will now be examined. As stated previously, Schwartzenberger's statement is used as his was the deepest appreciation of the nature of GP. Further, there are similarities in the way GP entered the respective systems. In both International and EC law, GP existed before any statutory confirmation (save Article 215 EEC) but Article 38(c) and Article 164 and 173 EEC serve as positive confirmation of the fact that GP are a source of law.

The seven statements of Schwartzenberger are now individually analysed for their relevance to EC law. The first was that "they enabled the Court to replenish, without subterfuge, the rules of International law by principles of law tested within the shelter of more mature and closely integrated legal systems". This sentence could be, with the exception of the words International law, wholly appropriate to use of GP in EC law. There is an interesting point in that Schwartzenberger seems to imply that before the advent of Article 38(c) the Court did use GP, or some similar device, to replenish the rules with subterfuge.

"They opened a channel through which concepts of natural law could be received into International law". This is also a possibility in EC law, though the mention of natural law clouds the issue somewhat. As stated in Chapter II, it is not necessary to hold a natural law position in order to uphold various tenets of natural law. Therefore

this second statement could read that GP open a channel for various fundamental values e.g. fundamental human rights, to enter EC law and thus provide a link between EC law and society.[44]

The third statement, holding out a set of rules for adoption by other judicial institutions, has little relevance for EC law. By contrast, the fourth dictum is of importance, "they made it possible for the world Court to strike out a bolder line in its application of International law then, in the absence of such wide reserve powers the Court might have found it possible to take". In other words, the ECJ by dint of GP has great freedom of action, which freedom it can legitimately utilise to produce "bold" decisions. This statement, if correct, gives a possible answer to any criticism of unathorised judicial legislation. Several so called bold or dynamic macro case decisions of the ECJ will later be examined in depth. While it will always remain a matter of judgment as to whether any decision over-reaches its limits and becomes judicial legislation, it is important to note that by dint of GP entering the EC legal order, the Court acquires a certain amount of freedom of action.

The fifth statement, that GP prevent failure of adjucication through non liquet is also applicable in EC law. The sixth, referring to classification of nations is irrelevant. The final statement, however, is of interest, "Finally they threw out a challenge to the Doctrine of International law to sail into new and unchartered seas". This, it is believed, is the natural counterpart to item four. That gave, or legitimised, the power of the Court. This gives that power a

definite direction. It stems from an understanding both of the nature of GP and the nature of law. As Chapter II demonstrates rules alone cannot contain the means, at any given time, to deal with all unforeseen situations. General principles can best express this abstract side of law and are sufficiently elastic to encompass all possible fact situations for any given principle. This means that case law involving GP is capable of dealing with unique situations and thus, as Schwartzenberger noted may go in a new direction. These cases may thus help give a definite shape to EC law.

Taking all five relevant statements together it can be said that GP have great theoretical potential for EC law, that, through their use in case law they are capable of affecting every part of EC law from the most prosaic to the most vital.

Section 6

The Implications of International Law and ICJ Practice for EC Law and ECJ Practice

As to the comparative law search the EC has a limited number of members states. Furthermore, these states share a common legal tradition. In consequence, there is no particular difficulty as regards the ECJ's search for GP from the municpal traditions of the MS.

Regarding GP from other sources, the search is limited to one legal system at a time, usually in a specific area e.g. USA anti-trust law. With the increase in EC membership, Greece in 1980 and Portugal, Spain and Cyrpus proposed, extracting GP may become more difficult but overall it is not a problem that should inhibit use of GP in EC law.

The second problem, areas of law outwith the ambit of the ECJ is of little relevance to the EC. In general there are few areas, and these of little import, where the ECJ and therefore the use of GP is excluded.

The third problem related to the weakness of the ICJ, the lack of any real authority to enforce its judgments, the distrust of its judgments (and of the ICJ itself) by states and its lack of prestige as an International institution. As to judicial authority, it is here that the most radical difference between the ICJ and the ECJ occurs, the latter has jurisdiction in all judicial matters over all EC

subjects including states. This fact should be the end of worries over this matter and might seem to overcome the last problem of GP in EC law.

It has been previously noted however, that the above problem faced by the ICJ had a root cause, the backwardness of states' external relations machinery, manifested in the GP of sovereignty. It should therefore be asked if the GP of sovereignty has any disruptive, or potentially disruptive, effects on EC law. In theory the answers should be no for it is believed that the whole institutional structure of EC law was conceived with the idea of inhibiting the power of the state vis a vis EC institutions. However, the first 25 years of EC existence have provided powerful evidence to show that this idea has not been fully realised. The main areas of this dissertation deal fully with the reasons for this but various factors may be noted here; the growing power of the Council; the dubious innovation of the European Council; the Luxembourg Accords. All these things suggest that the EC, far from advancing, is reverting to a more normal inter-state agreement.

Thus, the GP of sovereignty seems a disruptive factor within the Community. If so, it is also a dynamic factor that acts against the ECJ and to some extent, as will be seen, is acted against by the ECJ.

CHAPTER IV - NOTES

1. Public International law will be referred to as International law throughout this dissertation.

2. D.D. Raphael, "Problems of Political Philosophy", (1976), p. 54 "We may therefore define the state as an association designed primarily to maintain order and security, exercising universal jurisdiction within territorial boundaries, by means of law backed by force and recognised as having sovereign authority".

3. Gerhard Von Glahn, "Law Among Nations", (3rd edition, 1976), pp. 3-4. Von Glahn gave several definitions of International law, his own being that "International law is a body of principles, customs and rules that are recognised as effectively binding obligations by sovereign states and other international persons in their mutual relations". A sample of some other versions he quoted are E. de Vattel, "The Law of Nations is the science of rights which exist between nations and states, and of the obligations corresponding to these rights". Hackworth, "International law consists of a body of rules governing the relations between states".

   Finally, the definition of Abba Eban ex-Israeli Ambassador, it is suggested underlines the aptness of the proverb, "there's many a true word spoken in jest". "International law is the law which the wicked do not obey and the righteous do not enforce".

See also P. Jessop, p. 4 "A Modern Law of Nations: An Introduction", (1949), "One should always have at the back of one's mind a multiplicity of definitions covering the subject at hand in order to prevent oneself from accepting the most obvious".

See also Von Glahn pp. 4-5, The Individual in Relation to International law; George Manner, "The Object Theory of the Individual in International Law", 46 AJIL 1952, pp. 428-449.

4. An example of the trend is the article by N.K. Hevener and S.A. Mosher "General Principles of Law and the U.N. Covenant on Civil and Political Rights" 1978, 27 ICLQ pp. 596-613, which attempts to bring individual human rights within the ambit of states which have not ratified treaties guaranteeing such rights. GP is the vehicle used to support this contention.

See also article by G. Manner (fn. 3).

It could be argued that International law is too well known a concept to require definition. However it is a major point of this thesis that EC law and ECJ practice face problems which have their origin in International law, eg the problem of sovereignty inhibiting progress is faced by both systems of law. By showing that International law is moving, however slowly, towards affecting individual citizens of states a clear link is established between International law and EC law. See later sections of this chapter for further analysis.

5. See the Vienna Convention of the Law Treaties, 1969. Section 2, Reservations on the extent of Reservation; Section 4 Article 34, "A treaty does not create obligations or rights for a third state without its consent.

6. This fact is made clear in many texts on International law e.g. J.L. Brierly, "The Law of Nations", (6th edition, 1963), p. 63, "Paragraph (c) then introduces no novelty into the system for the "general principles of law" are a source to which courts have instinctively referred in the past".

Bin Cheng, "General Principles of Law as applied by International Courts and Tribunals", (1953), makes a broadly similar statement p. 387. See also H. Lauterpacht, "International Law", Volume 1, "The General Works", (1970), pp. 75-77.

Hevener and Mosher (fn. 4), who collated a variety of sources on the point conclude, p. 598 "GP have been overwhelmingly accepted as a major source of International law".

7. See Bin Cheng, (fn. 6), Introduction pp. 1-26 for a detailed analysis of the meaning of Article 38(c). He lists numerous further sources on this point. Further see M. Whitman, vol. 2, (1963-1973), p. 90-94. See also F. Kalshoven (Editor), "Essays on the Development of the International Legal Order", (1980), in particular J.G. Lammers, "GP of Law recognised by Civilised Nations", pp. 53-77. See also Lammers p. 53-54 for a

comprehensive list of sources concerning the meaning of Article 38(c). An interesting view is that of H. Kelsen who, much against the current trend, doubts the validity of Article 38(c). He argues Article 38(c) is superfluous, see H. Kelsen, "Principles of International Law", (2nd edition), 1966), pp. 539-544.

8. See Michel Virally's article, "The Sources of International law", pp. 116-174 at p. 144 in Max Sorensen (Editor), "Manual of Public International Law", (1968), (hereinafter cited as "Virally").

9. Virally (fn. 8), p. 144.

10. See G. Von Glahn (fn. 3), p. 18, Unlike Von Glahn, the following support the natural law view B. Cheng (fn. 6), at pp. 1 - 26, W. Friedmann, "The Uses of GP in the Development of International Law", 57 AJIL (1963) pp. 279-299, M. Whiteman (fn. 7), Vol. 1, pp. 5-8, 21-26 and 90-94.

11. Von Glahn (fn. 3), p. 18. See also Joseph L. Kunz, "Natural Law Thinking in the Modern Science of International Law" 55 AJIL 1961, pp. 951-958 for a discussion of this topic. See also Von Glahn, (fn. 3), Kuntz (fn. 11), Cheng (fn. 6), Friedmann (fn. 10), and Whiteman (fn. 7) generally. Von Glahn is against natural law, Kuntz is neutral.

12. G.I. Tunkin, "Theory of International Law", (1974), p. 244. See also pp. 197-8, p. 202. Tunkin's view is that principles which

have merely found recognition - albeit generally - in Municipal legal systems cannot be principles of law in the sense of Article 38(c) as those former principles cannot be regarded as principles of International law. Further the ICJ is only entitled to apply principles of law which are also principles of International law His reasons for these opinions are based on the fact that Article 38(1) first sentence exhorts the ICJ to decide disputes "in accordance with International law" and also on the fact that paragraph 1(c) speaks of "the GP of law recognised by civilised nations" which he interprets to mean that the principles must be recognised by states as "being applicable in International law". See also Tunkin pp. 195-7, for a survey of various Eastern European writers on this point. See also the view of Hans Kelsen who "only" considers it "doubtful whether such principles (in Article 38(c)) common to the legal order of civilised nations count at all", pp. 539-540, in H. Kelsen, "Principles of International Law" (fn. 7).

13. Sir Humphrey Waldock, Volume 106 (1962), "Recueil des Cours", "General Course on Public International law", p. 39. See also Chapter 4, "The Common law of the International Community-GP of Law", pp. 54-69, for an analysis of the Customs/GP issue.

14. G.I. Tunkin (fn. 12), pp. 197-8; Waldock (fn. 13), p. 39.

15. See H. Lauterpacht, "The Development of the International Law by the international Court", (1958), chapter 9 for examples of cases

using GP which (as Waldock (fn. 13) p. 58 notes) "may be a little ambiguous" (with custom).

16. For further critical comments on the theories of Tunkin see H. Waldock (fn. 13) p. 55, pp. 67-68; Virally (fn. 8), p. 147; J.G. Lammers (fn. 7), pp. 53-56. Of particular interest is the refutation by Lammers (p. 56) of Tunkin's interpretation of the sentence "the ICJ whose function is to decide in accordance with International Law such disputes as are submitted to it". Article 38(i) first sentence.

17. R.Y. Jennings, "General Course on Principles of International Law", pp. 327-600, Recueil de Cours, 1967(II), Volume 121 at p. 339.

18. Bin Cheng, "The First Twenty Years of the ICJ", The Yearbook of World Affairs (1966), pp. 241-257. Comparing the statistics overleaf with the cases cited in Cheng's book as involving GP shows a relatively small percentage of all ICJ cases involved GP.

Cheng - p. 242.

Contentions and Advisory Proceedings Before the World Court 1920-1965.

	PCIJ	1920-1945	ICJ	1945-1965
	No.	%	No.	%
Contentious Cases submitted	35	100	36	100
Leading to Judgment on Merits	19.5	55.7	12	33.3
Pending	-	-	3	8.3
Found without Jurisdiction	2	5.7	12	33.3
Found Inadmissible	1	2.9	3	8.3
Discontinued	12.5	35.7	6	16.7
Advisory Opinions Requested	28	100	12	100
Request Withdrawn	1	3.6	-	-
Delivered	26	92.8	12	100
Refused	1	3.6	-	-

PCIJ statute came into force 1921, work interrupted by War 1940-45.

19. See Bin Cheng (fn. 6), foreword by G. Schwartzenberger. Schwartzenberger stated this in his foreward to Cheng's work.

20. H. Kelsen (fn. 7), pp. 539-544 disagrees with Schwartzenberger's implication that the GP will have these theoretical effects whether or not the drafters of the clause intended them. He argues that the intentions of the framers is relevant e.g. "It is doubtful if the framers of the statute really intended to confer upon the court such an extraordinary power". (Compare with Ch. VI of thesis).

21. Brierly (fn. 6), p. 63.

22. Lauterpacht (fn. 6), p. 75.

23. Lauterpacht (fn. 6) p. 75. See also Brierly, (fn. 6), p. 63, who wrote "Its conclusion is important as a rejection of the positivist doctrine according to which International law consists solely of rules to which states have given their consent".

24. See Bin Cheng (fn. 6), see also Lauterpact (fn. 15), Chapter 9.

25. B. Cheng (fn. 6), p. 390.

26. W.W. Bishop, "General Course of Public Law", pp. 151-467, Recueil de Cours, Volume 115 (1965), at p. 239.

27a Zweigert and Kotz, "An Introduction to Comparative Law", (1977), p. 7. "The recognition of such general principles is rendered more difficult by the basic differences of attitude betwen the capitalist countries of the West and the socialist countries of the East on the one hand, and between the developing nations of North and South on the other". See also pp. 7-8.

27b The rules of International law governing diplomatic relations are the product of long established state practice, state legislative practice and judicial decisions of national law. Further this branch of law has now been codified to a considerable extent in

the Vienna Convention on Diplomatic Relations. Thus it is outwith the province of the ICJ. On Diplomatic Law generally see e.g. I. Brownlie, "Principles of Public International Law" (3rd Edition, 1979). p. 345.

28. W. Friedmann (fn. 10), p. 280.

29. Cheng (fn. 6). Waldock (fn. 13), p. 57 concluded also "The Court has shown restraint in its recourse to general principles... of law". It is contended that a study of the Marshall Supreme Court cases also shows this restrained use of GP - See Chapters VI and Chapter VIII a fuller explanation.

30. Lyndel V. Prott, "The Latent Power of Culture and the International Judge", (1973), p. 67. He cites the following cases as examples. The relevant defiant States are given in brackets. The U.N. Expenses Opinion (France and USSR) : The Corfu Channel Case (Albania) : The South West Africa and Namibia Opinions (South Africa).

31. L.V. Prott (fn. 30), p. 67. Also see pp. 100-110 where the reasons for such poor performance are explored. On p. 108 he quotes the President of the ICJ who stated, "the full potentialities of the present court have not been explored".

32. Sir H. Lauterpacht (fn. 6), Section 28, pp. 94-98, "The Problem of Completeness of the Sources of International Law".

33. Brierly (fn. 6), p. 25.

34. Lauterpacht (fn. 6), p. 12. He speaks of International law as being in "a transient state of immaturity".

35. Lauterpacht (fn. 6), p. 12.

36. A further weakness of International law is the limitation of the scope of matters regulated by International law. See again Lauterpacht (fn. 6), p. 21. Other deficits of International law are the limited scope of the law in general and the lack of International Institutions. See again (fn. 6), pp. 11-36.

37. Sir H. Lauterpacht, "The Functions of Law in the International Community", (1966), p. 3.

38. Lauterpacht (fn. 37), p. 3. For further information on the nature of sovereignty see Chapter VI of this thesis.

39. M. Virally (fn. 8), pp. 144-145.

40. See Chapter V p. 99.

41. Pierre Pescatore, "The Law of Integration", (1974), p. 7.

42. Jean Monnet, "Memoirs", (1978), see generally part two "A time for unity" the chapters on the formation of the EC. As will be argued in Chapters V-VI, this was one of the fundamental principles behind the EC.

43. See Chapter VI (fn. 126) where former Commission President, Roy Jenkins, is quoted "I had no idea of the extent to which I would be dependent on influencing national governments rather than appealing to European changes".

44. This is a major point for the law of the EC. It is more fully dealt with in Chapters V-VIII.

CHAPTER V : THE EUROPEAN COMMUNITIES - A NEW LEGAL ORDER

CHAPTER V

Section 1 A Restatement of the "newness" of the New Legal Order

The European Community, somewhat somberly, celebrated twenty-five years of existence on 29th March, 1982. It seems almost inevitable therefore that the "newness" of the new legal order will have, to some degree, been eroded in the minds of many Community subjects. The first aim of this Chapter is to re-state, in broad general terms, the basic structure and original aims of the EC. The second aim is more specific, to assess the role and power of the ECJ. The final objective of chapter V will be to examine the entry of GP into EC law. This is done by analysing Article 164 EEC. After such analysis the question is asked whether any GP were already present in EC law?

What precisely has been created which merits the description of "a new legal order"? or, to borrow Lord MacKenzie Stuart's phrase, "What is new about the new legal order"?[1] One way of beginning to answer this question is to show what the EC is not. Several arguments have been advanced to show that the EC is not a state. For example, all EC legislative and administrative machinery confine their activity to allotted tasks.[2] They lack the ability to act in all matters not specifically included.[3] Further though having armed forces is not a pre-requisite of statehood it should be noted that the EC has no armed forces and therefore no direct coercive power.[4] The Treaties brought to their logical conclusion and the Luxembourg Accords scrapped would not, in the opinion of Lord Mackenzie Stuart, resemble a federal state.[5] Overall therefore, it seems Dagtoglou was correct

when he wrote, "The EC is neither a superstate, nor a quasi-state, nor a federal state".[6]

In truth, as Chapter IV already noted, the EC is yet another agreement between states, in itself a common occurence. Thus it is not the act of creation of the EC structure that is original, rather the "newness" lies within the Treaties themselves. The EC may be termed a new legal order due to the scope, the purpose and the enforcement machinery of the Treaties. It is the wide ambit of each of these three factors coupled with their collective inter-relationship which, as will now be seen, justifies the use of the term "new legal order".

In dealing with these three major aspects of the EC, the logical starting point must be the scope of the Treaties. Further, this point is also the least complex to illustrate.

At its inception, the EC had six original member states:- The Federal Republic of West Germany, France, Belgium, Holland, Italy and Luxembourg. At present there are ten member states with further increases in membership over the next decade almost certain.[7] Even with its present membership however, including as it does most of the powerful trading nations of Western Europe, the EC comprises the world's largest trade area. This, it is contended, justifies the first claim of the Treaty having a wide geographical scope.

The second claim, that the EC has a far-reaching purpose, requires for its justification an examination of the EC Treaties themselves

and, in particular, the preambles to these Treaties. In fact, it is only through analysis of the preambles, that the basic aims of the EC can be found. In short, the Treaties are the means to realise the preambles. There are four such aims, peace, prosperity, that is, higher living standards to be achieved through economic activity, a desire to help the developing nations and finally union, that is, unity among the European peoples.

These four aims are, collectively, the purpose of the EC, the basic reasons for which it was founded. As such they require the fullest possible explanation. For this purpose, the following paragraphs set out a number of observations as to their nature.

The first point is by way of general comment. It is that, all in all, they are a remarkable set of aims directed towards what we Scots call "the common weel". They seem the sort of aims more often found in religious or philanthropic texts than in inter-state trade agreements.[8]

The second point to make is that the statements are connected to each other, that is, rather than being read as a list, they should be seen collectively as inter-related and interdependent. For example one aim is to help the Third World. Before any real aid can be given to developing nations, Europe itself had to be financially strengthened and rise from its straightened circumstances of the late 1940's and early 1950's. In order to have a flourishing European trade, and indeed, any trade at all, there must be peace among European states.

(Though the presumption that European peace automatically means world peace is now outdated, it is obvious that this wider interpretation is what the preambles intended).

The third point concerns union. Union is the most complex aim of the EEC preamble and the EC as a whole. There are several separate statements that can be made as regards union. The first is that it could have been left out of the preamble with no apparent loss of meaning or purpose for the Treaties. As it exists however and the Treaties being legal texts, if it was not inserted as mere decoration, then it must have a definite purpose. One possible explanation is that it is indeed a form of window dressing, that is, a general statement of intent that is not meant to be seen as a serious aim in itself. Another explanation is that it was inserted in the preamble for a definite, and important purpose. This particular purpose will be fully stated and discussed in Chapter VI.

It can be further said of union that it fulfills the purpose of binding together, in a written form, all three other aims. This is so as the aim of union has the qualities of a circular argument. That is, to some extent union among European people must exist, or be achieved, in order to allow peace and trade. In turn, peace and trade, once achieved may well produce deeper unity among Europeans, such unity in turn being the ultimate safeguard of peace between the Member States. Finally, if there is peace, prosperity and unity, the EC is now in a position to give help to the developing nations. Seen in this way, union becomes the key aim of the four. It binds them

together in a cohesive unity.

The fourth point on the nature of the aims of the preambles concerns their classification. There are a number of categories that spring to mind. Are peace, prosperity, union and the desire to help others, values? Chapter II gave several diverse explanations of values but a common part of each definition was that values were ultimate moral premises. As such it may be well that all four aims come under the umbrella of morals. If so, this would be a rare example of the situation where values are directly written into a legal text.

Another classification of the four aims is that they are fundamental GP, that is, they are partly values, but at the same time are direct links to action. An alternative way of stating this would be to say that GP of peace, union, prosperity and helping the developing nations are GP very closely linked to their value bases.

A third explanation could be that the four aims are policy statements. While, as stated previously in Chapter II, it is believed that GP and policies are very similar, this is not to say that everyone must support this view. For those e.g. Dworkin, who believes GP differ from policies this definition is probably the most acceptable, particularly so as the aims have definite political overtones.[9]

From the point of view of clarity of definition, this latter classification may be the most acceptable of the three.

However, as Chapter II noted, it is the case that any single objective definition of values, principles and policies is fraught with difficulties and also of doubtful worth. If so then the above should be seen as complementary rather than contradictory definitions.

The fifth point is that, having said that the aims are either values, GP or policies, or indeed all three, it is believed that they also serve the function of explaining and/or justifying the law of the EC. The explanation part of their function on reading the rules of the Treaties seems clear. This leaves justification.

Once again this is a subjective matter. Speaking personally, it is believed that all four aims have strong moral overtones and as such do justify the rules of EC law. As the earlier statement on the aims noted, aims that contribute to the "common weel" have moral overtones.

The sixth point to make on the aims is that they also function as concept words, that is, they help to express the abstract ideas of European Community law.

The seventh statement comes in the form of a question. Have the preambles, and therefore the aims contained within them, legal force? The answer is an unequivocal yes. As will be seen in Chapter VI the EEC preamble has been specifically referred to by the ECJ in various cases. This is not to say such action gives the preamble legal validity, but rather that examination of the cases shows the ECJ believes the aims to have legal force.

Further, a recent article on the legal force of the EEC preamble stated unequivocally, "It is widely accepted that the preamble has an important significance for interpretation of the Treaty".[10] Finally, on this point the relevant article, Article 31(2), in the Vienna Convention of the Law of Treaties declares, "for the purpose of the interpretation of a treaty, the context shall comprise, in addition to the text, including its preamble and annexes". Thus the real question is this; How much influence the preambles, through their interpretation by the ECJ, have had upon the development of the EC? This question is answered in Chapter VI.

The eighth and final point concerning the preambles leads directly to an examination of the Treaties themselves. By themselves, the aims outlined in the preambles are too vague to be attained by an International agreement. Thus, in order for their wide purpose to be achieved, far reaching yet detailed provisions are needed. Thus the well known concrete aims of the EC as set out in Article 3 EEC come in at this juncture. Though still of a general nature such statements are specific enough to give rise to the many detailed rules which comprise the Treaties, which in turn allows positive institutional action to commence.

The final justification of the treaties being a new legal order is in the effectiveness of their enforcement provisions. It has been shown that the EC has a broad scope. In order for the EC to succeed in its purpose which is, in its way, unique, enforcement machinery must be more effective that it has been in previous International agreements.

The statement by ECJ judge Pescatore, shows that this has in fact been achieved. Pescatore wrote that "this was another departure from tradition. The EC structure introduced new principles of representativity, apart from the principle of representation of States were the Commission, the Assembly and the ECJ".[11]

Section 2 The ECJ

It is this latter Institution, being the main subject of this dissertation, that is now examined. There are four major points to examine. First, to acknowledge that the ECJ exists. Second, to find why it was created. Third, to find what it was meant to do and fourth, to examine what it actually does do.

This fourth point is dealt with in Chapter VI. The first three are now examined.

"The most remarkable thing about the ECJ is that it is there at all".[12] This statement by ECJ judge Donner, superficially simplistic, is in fact one of the most profound ever written on the ECJ. Until the creation of a court as an Institution, the norm had been that agreements between states were governed by International Law. The Vienna Convention dictated that the contracting parties should at all times be free to amend the rules, disputes being settled by such means as political negotiation, arbitration, the ICJ or an ad hoc commission.[13] The provision of a court for what it is, at base, a system of International integration in specific economic spheres is more noteworthy, in its way, than the setting up of the agreement itself.

There are several possible answers as to why the ECJ was set up.

These answers are probably linked. In such a complex undertaking, to ensure any real progress the law involved had to be given greater

respect than was usual in inter state agreements. Many potential disputes might arise. Authoritative and speedy settlement of such disputes was required. The GP of sovereignty, which in International law resulted in the ICJ being given little power and also in lack of respect for its judgments, had to be dealt with. Finally, the tradition of continental Municipal legal systems gave the principle of legal control an important place in these systems. This principle can be expressed thus, where there is an administrative authority with power to take decisions affecting individual interests control of that authority is exercised by an independent tribunal.

The transference of the principle to EC law and its realisation in the foundation of the ECJ is clear. In fact, study of the Schuman Declaration and also the work of legal theorists, for example ECJ judge Lord MacKenzie-Stuart reveals the principle of legal control at the core of theoretical thinking behind the ECJ.[14]

What is the theoretical role of the ECJ and what power has it been given?[15] As in many aspects of EC law these two facets of the ECJ are interdependent. A wide ranging role pre-supposes wide power and, vice-versa, giving the court, irrespective of the theoretical confines of its role, wide powers pre-supposes it will make full use of them. Chapter VI examines this apparently simple but practically complex point in more detail.

The role of the Court can be construed from the provisions set out for the ECJ of the ECSC (Chapter IV Articles 31-45) in 1950. The ECJ was

to ensure the functioning of the other institutions. There was to be separation of powers. The ECJ was not to usurp the functions of the other three Institutions. Members of the Court were to have total independence. De La Mahotiere wrote that the Court had four functions, to ensure judicial control of the other institutions and in the case of damage by them to ensure redress, to ensure that the Treaties are correctly implemented by the MS; and to cooperate with the national courts in the enforcement of the Treaties.[16] Taking an overall view of the Court's role from the above it seems clear that ECJ Judge Pescatore was correct when he wrote, "the prime function of the ECJ was to be the guardian of the law".[17]

Section 3 GP in EC law,/Article 164 EEC Analysed

Article 164 has a dual function, it is the major source of ECJ power; it introduces GP into EC law. To deal with the former first it should be noted that it is no easy matter to interpret Article 164 EEC and thus define the powers of the Court.[18]

One problem in reaching an agreed interpretation of Article 164 is the fact that there are four official languages in which the treaty is written. No one version is thus definitive. It is, therefore, a matter of subjective judgement as to what Article 164 means. This matter has been the subject of an article by Dowrick.[19] After examining all four versions he concluded that the English language version was "misleadingly constrictive". He said that Article 164 was more than a mandate to the ECJ to apply the provisions of the EC and the secondary regulations and directives which the English language version "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed", seemed to suggest.

Instead Dowrick considered the French language version which exhorted the Court to "assurer le respect du droit" as closer to the true meaning. An equivalent English version of Article 164 was also given by Dowrick. This read that "the Court of Justice shall ensure that right is done accordingy to law".[20]

Dowrick's cogent analysis clearly points out the major question at issue. Should Article 164 EEC, whatever its language, be regarded as

a positive or a negative statement? That is, is it to be seen by the Court itself and all other EC subjects only as a mandate to apply provisions of EC law or as a dynamic statement shaded so as to impose a positive duty on the Court to do what it believes is right according to law.

A contentious possibility is that the Court may interpret the statement one way and its clients interpret it in the opposite way.

Bearing in mind the continental legal tradition best seen in French law of active judicial interpretation by use of GP and also the dynamic aspects of EC law, it is probable that the ECJ will see article 164 much as Dowrick's interpretation of the French language version. Chapter VI will show if this theory is borne out in ECJ practice.

The second major point of interest in Article 164 is that it is the vehicle through which GP come into EC law. In this it serves European Community law in much the same fashion as Article 38(c) in International law. Save for Article 215 EEC which expressly mentions GP and Article 173 EEC which implies them, the ECJ is not otherwise directed to apply GP of law. It is well known that the word "law" in Article 164 has been interpreted to mean more than written law.[21] By this inclusion of unwritten law in such a definition, the law is open to many theoretical implications, one of which is the concept GP of law. The word "law" in Article 164 can therefore be considered the major artery through which GP flow into the body of the EC.

As with Article 38(c), Article 164 is merely the written confirmation rather than the initiator of GP in EC laws. It cannot be said that, had Articles 164, 173 and 215 been differently worded, general principles would not have entered EC law. The first paragraphs of Chapter V stated that GP were embodied in the Treaties' preambles. An analysis by Van der Groeben has shown that GP are implicit in the body of the Treaty.[22] Further new GP, misnamed GP of Community law, have emerged through the cases.[23] This argument can be summed up by the view of Hartley who wrote, "there can be little doubt that the Court would have applied them (GP) even if none of the Treaty provisions had existed".[24]

Section 4 - Conclusions

Chapter IV gave a projected idea of the theoretical importance of GP to EC Law. Having stated the prime constituents of the new legal order, and also the point of entry of GP into that order, this can now be up-dated. As Chapters III and IV showed, the role of GP changes according to the basic traits of the individual legal system. For EC law it is believed that as well as GP entering the system through Article 164, they are already deeply ingrained in the very fabric of EC law. This is so for two reasons the structure of EC law itself, the fact that GP are an accepted part of the structure of MS legal orders. Lord MacKenzie Stuart seemed to echo this when he wrote that, "from the outset it was envisaged that the treaties would be operated in accordance with certain basic principles recognised by the Member States".[25] An equally relevant statement was made in 1970 by Advocate General Dutheillel de Lamothe who said during an ECJ case, these principles "contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law, an unwritten Community law emerges".[26]

Thus having discovered GP, they are now found to be all around us. It is almost impossible to state the importance not so much of the discovery but of its implications. Scwartzenberger's statement, coupled with the observations on the aims of the preamble and GP contained in the treaty mean that GP have a range of possibilities in EC law from filing gaps to shaping the bases of the law. To misquote Lord Denning, "GP are like an incoming tide. They flow up into the estuaries and up the rivers. They cannot be held back".[27]

CHAPTER V - (FOOTNOTES)

1. Lord MacKenzie Stuart, "The European Communities and the Rule of Law", (The Hamlyn Lectures, 29th series 1977), p. 14.

2. See case 9/69 Sayag v Leduc (1969) E.C.R. 329, generally and especially the opinion of Advocate General M. Gand at p. 342.

3. Lord MacKenzie Stuart (fn. 1), p. 14.

4. J.W. Louis, "The Community Legal Order", (1980), p. 25. He wrote, "The Community has no direct coersive power, it has a limited administrative infrastructure and in this regard also, must rely to a large extent on the Member States. In short, it is not a state".

5. Lord MacKenzie Stuart (fn. 1), p. 14.

6. Professor Dagtogtou (1973), C.L.J. 259.

7. Greece has joined recently on 1 Jan. 81., Portugal and Spain have applied for membership. It is possible that this trend will continue and EC membership will steadily increase.

8. If so, then it could be said the preambles are directed towards the good of the individuals of Europe. Thus, by the ECJ upholding the preambles they link the people directly to law. See Chapter VI for a more detailed explanation.

9. See Chapter II for the exposition of these views. Once again, it is stated here that it is believed whether the statements in the preambles are principles and or policies is of little importance.

10. S. Schepers, "The Legal Force of the Preamble to the EEC Treaty", (1981), p. 357; E.L.R., Volume 16, No. 5 October; see also R. Bernhardt, "Die Auslegung volkerrechtliche Vertrage", (1963), p. 89 for a similar conclusion.

11. Pierre Pescatore, "The Law of Integration", (1974), p.7.

12. Andre M. Donner, "The Role of the Lawyer in the European Communities", (1968), p. 59. The full statement is worth reiterating, "concerning the Community's judiciary, the Court of Justice, one cannot repeat too often that the most important thing about it is not what it has or has not done but simply that it exists".

13. The Vienna Convention on the Law of Treaties 1969. See provisions regarding settlement of disputes, e.g. article 66 "Procedures for judicial settlement, arbitration and conciliation".

14. See "Report on the work done at Paris by the Delegations of the Six Countries", (June 20th - August 10th, 1959). Library of the European Parliament EP 4305. See also Lord MacKenzie Stuart (fn. 1), pp. 11-13. See also The Spaak Report, London D.E.P. M 405 Vol xxll (1956). Also worthy of study is the EC publication "The

Court of Justice of the European Communities", (3rd Edition, 1983).

15. Lagrange (one of the drafters of the EC treaties) put the basic situation well, "The subject matter can best be considered from the two standpoints. The first is the role of the ECJ envisaged in the European Treaties. The second is the actual functioning of the Court", p. 710, AJCL 1966/67.

16. Stuart de la Mahotiere, "Towards one Europe", (1970), p. 305-6.

17. Pescatore (fn. 11), p. 7.

18. Article 164 EEC is taken as the representative article of the EC as a whole. It is hereinafter cited as Article 164.

19. F.E. Dowrick "Overlapping European Laws" ICLQ, Volume 27, July, 1978, p. 629 on. See also pp. 646-647. It is his translations from the original language versions that are quoted in the text.

20. Dowrick (fn. 19), p. 647. Also compare this version with the traditional English Judicial Oath, "to do right to all manner of people after the laws and usages of this realm". The two are similar in content. Also see H. Kutscher (former President of Chamber at the Court of Justice), "Methods of Interpretation as seen by a Judge at the Court of Justice", pp. 5-50 at p. 11-12. Kutscher wrote the Court has the power (under Article 164) to develop the law. The article is in "Judicial and Academic

Conference", (27-28 September, 1976).

21. Kutscher (fn. 20), p. 8, "These provisions of the Treaty make it clear that unwritten legal principles are also part of the legal order of the Communities".

22. Hans Van der Groeben, one of the negotiators of the Rome Treaty has shown that the EEC Treaty contains certain substantive norms which come very close to dealing with the question of Fundamental Rights and Freedoms. See "Uber das Problem der Grundrechte in der europaischen Gemeinschaft in Problems des europaischen Rechts," in "Festschrift fur Walter Hallstein", (1969), pp. 226 et sequetra.

23. See Chapter VI for examples of new GP arising through the medium of Community law. See again the quote by Cheng in Chapter II of the thesis "It is of no avail to ask whether these principles are GP of International law or Municipal law for it is precisely the nature of these principles that they belong to no particular system of law but are common to them all". Thus it is believed it is mistaken to classify GP as "principles of Community law". See also Chapter VI for an argument supporting the statement that GP of law are misnamed.

24. T.C. Hartley "The Foundations of EC Law", (1981), p. 121.

25. Lord MacKenzie Stuart (fn. 1), p. 30.

26. Case 11/70 Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide (1970) ECR 1125 at 1146. The actual phrase is "Does this mean that the fundamental principles of national legal system have no functions in Community law? No. They contribute to forming that philisophical, political and legal substratum common to the Member States from which through the case law an unwritten community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual".

27. Quoted in Lord MacKenzie Sutart (fn. 1), p.1. See also Lord Denning "The Discipline of Law", (1979); Lord Denning "The Family Story" (1981) for more information on the legal opinions and personal history of the former Master of the Rolls, one of the most respected (and individualistic) figures on English law.

CHAPTER VI : THE CONCEPTION, APPLICATION AND FUNCTIONS OF GENERAL PRINCIPLES IN THE PRACTICE OF THE ECJ

SECTION 1 SPIRIT OF THE LAW

The present chapter deals with the main subject matter of this thesis, the use by the ECJ of GP of law, and as such constitutes the core of this thesis.

What has preceded in the foregoing chapters is but a preparation for what follows. Regarding this chapter, there are several noteworthy points, its importance to this thesis and to Community law in general, the relatively wide scope of subject matter it embraces, and its length.

These points also indicate one necessity for Chapter VI - the need for a clear and systematic presentation of the material contained within.

The chapter deals with the following:- how the Court arrives at an overall view of its duty, how it transforms this philosophic attitude into a form concrete enough to apply to cases, the dynamics of the ECJ practice, that is, the practical problems the Court confronts in the pursuit of its duty and the case law (both macro and micro) of the Court relating the GP. A methodological point to note is that this material follows a definite pattern. It starts at broad theoretical generalisations and goes through to concretisation and subsequent transformation of theory into practice in the cases involving GP.

The first part of this chapter deals with the so-called judicial attitude or schema which, it is claimed, the Court has in mind before it deals with any particular case. This schema is seen as being more

than a crude self-opinionated collective set of prejudices by which the Court predetermines a case. In fact, it will be shown to be a deeply philosophical, highly abstract attitude and construction of the mind that, while constantly in mind, is actually applied only occasionally and then with subtlety and discretion.

Before going into this subject more deeply, it is acknowledged that the Court may well say it has no such attitude at all. However, to quote Mann, "judicial interpretation cannot avoid a certain amount of intellectual speculation".[1] Further, as Supreme Court Justice Felix Frankfurter, noted "judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constructing or promoting the force of law".[2]

Taking these statements together, it could be said that it is the legal and moral duty of the judges to attempt to foresee the effect of their judgments. Further, it is equally their moral duty to promote such "effects" as they think best for the good of whatever community they are duty bound to serve. In brief, the judges of the ECJ ought to have a policy.[3] Further it will be shown in the course of this chapter that certain judgments of the ECJ can be best explained with reference to a consistent ECJ viewpoint.

Of more relevance would be a possible argument by the Court which might tacitly admit to a schema of sorts but which denies it follows the one that will be outlined here. Such an argument is, of course, unanswerable. It is not claimed that what follows is the attitude of

the ECJ but only that it may be one possible explanation of ECJ action involving use of GP in cases since the inception of the Court, that is during the last quarter century.

It could be said that the ECJ is in fact several Courts living in one body, that is, it may function as the occasion demands as a constitutional Court, a private Court and a Court of final appeal. In dealing with an assessment of the overall duty of the Court, that is, how one subjectively believes the Court sees and carries out its definitive role, the Court most closely resembles a constitutional Court. This mode of ECJ existence forms the central core, both of this Chapter and this thesis. In this sense it is suggested that the Court has done more than deal with cases as they arrive. In fact, the Court has worked out some sort of philosophical framework or schema which it consistently uses when appropriate cases arise with due regard to the essential necessity of elaborating the initially broadly drafted EC law in the three treaty texts. Due to the fact that the Court is collegiate and that no individual judicial opinions are published in cases, such a notion is, at best, speculative. Nevertheless, as it is believed that such a schema does in fact exist, and also that it is of great importance in understanding the work of the ECJ with regard to GP, the following pages will try to establish this framework.

Before doing so however, it should be noted that, in constructing such a framework, the Court is doing no more than its duty. If Dowrick's interpretation of Article 164 is correct, then in order to do right

according to law, the Court must actively seek the spirit of the law.[4] In practice, in a new legal order, this is translated into seeking and evaluating the fundamental GP, or indeed the values behind them, of EC law.

A quote by Mann accurately sums up the situation, "The search for purpose in the treaties is a result of imperfection in the law as written... its roots however go much deeper. They lie in the very nature of law as a normative order with real but unrealised and only vaguely ascertainable ideals".[5] It is exactly "those vaguely ascertainable ideals" that the Court searches for. They are found not only in the Treaties themselves, but in the manifold fact situations that preceded the foundation of the EC.

What were the reasons behind the foundation of the new legal order? A comprehensive answer to this question would be interesting but it would have to be very extensive and detailed. It is, however, possible to give a summary account of historical, political and other causes, i.e. ten relevant factors which, combined, offer a satisfactory answer. In what follows below, ten reasons are mentioned and explained individually. Save for a loose chronological order, no other significance attaches to the order of their presentation.

As noted in Chapter III, new ideas or institutions do not arise completely out of nothingness. The first point to note, therefore, is that the basic idea of some form of European unity is centuries old.[6]

The second reason is the GP of national sovereignty. More precisely it is the decline of national feeling among the European peoples and the relative impotence of bureaucracies or national institutions to re-create such ideas after World War II. To give a fuller explanation of this important factor in the creation of the EC, Spinnelli noted that during and after the 1914-1918 War, national sovereignty was on the upsurge.[7] No state, save for the Hapsburg Empire had lost its sovereignty. The result of the war was, in fact, a re-affirmation among the citizens of Europe in the ideal of the nation state. This belief, strengthened and glorified by the twin idealogies of communism and fascism reached such a pitch that powerful leaders such as Lenin, Mussolini and Hitler "called for the continuation and enhancement of the state and crowds came to listen".[8]

The support of the European people for the GP of national sovereignty declined sharply due to the third cause of European unity, the Second World War. In this conflict, all states save the United Kingdom and neutrals suffered defeat at some stage.[9] Further, among the peoples of Europe, there had been seen a new phenomena, a large scale ignoring of national loyalties in order to fight alongside former enemies. After the war, despite regaining formal sovereignty, national institutions were still relatively unstable and, on their own, practically incapable of solving post-war difficulties. Nationals of these states already embittered against their countries by war thus lost further respect for the GP of sovereignty.

A fourth reason was that, due to their war enfeebled conditions, the national institutions lacked the power and the will to adhere to, or promote, the GP of sovereignty. In normal times it is these bureaucracies that have a major interest in maintaining this GP.

The fifth reason was the post-war rise of Catholic inspired political parties in Western Europe. At the time the Catholics were, as Spinelli put it, "the least imbued with a nationalistic point of view".[10]

Sixth, the politicians who were then responsible for shaping French, German and Italian foreign policy were not exponents of national sovereignty.[11]

The seventh and eighth factors were the states of the USSR and the USA. A further result of World War II had been that the centre of world politics shifted from Europe towards these two nations. Thus, being the new dominant force in the world, their aims and actions had, and have, a direct effect on Western Europe.

Soviet actions in Eastern Europe had two distinct effects. They encouraged the idea of European unity among Western nations. They were a factor in persuading the United States, which adhered to the idea of European unity, to offer direct encouragement to Europe in the form of the Marshall Plan.

The Marshall Plan is the ninth factor. It was intended to be the means of re-organising the European economy so as to provide a solid foundation for the re-born democracies.

The tenth and final factor was the problem of The Federal Republic of West Germany. Some form of European unity provided the solution to a variety of problems concerning that state. Unity re-established German respectability in Europe and enabled that nation to retain its sovereignty but under a definite, and restrictive institutional framework. With Germany as part of Europe, both a concerted European Economic Community and European Defence Community became viable. Finally, as regards The Federal Republic of West Germany, the EC allayed French doubts and fears regarding the re-establishment (in practical terms) of German sovereignty.

While there were many more factors, of greater or lesser importance, which contributed to the formation of the EC, the ten factors given above may be viewed as forming the central core of historical forces moving in the direction of European integration.

What can be deduced from the above points? In particular, what relation do they bear to the preambles of the Treaties? Some comments may now be made as regards the causes of the EC, which will show the fundamental principles or values contained in the preambles of the Treaties in a clearer light, and allow a subjective evaluation to be made of them.

The ten fact statements given above should be seen as belonging to two distinct groups. The first "group", for want of a better word, comprises the first statement. The second, statements two to ten. The latter "group" is dealt with first.

One characteristic of these fact-situations is that they are all of a dynamic nature, that is, they arose and crystalised over a short period of time. As such they continue to remain fluid, i.e. continue to evolve. A further noteworthy fact is that all the problems mentioned were short term difficulties requiring immediate short term solutions. Two problems in particular stand out.

There was an urgent need for Europe to rebuild its economic base. Once this had been achieved, the next challenge was long term; how to maintain that prosperity. The second problem was peace. It might seem that peace is not a short term problem but rather a question of long term maintenance. However, using the word "peace" as a concept word to include not only lack of open warfare but also lack of Cold War tension with Eastern Europe and latent hostility and bitterness among the European states themselves, it becomes a short term achievement. Once this tension (a prime cause of war) had abated, then maintenance of the new situation becomes a long term aim.

Seen thus, for the governments of the Member States, the GP or values peace and prosperity are taken up as short term political solutions to

short term national problems. Once achieved, the maintenance of these conditions might be viewed by states as a national rather than a supranational task.

The former group, the idea or ideal of European Union corresponds directly to the GP or value "union" in the preambles. This can be viewed in a distinctly different fashion. It should be noted that this group is not in the Treaties' preambles for any of the above reasons. In fact, it is questionable if it was backed by governments at all.[12]

The term, union, unlike the preceding statements is not a stop gap solution to European and world problems but represents a long term philosophic idea or ideal. Though the actual words in the EC preamble were taken from the UN charter, the factor of union being a GP or value makes its precise wording relatively unimportant. Its major import (as Judge Donner said of the ECJ), is that it is there at all.[13]

Union is a GP of great historical and intellectual depth.

In 1600, the King of France, Henry of Navarre, together with his Minister Sully, set up, between 1600 and 1607 a permanent committee of the fifteen leading Christian states of Europe. This body was to act as an arbiter on questions of religious conflict, national frontiers,

internal disturbance and common action against the Turks. This, the Grand Design was, according to Winston Churchill, the beginning of the idea of a United Europe.[14]

In 1798 the philosopher Jeremy Bentham, wrote that European unity is positively in the interests of the people.[15] This line has been broadly followed by intellectuals such as Immanuel Kant, the Compte de Saint Simon, and August Compte.[16a] Also Proudhon, for example, in "Du Principe Federatif" in 1863 prophesied "the twentieth century will open the era of federation, or humanity will begin a purgatory of a thousand years".[16b] Further Antone de Saint Exupery stated that "Man's finest profession was that of uniting men".[17]

The twentieth century has seen the continuation of this ideal, particularly in the writings, and more importantly, in the deeds of Jean Monnet.[18] Monnet and other 20th century federalists injected this principle or value into the EC Treaties and the various documents that preceded it.

This principle union gives a moral and intellectual base to the EC. It is the complement of the principles of peace and prosperity which give a legal and political base to the EC.

This statement that union is the moral and intellectual base of the EC, or (more accurately), that EC law has a strong moral and intellectual derivation was clearly understood by the leading statesmen of the time. For example, while discussing the Shuman Plan

with Monnet, the German Chancellor, Adenauer stated, "this project is a matter of the highest importance: it is a matter of morality"[19] The President of the United States, Eisenhower, said, "the real problem's a human one. What Monnet's proposing is to organise relations between people and I'm all for it".[20]

In evaluating the history of the EC, it is believed that the importance of this moral and intellectual idea is under-estimated by the European peoples in general and also by many of their government officials who took office after the early fifties. It could be argued that since the idea of union was not a direct and immediate cause of EC formation, it should be discounted. Such an argument, though popular, is incorrect. No intellectual idea can by itself become law. It requires a political act of will. It is correct to say that the idea was not the immediate cause of the EC but incorrect to assume that it therefore has little relevance to the developing Community.

Seen as a GP or as a value it is of little point to try and give a definitive exposition of union. It is submitted however, that it has the following characteristics. Union attempts to do the maximum good for the maximum number of people.[21] Union stands for two basic interrelated concepts, union among states and union among peoples. It is submitted that, as the philosophers quoted previously wrote (or implied) the attainment of union is the highest ideal of humanity. This is so as the realisation of this GP or value would constitute a definitive step beyond International law which, as Chapter IV noted, is at present mainly concerned with relations among states. It would

in fact be the realisation of the phrase gena un summus (we are one family). If so then it would, it is hoped, change the way citizens of one state think of citizens of another state. From seeing fellow human beings who belong to a different state as strangers and potential enemies we may come to think of them as fellow members of a trans-national society. The implications of such a change in human perception are so vast as to be almost frightening. At the very least peace and renewed efforts to eliminate poverty would result. Further such a community would serve as an example to the outside world that sovereignty is not the only GP worthy of consideration when deciding how to live.

Thus the GP is concerned both with the good of the individual and the state. (The state however, in order to conform to the concept, must weaken its GP of sovereignty.) Union therefore is a GP or value, basically moral and to a lesser extent legal and political. Further it clearly encapsulates the universal, that is, it goes beyond national boundaries.

Overall therefore, it is a GP which has the power to inspire not only acceptance but positive action on its behalf by all European citizens.

The GP of union, it is submitted, is recognised and given its true weight, as regards its importance to the EC by the ECJ. There are several reasons to support this view. First, as stated, the GP or value of union is the moral and intellectual backbone of the law. Second, it is the only fundamental GP or value of the preambles that

the judge can consistently apply to fact situations. It seems impossible, in any practical sense, for the ECJ to apply the abstract notions of peace or general prosperity or helping the developing world in a case.[22] As this chapter will demonstrate, it is possible to apply union in a practical form. By doing so, as Chapter V showed, all the other preamble principles are indirectly upheld.

Third, it is contended that no other principle, borrowed from any legal system, so perfectly fits the idea of guardian of the law. By upholding the value of union, the Court thus fulfils its primary constitutional function of protecting the law, and thus the EC itself.

It is this basic attitude, protection of the Community by protection of union that the Court brings to cases.

Having stated that the Court sees its duty as giving support to the GP union it should be noted that this statement does not mean that the ECJ will consider the individual its most important potential client. Rather it is believed the ECJ sees its highest loyalty as being to the EC (as an entity) itself. This is so as the Court is guardian of the Treaties, that is, its duty is to protect the Treaties not try to prematurely apply their highest, as yet unrealised ideals.

Section 2 - Integration

Having argued that the ECJ has, as its primary duty, the upholding of the GP or value of union, it can now be demonstrated as to how this mental, abstract philosophy can be transformed into action. Union could well be seen to be a value rather than a GP for it is suggested that it is too broad to be used in the majority of fact situations, that is, for most cases the terms of its applicability are, in any practical sense, indefinable. The solution is to use instead the GP that is most closely associated with this value, that acts as the bridge between union and the Treaties. The GP that, on study of the Treaties and of the concept union, best performs this role is the GP of integration. If integration is seen as the correct principle to use, then it becomes, in effect, the key concept of the new legal order. As such it requires the most searching analysis.

This is done in the following manner. First, a general analysis of integration is given. Second, the question, what is the level of support that is given in theory and practice by the ECJ for this GP? is answered. In the course of this, the concept itself is further explained.

Before undertaking these tasks, however, the query implicit in these statements must be answered. Does the ECJ actually support integration at all?

There seems ample evidence to show that it does. Many writers on European Community law have made an examination of ECJ case law over

long periods of time and have come to roughly similar conclusions. Bredimas stated, "It has acted as an integrating institution as well as the only integrated one".[23] Prott wrote, "This court seriously values its role as an integrator, and that where several solutions may be juristically possible, it continuously chooses the decision that will operate to enhance the Community's integration".[24] Opperman's investigation of ECJ jurisprudence revealed, "evidence of the inclination of the European Court to act as a factor of integration"[25] The writings of Scheingold and Axline also confirmed the pro-integration attitude of the ECJ.[26]

Possibly more relevant are the writings of the judges and advocate generals. Examination of the works of Donner, Kutscher and Pescatore and also Advocate General Lagrange, an author of the Treaties, show that integration has been a priority of ECJ case law.[27a] As Kutscher noted "The Court's methods of interpretation and its decided cases can be described as leaning in favour of integration".[27b]

What is integration? A general definition is given by the Oxford English Dictionary which says that "integration is the combination of parts into a whole" and "union" is a whole resulting from the combination of parts or members". As regards Community law, integration is a fundamental GP of the new legal order derived from the Treaties themselves. It is dynamic in that it requires constant movement towards a goal. As a GP integration, being implicit in the Treaties, is the essence of the spirit rather than the letter of the law.

Possibly, the major point about integration is that, as a GP, it must defy any attempt at total and exhaustive explanation. Thus, for EC law instead of attempting to define integration it may instead be more accurate to say that, given a certain core of meaning to integration (stated above) it has, radiating out from this core, many shades of meaning of which each, or indeed all, is or are relevant at some point in EC existence.

The second analysis, of how much support the ECJ gives to integration, is structured after this fashion, that is, integration is split for this purpose into three overlapping categories of meaning, political, economic and defensive. Both individually and collectively these categorisations become, at times, the ultimate aim of the Community and also the means to an ultimate EC aim.

The survey that follows, dealing with the level of support the ECJ gives to political, economic and defensive integration deals with approximately the quarter century of ECJ existence, that is, its statements reflect theory and practice over that period of time.

By including some political content in the meaning of integration, can it be assumed that the ultimate aim or purpose of the EC is that it culminates in some kind of Federation of European States?[28] As the previous chapter stated, both Lord MacKenzie Stuart and Professor Dagtoglou doubted that this was the case.[29] It is contended that their arguments, that if all Treaty provisions were fulfilled, no

federal structure would exist are correct in so far as they go, but fail to take account of all the implications within the Treaties. As the heart of the EC seems to be dynamic progression, it appears a logical assumption that when the EC has reached one goal the forces that were present to achieve this end would inevitably continue to exist and cause the Treaties to be altered so as to become the basis of a United States of Europe. The fact that no definite shape for the political future of Europe is outlined within the Treaties is immaterial.[30] It is of importance only that the Treaties contain the germ of the basic political idea.

These thoughts are clearly present in the writings of two of the most authoritative figures connected with the EC, Jean Monnet and Advocate General Lagrange. Monnet wrote, "I have never doubted that one day this process will lead us to the United States of Europe; but I see no point in trying to imagine what political form it will take".[31] Advocate General Lagrange made this explicit statement, "The objectives of the Community Treaties are economic but their aims are political. The expectation has been that economic integration will, in time, increase the degree of continuity of interest to the point that the creation of a federal organisation within the Community becomes necessary. Such an organisation would come into being by expanding the powers of existing institutions and founding new ones, or their combination".[32]

Further support for this view comes from many other individuals including, for example, Hallstein and Behr.[33a] In particular, the

view of Judge Pescatore is worth quoting, "this has no sense or driving force unless it is to evolve towards a greater political unity of Western Europe".[33b]

The views of some other judges on political integration, culled from speeches of the judges during the swearing in of a new judge or on the departure of a judge, were analysed by Feld.[34] He believed, on this evidence, that the majority of the judges favoured political integration. In particular he noted that, "Mr Catalano stressed that what is important is the creation of a European jurisprudence"[35] and also that Professor Donner, "In several of his speeches ... emphasises the constitutional role of the Court".[36]

A further argument given by Feld upholding his view of judicial support for political integration was that the ages of the judges meant that they personally had experienced the horror of inter-state European conflict and might well be in favour of a unified Europe as a bulwark for European peace.[37]

From all the above statements, the one by Pescatore in particular, seems to sum up the argument over the political content of integration. Without a political aim, whether implicit or overt, the EC is a structure with little real purpose. If so, then the definite and powerful political aspect of integration should mean that, in theory, if the ECJ is active in upholding integration in general, part of its allotted role must be the maintenance of political integration.

The methods the ECJ uses to maintain political integration are stated in further sections of this chapter.

A further meaning of integration is of a different nature, economic integration.[38] As opposed to the previous definition of integration, the boundaries of economic integration are clearly set out in the Treaties. They are the establishment of a customs union, freedom of movement for persons, services and capital and common policies in selected fields. These are what could be designated the practical limits of integration, that is, here rights and duties exist and the legal order begins so that such rights and duties are assured. It is this sphere of integration, economic integration, that concerns the vast bulk of EC cases involving GP. Such cases do not see the ECJ putting on its constitutional hat.

The major point of interest in economic integration, as regards this dissertation, is whether economic integration is the aim of the Treaties or the means to that aim. It will be shown both here and further on in this Chapter that the confusion between various groups, that is the political leaders of states, institution representatives, the ECJ, and the people of Europe as to what are the aims of the Treaty leads to serious difficulties for integration. To some extent this has already been shown in Section 1 of this chapter.

The suggestion is advanced that economic integration is primarily the means by which political integration is achieved. At this point in time however, and possibly ever since the inception of the EC, for all

practical purposes economic integration is now the aim in itself. There are various reasons why this has happened.

In reality, the process of using economic means to achieve a political aim is not, in practice, as simple as the theory suggests. As Pescatore noted "Economic integration has not always led us by natural progression to political union. The historical precedent usually cited in that connection - that of the German Zollverein - was probably an accident in history".[39]

A further factor is that in the EC Treaty, as has been noted, the aim of political integration is not clearly stated. Instead vague phrases of intent e.g. "an ever closer union" are substituted.[40] While reasons for such draughtsmanship are readily explicable, the clear line of reasoning, economic union to achieve political union, is broken. Thus the means have now become the aims.

Superficially, it might seem that, as the thing to be achieved is now both simpler and less abstract, progress towards economic integration should be relatively smooth. In fact the Community is characterised by its lack of progress. There are three main reasons for this state of affairs. Firstly, if peace and prosperity for Europe are seen by states as short term goals rather than long term values, despite obvious minor shortcomings, it is suggested that such goals have been achieved. Thus peace and prosperity, two major factors for inter-state co-operation have expired. This leads directly to the second cause of Community sonambulism. It is that the remaining reasons for

nation state co-operation which are union, helping the Third World and the maintenance (as opposed to the achievement) of peace and prosperity are weak. Union, to the member states is an abstract concept of relative unimportance, the other two aims or GP, the maintenance of peace and prosperity and helping the Third World can be achieved in a variety of other ways, in particular by independent state action. Further, other more powerful perennial GP's, sovereignty, individual financial and political state interests, have now re-emerged. Thus as Bredimas noted in 1978 "the spirit of the Treaty is more supranational than the present attitudes of the governments of the MS."[40]

In practice, the will of the Member States to co-operate in EC economic development is at times, absent. As Sallust noted, "paucis carior est fides quam pecunia". [41] (Few do not set a higher value on money than on good faith)

The third weakness of so-called, "pure economic integration" is that despite its lack of overt political aims, it is inevitable that economic integration has political consequences. These being of an uncertain nature means that the EC is moving at an uncertain pace along a political road that leads to an unknown destination. Therefore it may well be that some, or indeed all Member States, do not wish to make progress. If this view seems overly speculative, it is relevant to recall the view of Karl Deutsch who wrote, "International organisations have often been seen as the best pathway for leading mankind out of the era of the nation state."[42]

Economic integration is thus, at present, the aim of the Community. As the last few paragraphs noted it is not proceeding smoothly. It could be asked if it has ever developed without hinderance? Hamson noted that in the mid-sixties integration was not proceeding as smoothly as had been hoped. In 1971 Dahrendorf stated, "Within the Treaties of Rome and Paris a development of European integration started which has achieved much. But this development has today exhausted itself".[43] Such lack of progress has continued to the present day. It is so well known as to be commented upon by the press in unequovical terms. The leader, on 12th April 1981, of the Observer read: "The European Community is dying the slow death of inertia. Its involuntary asassins are a motley crew, nationalism, bureaucracy, dogmatism, and vested interests".

More authoritative views on this subject not only agree with the newspaper's assessment but describe the situation in equally dramatic language. The 1980 Report on the European Institutions read, "Economic troubles leading to political and social weaknesses at home were driving governments into more nationalistic attitudes ... States were less willing to heed the Commissions advice or let it administer policies in the European interest".[44] The President of the European Commission wrote, in April, 1982, "It may be that the Community is traversing the most difficult period in its history - for never in all its twenty-five years have the winds of crisis blown so hard".[45]

The previous section on the ills of economic integration has stated much that is of relevance in a further part of this chapter. Yet it is given here first for two reasons; to preserve the continuity of the explanation of integration as political, economic and defensive; to pave the way for an important definition, which has never previously been given, of integration. This category - defensive integration - will be dealt with in the section on ECJ case law. Its basic explanation however, is now given.

It is contended that the third, and totally subjective, categorisation of defensive integration is a legitimate part of the meaning of integration. By defensive integration, integration is seen simultaneously as the means to an aim and the aim itself. It operates thus; throughout Community history whenever economic integration, and consequently political integration, has slowed down or run into difficulty, the ECJ has, by re-stating the basic fundamental principles, i.e. the spirit of the law, brought into play defensive integration. Its aim in doing so was not to push the EC in a new direction politically or economically but simply to keep it going, to keep the momentum of integration alive until the legislative authorities produced fresh initiatives of EC policy. At such low points in EC existence, the means becomes the aim whilst simultaneously still being the means to the aim; that is integration not for the sake of politics or economics but integration for the sake of integration.

To sum up, integration as a total concept is the concrete expression of a moral ideal. While being the means to the aim of political union as a good thing for the peoples of Europe, it is for all practical purposes the means to economic union and on occasion the aim itself for the EC. Its content includes political, economic and defensive integration. Legally speaking, it is the duty of the ECJ to give its full support to integration in all these shades of meaning.

This last point, that is the legal duty of the ECJ to promote integration cannot be emphasised too strongly. To avoid any possible doubt on this point, the explicit statement by the ex-president of the ECJ, Judge Kutscher, is given. He stresses that integration is a legal principle and not a whim of the judiciary, "The Community judge must never forget that the principles establishing the EEC have laid the foundations of an ever closer union among the peoples of Europe and that the High Contracting Parties were anxious to strengthen the unities of their economies and to ensure their harmonious development (Preamble to the EEC Treaty). The principle of the progressive integration of the Member States in order to attain the objectives of the Community does not only comprise a political requirement; it amounts rather to a Community legal principle". [46]

Of equal importance is the succintly delivered opinion of Supreme Court Justice Felix Frankfurter, "Upon no functionaries is there a greater duty to promote law". [47] Thus for EC law it could not be made plainer that it is the legal duty of the ECJ to actively promote

what they regard as constituting the law of the EC. It is suggested that it has been clearly shown that law includes the GP of integration in all its various aspects.

Section 3 - Integration as a positive act

The previous section gave an explanation of the concept embodied in the word integration. Further, it showed that the concept had a wide scope which the ECJ, if it is to uphold integration, must encompass. The aim of this section differs. It will state some problems faced by the ECJ in attempting to actually apply this GP in the cases. The majority of these problems can be traced to the many subjective (and emotive) meanings of integration.

The legal duty of the ECJ is to uphold the GP of integration. Stated thus, the phrase appears explicable and the task straightforward. That is, grammatically speaking the sentence is a simple construction of subject and predicate and overall has a clear meaning. Further the actual task which the ECJ has a legal duty to perform seems relatively straightforward. In fact, as will be seen further on in this chapter, the task is one of the most complex problems ever faced by any legal tribunal. The former statement, the apparent ease of intelligibility of the phrase is herewith discussed. The words "uphold the GP of integration" require precise explanation as they are capable of misinterpretation. There are four main situations regarding this phrase that should be clarified.

First, the principle of integration is an implicit rather than an overt GP, that is, in cases the GP of integration will rarely receive a direct mention. Rather the use of the principle has to be deduced from an overall examination of a case or series of cases.

Second, the concept of integration is not an active consideration in many EC cases. Further in these cases that do involve GP, which is where the concept of integration might apply, it will only be considered in the small number of cases in which the Court feels that it may be relevant. Such cases, where the GP of integration has a direct influence on the Court, could be seen as involving some constitutional aspect of EC law. These may be termed macro cases. Examples of macro cases are examined in a later section of this chapter.

Third, it should be noted that integration is a GP and not a rule. As such it does not apply in all or nothing fashion in every case in which the Court thinks it relevant. It could be said that the attitude of the Court that has been postulated could be seen as analogous to the view of Plato in the Republic. Plato held that the greatest good is the good of the city.[48] The ECJ views the greatest good as being that of the EC, as an entity. Such a view if applied in the rigid form of a rule would become, at worst, a form of tyranny, at best government by judges. By keeping in mind the fact that integration is a GP, with all that that entails, such a situation should be avoided. The consequences of too rigid an application of the GP of integration are seen in Chapter VII.

A fourth point about the phrase that requires explanation are the reasons for having chosen this form of words to encompass the supposed attitude of the Court. The key to the phrase "the object of the ECJ is to promote integration" is its simplicity. It is stated thus, and,

it is believed, thought of in this way by the ECJ, in order to allow the words to be transformed into positive action in actual cases. In other words, it is kept simple so as to be kept workable.

It should be noted that it is extremely difficult to construct a phrase that contains the essence of what any one person or group believes to be the spirit of the law. The general problem in this regard was well summed up by Schermers when he stated, "each society subjectively decides what principles it considers to be compelling and each society changes this notion slowly but continuously. A definition of these principles is, therefore, very hard to give".[49] The truth of this statement, with regard to EC law was highlighted by Ruber who, in the course of his dissertation, noted that twenty different authors gave twenty different definitions of key concepts of European law.[50]

A selection of the fundamental principles of EC law, that is these principles that various authors consider constitute the spirit of the law is now given. Louis cited as fundamental, "those GP which emerge from the very nature of the treaties; the principles of equality, unity, freedom and solidarity."[51] Schermers favoured as "compelling legal principles" these stemming from the common legal heritage of Western Europe.[52] Toth and Hilf both took as their choice fundamental rights and freedoms.[53]

The basic problem with all the above definitions, whatever their respective merits, is their wide range and loose definition. From the

point of view of the ECJ requiring a workable schema, having a half dozen or so fundamental principles, which may also continuously be changing from year to year and case to case, has two major disadvantages; the difficulty of actually keeping in mind and applying all such principles in an actual case; and the danger that, as Virally noted, of so many fundamental principles ending up being employed as so many rules.[54]

The phrase stating that the object of the ECJ is to promote integration avoids the above problems. The phrase and the schema it incorporates is based on an understanding of the nature of GP, in particular their constantly changing weight or importance vis a vis each other in different fact situations. For EC law, only integration should be regarded as a constant fundamental GP. All other GP's are not to be applied too rigidly i.e. not to be applied as all or nothing rules. As regards each other all GP have equal weight and one or more GP assume greater weight, (that is they temporarily acquire fundamental status) only when, according to the circumstances of the case they act to ensure the stability or promotion of the principle of integration. The case of Defrenne v SABENA (the second Defrenne case) which will be examined later, illustrates this situation.[55] This case involved two GP, legal certainty and integration. As will be shown later the GP of legal certainty was overtly the fundamental GP relied upon by the judges, whereas in fact the most influential GP in the case was the implicit GP of integration, i.e. legal certainty acquired fundamental status for this particular case in order to uphold the perennially fundamental GP of integration.[56]

Section 4 - Interpretation

In what has thus far preceded this present section, emphasis has been laid upon the relative freedom of the ECJ judges. Equally, it has been noted that it was the legal duty of the Court to act in the fashion stated. This section combines both these themes. It deals with the interpretation of the law.[57]

Judicial freedom and judicial duty come together in that, in order for GP to be used at all by the Court, a certain amount of judicial discretion in the interpretation of the law is almost a pre-requisite. Equally important it must be seen that the Court uses a method, or methods, of interpretation of the law that meets the requirements of the particular case in question. A further fact to note is that in discussing interpretation of the law, the final step is made from the abstract philosophic notion of union to actual application of a GP to a particular case. The basic situation is well put in the statement by Schermers, "The actual application of the Treaties and of Community acts depends to a large extent on the interpretation which is given to them. The only authentic interpretation is that by the Court of Justice".[58]

The object of this section is to determine the following: the methods of interpretation the ECJ adopts in general; of these which, if any, is most favoured and why. Finally it is noted where GP originate, how they are found and how they are translated into EC law.

In general, there are four main methods of interpretation used by the ECJ: the literal approach; the use of historical background; systematic interpretation and teleological interpretation.[59]

The literal approach is that, when the text of a provision is clear and compelling, and apparently meant to cover cases such as the one in question, the Court of Justice will not depart from it.[60] The historical background method of interpretation follows the continental judicial tradition.[61] Thus the ECJ can use preparatory documents of secondary Community legislation, such as debates in the European Parliament.[62] Customs nomenclature is another legitimate aid to interpretation.[63] As to systematic interpretation, here the Court makes use of the system of the Treaties. The place an article occupies in a particular Treaty chapter is relevant as regards interpretation. Also, the introductory articles setting out the purposes of the Communities help to interpret other articles.[64] Finally, there is the teleological approach. This uses interpretations based on the purposes of the Community Treaties.[65]

It is undoubtedly the last method, the teleological approach, that for the Court is the most popular and widely used method in interpreting Community law.[66] As Bredimas, for example, concluded "the major analytical tool applied by the Court has been the functional method."[67] The reasons for this are as follows.

Firstly, the other three methods of interpretation mentioned, literal interpretation, historical and systematic interpretation, all have certain weaknesses. The systematic approach, it might be argued is not weak as such but is of limited application.[68] As to historical background, as the travaux preparatoires of the Community treaties are secret and therefore unavailable to the Court, this method accordingly suffers. Literal interpretation in Community law is bound up with the problems of language. Unlike the Treaty of Paris, which was drawn up only in French, the Treaties of Rome are equally authentic in all Community languages and so is all secondary legislation made under them.

Thus literal interpretation, which it might be argued is the second most important method of interpretation, has produced many problems.[69] For example, freedom of movement for workers or the right of establishment may be curtailed under ordre public. This translates as public policy in the English language version. Yet the European Convention on Human Rights has it as public order, a version Lord MacKenzie Stuart opines as more appropriate.[70] As Lyon-Caen has said "Its role is so extensive that the concept itelf has lost all precision"[71] The case of Stauder v Ulm also illustrates the problem of language as regards the official texts.[72]

A further language difficulty is over the pronouncements of the Court itself. "The Court has to use words which are intelligible in all languages."[73] For example, in Rutili v Minister of the Interior, regarding the concept of l'ordre public the translator "felt

constrained by the official text of the Treaty to speak of conduct which might constitute "a genuine and sufficiently serious threat to public policy" when public order would have been more appropriate".[74]

A second reason is that both the Treaties and subordinate legislation refer to a number of important concepts but leave them undefined. In other words, for the Treaties to have practical consequences such definitions must be found by the Court. The best known example of this is Article 215, paragraph 2, EEC which explicitly speaks of "general principles common to the laws of member states". Further, the words "civil and commercial matters" are ambiguous.[75] They are to be found in both the title and the opening article of the "Convention on Jurisdiction and in the enforcement of Judgements in Civil and Commercial matters". These words, since they govern the whole field of application of the Convention are of crucial importance.[76]

The third reason is the different approach towards interpretation necessary where, as is fairly frequent in EC practice, the Court is called upon for the first time to pronounce upon a problem, as against interpretation within a mature legal system. In the latter, for example, under English law, whanever Parliament produces a Statute to codify common law, practitioners consult the pre-codified law in order to understand the Statute. With the Treaties "one starts from scratch".[77]

The fourth reason is of a pragmatic nature but still of great importance. As Dr Ehlermann, Director, Deputy Financial Controller of the Commission stated, "The conditions in which Community law was, and is prepared, are hardly conducive to careful drafting. This is true not only of the Treaty negotiations in Val Duchesse, but also of the horse trading which takes place all the time in the Council".[78a]

Thus for these reasons, the ECJ will avoid a minute textual analysis. It thus looks to the purpose of the text in disputes - the teleological approach.

The teleological approach seeks out the object of the disputed legislative text and tries to give practical effect to it. Thus in seeking a solution to a problem, the Court will choose one that makes things work rather than one that brings them to a halt.[78b] This action must be clearly understood. In seeking the object of the text, the Court therefore seeks the spirit of the law. As stated previously, "spirit" is merely another synonym for fundamental principles. The Court thus looks for principles, such principles constituting the first link in the chain of judicial reasoning in the appropriate cases.

What are the consequences implicit in the use of the teleological approach. The first and most important is that it gives to the Court a greater amount of freedom in the making of decisions than any other method. This, in turn, means that more stress must be laid upon the judge as an individual and thus upon his individual influences.[79a]

The fact that ECJ is collegiate however, means over extensive study in this particular area is unrewarding.[79b] In turn, this also means that further refinement by legal theorists of the teleological interpretation process is of little value.[80] The ECJ itself, for example, is anxious to protect its freedom in this respect. As Kutscher stated, "The Court of Justice of the Communities shares with the national courts a reluctance to give, in its judgments, general rulings on the problems of interpretation. It explains the rules and also indicates which methods it is using in the process, but it does not express an opinion on the basic question of the methods of interpretation".[81]

The second major consequence is this - Pescatore wrote of teleological interpretation that, "Here it is concepts such as custom union, equality of treatment and non-discrimination, freedom of movement, mutual assistance and solidarity, economic interpretation and finally economic and legal unity as the supreme objective, which have provided the decisive themes of a large number of judgments dealing with the problems posed by the implementation of the Common Market".[82] If the word "concepts" in the above statement is substituted for the more accurate phrase GP then, in plain language, teleological interpretation means that GP provide the basis of any purposive judgment.

Having stated that GP are at the base of teleological judgments (either overtly or by implication), it still remains to be seen where the GP come from and, once found, how they are transplanted or applied in EC law.

Where are the GP to be taken from? There are five sources, which together constitute the reservoir of GP. These are the laws of the Member States; laws of the non-Member States; the Treaties of the EC; Public International law and GP as a source in their own right.

By far the most important and widely used source is the laws of Member States.[83] Both civil and administrative principles are used.[84] In general, greater use is made by the ECJ of administrative principles. National laws are invoked as and when the need arises.

Laws of the non-Member States are rarely called upon but are nevertheless of importance. Articles 85 and 86 of the EEC Treaty are largely based on United States monopolies and restrictive practices law. US law has been referred to in disputes concerning these articles. As Chapter III noted, it has been observed that the EC resembles the USA of the 1820's as regards business law and state boundaries. Possibly recourse to US law should be more frequent as this law contains many valuable analogous cases.

The EC is composed of three treaties. This fact comprises the third source of general principles. In a few decisions parallel principles from the other treaties have been drawn.[85]

The penultimate source is Public International law. It is a definite source of GP, but one condemned by most commentators and regarded as of little importance.[86] At best, Public International law is seen

as of use only in exceptional circumstances. However, recent judgments by the ECJ on fundamental rights may change this situation. The ECHR is now an accepted source of fundamental rights. Thus all treaties adhered to by the Member States must now be similarly regarded. Possibly other principles can be taken from such treaties.

The final source of GP is not GP from X system of law, but GP as a source of law in their own right. The ECJ has felt free to rest its reasoning on GP as such. As Bredimas noted, "Occasionally one finds the Court referring to "General Principles" applicable even in the absence of a text referring to them".[87] In Walwereke v High Authority, the Court stated, "We must include the GP of law in the rules relevant to the application of the Treaty", without making it clear to what principles it was referring to.[88] This practice, it must be stated, is the exception rather than the rule. Usually the Court will state the principle explicitly.

What criteria are needed for a general principle to be recognised as part of EC law? In what way does the ECJ extract, refine and apply the general principle of law? Briefly stated the process is as follows:- to establish the existence of a general principle, a comparative analysis is carried out.[89] This is undertaken by the staff of the ECJ.[90a] If this process successfully establishes a general principle, the ECJ elaborate on a synthesis to derive a detailed rule from it. This rule is then applied to the facts of the case.[90b]

The main method used to shape national concepts to EC purposes is critical comparison.[91] It is unnecessary for the principle to be unanimously accepted in all Member States. Nor need it be accepted in a majority of states or even that it represents the lowest common denominator of the national solutions. Bredimas states that merely the basic elements in a GP that can be built up into a rule of EC law are looked for.[92] Toth phrases the requirement somewhat differently, "What is required is that a principle should be widely accepted and should provide a solution which is, if measured by the methods of "evaluative comparative law" the most appropriate and judicious of all comparable solutions, taking into account the particular objectives and nature of Community law"[93] The former criteria seems to emphasise the requirements of EC law, the latter the GP. Where the general principles in the national laws are contradictory and no common meaning can be found then according to Bredimas '"the ECJ will evaluate the differences, reconcile them and shape them according to Community purposes.[94] Toth, however, states, "It is nevertheless clear that there is no general common principle where the national laws vary to such an extent that it is impossible to extract from them a truly common meaning of a legal concept."[95]

If a general principle exists in one Member state, but is not generally known in others, "In such cases, a principle of national law can only be adopted in Community law as a new and independent concept of the latter and not as a general principle of law, with a new and independent meaning of its own..."[96] If so, is this not close to judicial legislation? Toth states "In some cases even the fact that a

principle is universally recognised in the Member States may not lead to its incorporation into community law, namely where this could be achieved only by what would amount to genuine legislative activity on the part of he European Court."[97] Is the previous situation not closer to legislative activity than the latter?

Finally, a GP would not be used in EC law where the point in question is covered by a rule (or a GP applicable in EC law).[98]

The above opinions show a marked diversity in some areas as regards what constitutes comparative law analysis by the ECJ. The two authors quoted are both competent, up-to-date and authoritative, yet neither can be seen as a final authority on comparative law. This is due to the fact, as Bredimas notes, that the "Court has not so far furnished expressly any explanations on the conditions of its recourse to GP but limited itself to declaring that a certain principle existed or not".[99]

It is suggested that this is a deliberate policy on the part of the Court. The reasons behind it are discussed fully in the following sections of this chapter. However, this fact means that comparative analysis has limitations as a tool by which to judge the work of the ECJ. If no lead is given by the ECJ, exactly how a GP came into EC law will always defy exhaustive analysis.

Section 5 - Why the ECJ is not a government of Judges

The previous sections of this chapter have theorised that the Court, in its constitutional role, has taken the following steps. First the Court found what it believes to be the spirit of the law, union. Second, having found union the Court found a method of applying the GP or value union to the nearest GP relevant to EC law, integration. Sections Five and Six deal with the problems that hinder the Court in the performance of its duty. These problems may be divided into two sets of obstacles.

These two sets of obstacles both function as checks on judicial activity but each creates a distinct problem area for the Court. The first set of obstacles consists of the normal legal and closely related extra-legal restrictions to be found, in an analogous form, in every other legal order. They are discussed in this section. The second set of obstacles are of a more insidious nature. They originate not from law but from the relatively primitive relationship of states with international institutions. These latter obstacles are ultimately a more serious restriction on judicial activity than the former set of restrictions. They are discussed in Section 6. As the public concretisation of both sets of obstacles is made known by the phrase "government by judges" a separation is required of the two problems. Further an exact analysis of the phrase "government by judges" with reference to its relevance to the second set of obstacles is required. "Government by judges" is not analysed for the first set of obstacles as it is believed that the phrase has, in this area, an accepted or known core of meaning. More importantly, it is conceded

that the first claim is a valid one and that the checks on ECJ power are necessary. The exact extent of such restrictions is, of course, a subjective matter but, as long as commentators upon law agree that the basic core of judicial restrictions does prevent government by judges, then their function has been effective.

The various restrictions of a legal, and also closely related extra legal nature, upon the ECJ are stated as follows.

In speaking of the Court promoting integration, it is easy to forget that the Court can speak only through its case law.[101] Here there is a double restriction on ECJ activity. First, only cases involving GP will have the GP of integration as a possible complicating factor. Second, cases involving the exercise of a great amount of judicial discretion are comparatively rare.

In fact, the overall case load of the ECJ is not too heavy. As Lord MacKenzie Stuart noted "Busy as the Court of Justice is, litigation involving Community law is more frequently to be found in national courts and tribunals".[102] If so then in absolute terms the number of GP cases is not excessive, as they only constitute a percentage of a low overall number of cases.

Secondly, not all EC law is within the ambit of the ECJ. Bredimas points out, "The accusations and fears of Government by Judges are unwarranted and far fetched. There are fields in which it has no competence whatsoever; for instance it does not rule over conflict of

laws, it does not apply Community law to the facts of the case in preliminary reference."[103]

Thirdly, it must be remembered that the Court only has the jurisdiction granted to it by the treaties.[104] Thus the argument should concern the extent of ECJ authority. Emotive talk of government by judges gives the impression that power derives from the whim of the judiciary.[105]

From the point of view that the ECJ is the judicial, and not the legislative or executive arm of the Community, the fourth point is the most important of all statements in this section. It is that the entire Community structure is based upon a complex system of checks and balances, specifically designed to ensure that no single institution achieves an undue concentration of power.[106] This doctrine should, in theory, be well entrenched into the EC structure as it is a fundamental principle in many Continental legal systems, these same systems of e.g. France, Germany, Italy providing the basic structure of Community law. Further to take an analogy from US law the fascinating thing about the Supreme Court has been that it blends orthodox judicial functions with policy-making functions in a complex mixture. "And the Court's power is accounted for by the fact that the mixture is maintained in nice balance; but the fact that it must be maintained in such a balance accounts for the limitation of that power."[107]

The fifth factor begins the extra-legal checks upon judicial misuse of power. Despite their abstract nature, it is contended that, in practice, they provide a restriction upon judicial activity as powerful as any other mentioned in this dissertation. The fifth check is that ECJ cases are observed by a great number of people and groups. Lawyers, academics, EC staff, individual citizens, business companies, other EC institutions, members of national governments, national newspapers, and specialist legal and business periodicals all report, comment upon, or observe ECJ decisions. Examples of comment upon cases are as follows. Mann, an academic, wrote of the Café Hag case, "The Court disregarded the clear wording, the intended effect, the true meaning of the Treaty of Rome".[108] The French newspaper, Le Monde, wrote of the ERTA case, "This case belongs to the category of political cases ... it is a mythical elaboration revealing a maximalist conception of the European construction".[109] The point of the fifth factor is not that the ECJ is swayed by public opinion, nor that it decides a case, as the newspaper report clearly shows, to curry public favour but that it performs its duty in full public view.[110] If so, any derogation of duty or clear breach of legally defined judicial activity would be seen, and commented upon, by a variety of sources. Such breach of power, whatever the legal consequences, would ensure that the Court would lose a good measure of public confidence and support.[111] If so, then this point is a real check on judicial mis-use of power for as Salust said, "Qui male agit odit lucem", (the evil doer hates the light).[112]

The sixth check on judicial government is also extra-legal. As opposed to the previous check which was of an external nature this one stems from internal factors, from the Court itself. It is that, as Bredimas concluded, "the Court seeks to avoid conflict".[113] Prott goes even further than this in his conclusion. He believes the Court, "conscientiously seeks to meet the expectations of its audience".[114]

Such statements should not be misinterpreted, that is they should not be taken to mean that the Court will act to please public opinion. The sections on the actual EC action, and the ideas behind it, will provide a full explanation of this statement by Prott.

The fact, if Bredimas and Prott are correct, that the Court will try to meet the expectations of its audience, coupled with the rest of the points made in this section, provides an important statement with which to end this section. It is that the Court cannot pull the EC in a direction it does not wish to go. The Court is, in the end, controlled by the wishes of the other EC Institutions and by the aspirations of the EC as a whole.[115]

Section 6 - Extra-Legal Barriers to Integration

The arguments in this section have already been partially explained previously in this dissertation. They are now given in full with additional arguments and premises. There are several reasons for so doing. First, the arguments are extremely important in understanding the dynamic and extra legal nature of the opposition that the ECJ faces in the performance of its duty as a Constitutional Court. As such, they must be fully stated if ECJ counter action, to be explained later in this chapter, is to be understood. Secondly, the previous accounts of such arguments have deliberately ommitted material that has full relevance only in this section. Thus, for clarity, it is intended to restate all arguments in full even at the expense of some repetition.

It is suggested that the EC is based upon twin foundations; on people banded together in various groups, in particular states and EC institutions; on fundamental GP that provided (and continue to supply) the fundamental reasons for the actions that established the EC and gave impetus for its continued progress towards integration.[116] A major dynamic factor that disrupts this progress towards integration is the lack of cohesion between various groups, in particular states and the ECJ, in their attitude towards fundamental GP. Previous sections dealing with immediate EC pre-history and integration roughly sketched the causes of this diversity. This section examines how a state assesses (and re-assesses) the GP of integration and sovereignty; how the ECJ assesses these fundamental GP; the problems that arise for the ECJ as a result.

Thus the first area of discussion involves a state and the GP's of integration and sovereignty.[117] An analysis of immediate Community pre-history showed that it was established in an era when sovereignty had little support from states and their subjects. An interesting analysis by Spinelli however, concluded that support for integration by states leading to European union was of a temporary nature.[118] In fact, if Spinelli is correct, the decline of enthusiasm for integration actually began before the EC was created. He wrote, "The train of events which had forced the leaders of the six countries to attempt a policy of supranational integration began to slow down with the death of Stalin".[119] A fact that lends credence to Spinelli's words was the failure to establish a European Defence Community.

Such events suggest that the GP of sovereignty is, to the European nations, a perennial fundamental GP, which, from the early fifties, they had began to re-assess in a more favourable light.

The second factor follows directly from the above. Despite the upsurge in the popularity of sovereignty before the creation of the EC, that Institution was nevertheless established. Further, four internal institutions were also created to direct the EC on its chosen path. This sets up the second premise that these institutions, and in particular the ECJ, will come to hold individual views on GP and sovereignty.

How does the ECJ, as opposed to the MS, see the GP's of integration and sovereignty?[120] Before suggesting an answer, three points are made. First, that the Court, by virtue of being a judicial organ, is a relatively stable institution and, of all Community institutions, the one most free from external influences. It is also the nature of a court in general to be of a fairly conservative disposition.[121] These facts should mean that any views on any principles examined by the ECJ, once formulated, should remain constant over a long period of time.[122] Second, whether or not the other institutions, and in particular the Commission, might hold similar long term views on principles, the day to day political role they play in running the Community must present an obstacle towards an adherence to, or enforcement of, basic principles of EC law.

The third point, following on from the above, is that the Court becomes the institution that holds the conscience of the Community, an uncomfortable political stance. Bredimas wrote "By its functional interpretations it has remained the most faithful instituion to the spirit of the architects to the treaties".[122]

It is suggested that, as stated previously, the ECJ upholds integration. As a consequence, it opposes sovereignty. This view is re-enforced by the opinion of Lauterpacht who believes that International institutions act as brakes upon the power of sovereignty.[123] He notes, however, that at present in Internatinal law the GP of sovereignty is in the ascendence.[124]

The consequences of the above facts are as follows.

The Court and the Member States have directly opposing views on sovereignty and integration. In particular if the EC, as an International institution, is meant to advance it must simultaneously grow in strength and this can only be at the expense of the GP of sovereignty. For example as Kutscher noted "so far as the Community Treaties are concerned the principle that limitations on the sovereignty of the contracting states are, in cases of doubt, to be interpreted narrowly does not apply".[125a] Put simply, the ECJ, if it wishes to advance integration, must weaken the GP of sovereignty. This situation, where the Community will grow at the expense of sovereignty, is a direct contradiction to the situation in International law, where sovereignty is advancing.[125b] Thus it would seem that there might be a struggle between the ECJ and Member States over the GP's of sovereignty and integration. Much will depend, if this analysis is correct, on how far the Member States will be willing to weaken the GP of sovereignty to advance the common good, European integration.

At this point it should be noted, once again, that states have a major influence on the EC. As former President of the Commission, Roy Jenkins, wrote, "I had no idea of the extent to which I would be dependent on influencing national governments, rather than appealing to European changes ... I realised it was an illusion to believe that one could rely primarily on appealing to the people of Europe".[126]

This talk of struggle between groups might seem far fetched and outwith the ambit of the Court. However at this juncture the view of Judge Donner is given to show that the discussion is based on fact rather than fantasy. Judge Donner noted that by instituting a Court of Justice law was introduced to govern the Treaties. By introducing law "Lawyers were called up to undo what was done in the century before".[127a] i.e. to undo national sovereignty. His statement on sovereignty is unequivocal, "It is one of the main intellectual and legal obstacles to overcoming an antiquated and unhappily propogated state system for the purpose of creating political entities commensurate to the needs and possibilities of our time ... Only a deep conviction that the values to be upheld and the aims envisaged are <u>indispensible to human society</u> is equal to the endless debate with the entrenched forces of prejudice, self conceit and conservatism".[127b]

Equally relevant is the point that the Court plays a part in the struggle. Support for this view comes indirectly from the writings of American political scientists. Speaking of US Courts Murphy and Pritchett wrote "Political scientists have sought more and more to develop an approach to the judicial process which would give the activities of the Courts new meaning by placing them within the mainstream of political relationships".[127c] Becker made the provocative statements that "Effective Courts, properly run are a political weapon of some magnitude" and that "the Supreme Court

exercises a unique and unparalleled influence of political leadership".[127d] While not going as far as Becker in his claims for the Supreme Court it is contended that the situations produced by the new legal order require a new view of the ECJ - as a participant in the political struggles both among institutions and between institutions and states. Seen from the perspective it is submitted that the activities of the Court to be discussed in the following section will become clear.

To re-iterate the basic situation, at any given time states and the ECJ each draw from the EC the GP and values they consider to be the spirit of the law. For some Member States, the spirit of the law, or essence of the EC is that it is, or was, the short term solution to short term political and economic problems. Such problems having now been overcome, the EC is concerned with maintenance of peace and relative economic prosperity. Further, the main thrust of the EC is not, and never has been, moral and universal, but served as an appendage to national, political and economic aims. As such, the good of the EC must in most instances be secondary to national interests.

The ECJ, it is suggested, sees the spirit of the law in a different light. The EC is a long term institution concerned with a deep moral issue, the good of the people of Europe. The economic base of the EC is the vehicle in which to achieve this.

The statements above to the effect that there is a deep divergence between the aims and opinions of the ECJ and the Member States, and possibly also other groups as well, is one of the most interesting but least discussed aspects of European Community law. The overtly political nature of such matters is the probable justification. It was discussed here for two major reasons; that the lack of cohesion between the foundations of the EC leads to definite consequences; that the ECJ is aware of, and has actually acted in a deliberate manner to meet this extra legal opposition. This latter statement, that the ECJ has adopted a course of action to counter threats to integration is dealt with in the sections on case law. This leaves the claim that the weight attributed to various GP's by certain groups, especially states, have definite consequences for the ECJ and for EC law in general.

It is contended that there are three main consequences for the ECJ which can be classified in this manner. Actual disobedience by a state of an ECJ decision it feels goes against some important national interest; a general atmosphere of lack of trust of the ECJ; specific accusations against ECJ conduct e.g. government by judges.

The first, anti-ECJ action is pardoxically the least serious due to its relative infrequency. This results from two factors; the deliberate policy of the Court in prevention of such instances by the means to be outlined in the latter part of this chapter and the fact that, unlike International law, the entire EC structure is

sophisticated enough to prevent, or at least dissuade, continual outright anarchy.

A case where a judgment has been ignored is Commission v France (the sheep meat case).[128] In September 1978, the ECJ ruled that French controls on imports of lamb from the UK were in violation of free movement of goods (Articles 9-37 EEC).

The second, and extremely serious consequence, is a general atmosphere of lack of trust of the ECJ by its clients, in particular by MS. This means that ECJ lacks the necessary freedom to fulfill its function. Further, not only is the Court itself inhibited, other institutions may be unwilling to make use of the Court to clarify the law and rely instead on drafting minutely detailed rules. An analogous situation was recently seen in the United Kingdom where an attempt to reform the drafting of legislation failed for this reason. The Renton Committee on the preparation of legislation concluded that legislation drafted in a simpler fashion was beneficial to United Kingdom needs but was impractical as Parliament was simply not prepared to trust the judges.[129] Again, as justification for the inclusion of this whole debate within the confines of an essay on law the words actually used in the Renton Report, "Lack of trust" show that politics is a part of law.

The third and most obvious consequence of disharmony among groups caused by diverse interpretation of principle is various direct accusations against the ECJ. The statement by Bredimas is an accurate

account of these charges, "sometimes when it delivers a functional judgment, challengers speak of a political judgement driven by the desire to reach a certain conclusion, whilst for a literal judgement, they argue that the Court did not give in to political pressure i.e. that it was objective. Moreover, on the process of filling gaps by interpretation, they accuse it of government by judges".[130]

Taken together, these three consequences have a further and most important result, they endanger the independence of the ECJ. Yet as a recent report on the European Institutions noted, "The main condition of its (the ECJ's) effectiveness, now and in the future, is in the maintenance of its perfect independence from government and other Community institutions".[131] Seen against the following statement of Bredimas, there is real cause for concern for judicial independence. "Although the Court is relatively the most independent institution of the Communities, one should not forget the pressures exercised on it: influence of the Member States manifested through the Council, indirect influence of powerful pressure groups. These influences nowadays are not even dissimilated".[132]

Having demonstrated the danger to integration, and indirectly to the Court itself, it remains only to raise two further items. First, it should be asked if the Court itself is perceiving the situation in the way described. If, as the coming section may show, the Court has evolved a policy to deal with its critics, it must in the first place be aware of them. While not claiming that the view of one judge necessarily represents the whole Court, the quote by Lord MacKenzie

Stuart is highly illuminating, "I suspect that if one could truly see into the minds of the critics of some of the Court's more discussed decisions, the disagreement is less with the decision than with the aims and purposes of the Treaty itself ... you may not like the chosen path, but that does not absolve the Court from following it ... There is a failure to make the essential distinction between the Treaties on the one hand and the law which must be observed in their interpretation and observance".[133] In short the Court is aware of its critics and disagrees with them.

Having stated that the accusations of government by judges stem from fear, both of judicial usurpation of the GP of sovereignty and promotion of the GP of integration, it is nevertheless necessary to explain fully the nature of such claims and test their validity. In jurisprudence it must be the case that any claim will be dealt with on its own merits. The dubious nature, if any, of the claimant or the reasons behind the claim are irrelevant. Thus the phrase "government by judges" is examined and possible judicial action constituting government by judges is scrutinised. It is suggested that this phrase acts as a concept phrase for all possible accusations against the ECJ.

What does the phrase "Government by the Courts" mean? The concept within the expression is from the case law of the Supreme Court of the United States, the expression itself from an article by Bondin.[134] Dumon gives a comprehensive account of the conditions needed for the Court to realise the phrase in practice. He stated that, "Government

by judges is realised if the Courts exceed their proper task: if they ignore, infringe or brush aside the rules of the law which it is their duty to respect and apply, if they base their judgements on their own social and ecomomic views or those of the parties to which they belong ... if their judments stem from "choices" and from policies which have not been decided by the political authorities or those with power to amend the constitution or to legislate - and which do not emerge from positive law, that is to say from the legal system as a whole, its spirit and development and general or other principles".[135]

The counter arguments against the charges are as follows.

In general, the fine distinctions needed to differentiate between law and politics are difficult to make in any practical sense. Of course, there are extreme cases where it can be said that "here is a political act". However, in the great majority of cases the law/politics distinction is blurred. This argument is advanced by several legal theorists. As Kelsen, for example, stated, "every law applying act is only partly determined by law".[136] Bredimas is even more explicit, "In the last analysis, the distinction between legal and political issues is a fallacy: every dispute has political and legal aspects."[137]

Thus the accusation of government by judges must have some truth as the political aspect of judicial activity can never be totally eliminated. Equally, for the Court to avoid such claims would mean its refusing to handle cases involving an element of discretion. Thus

the question of government by judges cannot be satisfactorily resolved, that is, it cannot be objectively upheld or refuted. It will always be a matter of subjective judgment. Perhaps the most sensible statement on this emotive issue was that by Schermers, "In Continental legal theory, a decision by a Court, even of a Supreme Court, only decides the case at issue. Courts are to apply the law and not make it. When rules are required, they should be made by the legislature. In practice, however, the system is not as strict as one might think ... In practice, the cases of the ECJ are quoted as precedents which - though not formally binding - are important sources of law. The extent on which the the case-law of Courts is needed as an additional source of law depends on the legislation involved; the more general the legislation the more scope the Courts have for making supplementary rules, through interpretation. In the EEC, the principal legislator, The Council, hardly operates and the secondary legislator, the Commission, has insufficient power to fill the gap. The legislation, therefore, is broad and incomplete with the result that the case law of the ECJ is relatively important".[138]

Bredimas and Dugard also argue the practical viewpoint.[139] They state that "The Court quickly realised that the Community can only survive by constantly expanding to meet new conditions by a continuous interaction between law-finding and law-making for which there is no neat division of these powers". Boukema also argues that the tendency for the Court to legislate is not incompatable with democracy.[140]

To sum up, it is true that, in carrying out its duties the ECJ, to some extent, legislates. Equally, it must be pointed out that this judicial legislation is, in fact, an unavoidable consequence of an imperfect legal order. Whether or not the judiciary overstep the mark is a subjective question. It is suggested that due to the fact that the Treaties are highly political instruments at an early stage of development, much so-called judicial legislation is unavoidable. Perhaps Hallstein summed up the situation best when he wrote of the EC, "we are not in business (economic integration), we are in politics".[141]

There is also a further observation to be made here. It is that the question, whatever its answer is of lesser importance in EC law than in other systems of law. This viewpoint was argued by Kutscher when he wrote, "This question touches on the relationship between case law and legislation and the principle of the separation of powers. The question, however, loses some of its importance when the laws have not been adopted by a directly and democratically elected Parliament...".[142]

Finally on this subject, the opinion of Pescatore is given. He wrote, "the Court has been careful not to exceed its role as a judge ... There has never been any question of setting up any form of government by the courts, to use a perennial expression"[143]

Section 7 - Macro Cases - The Van Gend en Loos Case Analysed

The following paragraphs deal with the preliminary questions that arise before ECJ macro cases are discussed. The first such question is why do macro cases arise in Community law? It is contended that macro cases arise as a natural consequence of the establishment of a new legal order. Chapter III, dealing with developed systems of Municipal law, noted few if any macro cases in any or all legal systems. The one major exception was the legal order of the United States. There, several macro cases were found, the Marshall cases. It was suggested that these had arisen as a direct consequence of the relative immaturity of United States constitutional law as regards trade and commerce. If this was so, then EC law, being a new legal order at an early stage of development, macro cases are to be expected at this early period in EC development.

The second question is what, in EC law, constitutes a macro case? At this point it is important to give a terminological explanation related to the uncommon use, in a legal context, of the terms "macro" and "micro" in what follows below. These terms are common in texts of economics and one may assume their conceptual function in such texts is known. It may be argued that the nearest corresponding terms in legal texts may be "fundamental" for macro and "non fundamental" for micro. Terms like fundamental which are used in a legal context have a well established meaning in legal discourse. Indeed these terms have already been employed in this thesis to define GP in EC law. In order to clearly separate the categorisation and classification of individual cases involving GP from the definition of GP as such in EC

law, the terms macro and micro are used to categorise and classify individual cases. Further, it is submitted that the terms fundamental and non fundamental do not correspond precisely to what the present author has in mind for making specific distinctions between individual cases. With this in mind the terms macro and micro, and there is no reason why new terms may not be introduced as long as their use and function are clarified, are preferred.

In order to clarify the important distinction between definitions of GP and categorisation of individual cases, the definition of GP is reiterated. Many authors have defined GP in terms of their belief that, in looking at GP as a whole, some GP are more fundamental than others. This thesis too has adopted a definition of fundamental and non fundamental GP. Only two GP have been regarded as fundamental, namely the GP of integration and any other GP which may be deemed essential for subsequently promoting or strongly defending the GP of integration. This definition of GP is, it is submitted, both more flexible and more intellectually complex (though more practicable) than all previous definitions which rely on fixed categories of GP.

Each individual macro case concerns the GP of integration and may possibly concern the second category of GP as well. Each micro case concerns only a GP or GPs which do not, in the particular fact situation, substantially promote or strongly defend the GP of integration. Thus it cannot automatically be assumed that any given GP save the GP of integration will be classified as fundamental in any given case designated as macro. Further, in any case designated as a

micro case, no GP is to be looked upon as fundamental in that particular case. The GP of legal certainty is used to illustrate the above. Thus, the GP of legal certainty may be classified as fundamental in a macro case only if that particular GP is a major factor in substantially promoting or strongly defending the GP of integration in that particular case. If, in that same macro case, the GP of legal certainty is only of minor consideration for the Court, then it should not be seen as a fundamental GP in that particular macro case. With regard to micro cases, the GP of legal certainty will not be regarded as a fundamental GP in that case even if it is an object of major consideration by the Court, because the facts of the individual micro case are such that the question of substantially promoting or strongly defending the GP of integration simply does not arise. The circumstances which, when taken together, constitute a case being recognised as a macro case are now given.

As there is of course no objective answer to the question of what constitutes a macro case what follows is a subjective opinion. There would, for this particular legal order, EC law, appear to be four requirements. First the case must involve, implicitly or explicitly the GP of integration and possibly also a further GP or GPs which, with regard to the individual fact circumstances of that particular case strongly promotes or defends the GP of integration. Second, the case must have some sort of constitutional significance, that is, the legal question at issue should have definite consequences for EC law as a system. Possibly this somewhat loose requirement could be better put by requiring that the issue in question should affect the central

core, or the constitutional spirit, of EC law.

Third, the issue(s) of the case should be of direct interest to one or more MS. This could arise where a state, whether or not directly involved in the case would be interested in, and affected in some significant way by the outcome. For example, in Defrenne v SABENA the outcome, of course, affected all states but only two states not directly involved in the case actually showed concern as to its outcome.[144]

The fourth and final factor is that the case should be controversial. Again this is a difficult-to-define qualification. Possibly it would arise when the question to be decided and/or the repercussions resulting from a particular decision, would touch upon a GP or GPs fundamental to one or more MS.

For a case to be considered as a macro case the first two factors must be present. The last two factors may be present.

The final preliminary question to be answered is why are only a handful of macro cases examined? There are several reasons for so doing. First, it is believed that relatively few macro cases exist.[145] If so, it is difficult to see how complete coverage would add to the arguments taken from a representative selection of cases. Second, the actual cases chosen are well-known examples of macro cases not obscure hand picked cases.[146] Third, not all cases chosen fit in with the theories presented; due to the nature of GP almost any case

involving GP is capable of wide ranging subjective interpretation so little is to be gained in any case from deliberate "fixing" of examples.

In general, this section will show the complexity and difficulty of the task of the judge in doing right according to law in cases involving fundamental GP by outlining eight major areas of analysis. First, how the chosen case qualifies as a macro case; that is what are the special features the case possesses in order to be seen as a macro case. Second, the methods the Court adopts to appease, and/or counter its critics. Third, it will be shown what the Court actually does (in a positive sense) in the cases. Fourth, the use made of GP in the cases will be illustrated. Fifth, it will be questioned whether the ECJ has used a schema or plan. Sixth, it will be asked why macro cases were and are seen as important for EC law. Seventh, it will be shown into which category of integration, political, economic or defensive the actions can be classified. Eighth, it will be examined whether the ECJ has remained constant in its adherence to the fundamental principles outlined in the cases and to its policy.

To avoid unnecessary repetition, the following schema is used. One case is analysed to illustrate all the above major points. Other cases are then analysed selectively to illustrate one or more particular points. Finally, an overall evaluation of all macro cases discussed is given.

The first case to be analysed, which will deal with all the major points, is that of Van Gend en Loos.[147a] It could be said that this case is the most famous and possibly the most important in all EC case law. For example, Pescatore, called Van Gend "a fundamental decision, one of the most forceful rulings of the Court, which remains fresh and vigorous as the day it first came out".[147b] As such, it is a natural choice for the most extensive examination.

The facts of the case are as follows: Article 12 EEC states, "Member States shall refrain from introducing between themselves new customs duty on imports or exports or any charges having equivalent effect and from increasing those which already apply in their trade with each other". In Holland, the firm of Van Gend en Loos imported into that country a substance "aqueous emulsion of urea-formaldehyde". Under a pre-treaty customs classification, this product bore 3 percent import duty. After the implementation of the Treaty by Holland, there was a re-classification resulting in the duty being increased to 10 percent. Van Gend en Loos appealed against this increase to the Tariefcommissie invoking the provisions of Article 12. The Tariefcommissie, using the procedure of Article 177, put the following question to the ECJ, "Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the court must protect."[147c]

Van Gend, it is suggested, is an excellent example of a macro case. As the facts of the case showed, there were at stake several factors

of importance to EC law from a constitutional point of view; direct application of a Treaty article, which Lord MacKenzie Stuart called "a novel and unique feature of EC law".[148] ; protection of the individual right of Community citizens; the duty of Member States in the above situation.

A further test of a macro case was also passed. Normally, only the parties to the action before the national court and the Commission submit written observations. In Van Gend, in addition to these submissions, the governments of the Netherlands, Belgium, and Germany also submitted written observations. Thus as Lord MacKenzie Stuart noted, "interest was considerable".[149] Not only were three of the six signatory governments agreed upon what was to be done, but also "at least one of the other governments also would have concurred if it had at that time been taking an interest in what was happening in the Community's Institutions".[150a]

It is a subjective matter as to whether the issues raised in Van Gend were controversial. However, reading the submissions of the Member States gives a possible answer. They were to the effect that Article 12 imposed an obligation on Member States. That if a Member State failed in that obligation, the Commission could take proceedings against that offender under Article 169 but there, all governments agreed, the matter ended. As Pecatore noted "The (original) question stems from a typically national attitude".[150b] Such a clear stance by the Member States on what, for EC law, was an important issue seems to indicate that the matter was of direct and immediate concern to them

and, therefore, that a particular answer might be controversial. Further, this viewpoint is strengthened by, as Advocate General Roemer noted, the large measures of competence retained by the Member States during that transitional period.

As to whether fundamental GP were raised in the case, the answer is given in the section on use of GP.

How does Court appease its critics? There are four main measures the Court uses to appease, or more accurately, to counter the attacks of its critics. These methods may be divided into negative and positive methods. The first counter can be classed as a negative measure. The Court, as a previous section noted, is legally able to give judgments which have some measure of political integration. It was mentioned there that there were relatively few macro cases. This is due to the fact that the Court does not seek to make political statements. It pursues the negative course in as many cases as possible. Thus the Court has a deliberate policy of inaction. Though it has been argued that the ECJ has a duty to promote integration, it does not do so through attempting to see constitutional issues in every case.

The second measure is also negative; where the Court does make a statement which has a measure of political content, it is made in a less dynamic and fulsome manner than critics may suppose. In the Van Gend en Loos decision the Court did not take all the steps advocated by the Commission as a necessary and logical consequence of direct effect, that is, the Court did not say that a provision which

is entitled to direct effect must, therefore, also prevail over any national law. Thus it seems the Court, even in this so called dynamic integration decision, appeased its audience. Stein puts this bluntly, "Clearly the Court exercised judicial restraint ...".[151] "The strong opposition from the Member governments and its own Advocate General may have convinced the Court that its ruling affirming the "direct effect" principle in broadest terms was "sufficient for the day" as far as it went".[152]

A further explanation of this point is made later on in this section where defensive integration is discussed.

The third device used by the ECJ is also negative. In the opinion of Bredimas and Prott, the Court seeks to satisfy its critics by, irrespective of what statements of GP are made, slanting the actual decision in favour of the state or fudging the issue altogether.[153] This seems a bold statement yet the opinion of Bredimas is unequivocal. She wrote, "Whenever there is a danger, by adopting a bold position to displease the MS and compromise the desired evolution, it (the Court) adopts the following technique, it gives a conservative answer to the facts of the case in question in order to make the propounded principle acceptable".[154]

The fourth part of the Court's appeasement technique is positive. It is to make use of the teleological method of interpretation and GP, the technique being that the Court deliberately seeks to use these methods and GP in constitutional, and more pragmatically,

controversial cases whenever possible. A reading of the case makes it clear that it was by no means certain that this mode of interpretation was the obvious one to use.[155] However, the attitude of the Court on this matter is shown by the lucid statement of Judge Pescatore, "The Court based itself essentially on considerations drawn from the objectives of the Community, from the structure of the Institutions, and from the general system of the Treaties. It expressly placed cousiderations drawn from the "spirit" and the "scheme" of the Treaty before those arising from the wording, thus making it clear that the wording can be clearly understood only in the light of the system and the objectives of the legislation".[156]

The Van Gend case provides a good example of the amorphous aspect of principles. Hamson, in a long and, in the main, critical analysis of Van Gend, believed that, "The end product of Van Gend en Loos is certainly very questionable", but concluded the decision was, in the end "justifiable".[158] Thus Hamson is reduced to using a subjective term "justifiable" rather than a scientific wording such as, "the decision was incorrect", or "the decision was correct". As well as providing a shield against damning criticism, use of GP makes it difficult for any comprehensive agreement to be reached on the reasoning process of the case and the ultimate decision that follows. For example, Hamson, a respected academic, on analysing the case came to one conclusion. Lord MacKenzie Stuart, an ECJ judge, on the other hand examines both the case itself and Hamson's analysis and disagrees with him, stating "the choice taken by the Court ... is justifiable by the logic of the decision itself". Though Lord MacKenzie Stuart,

going by what has been said above, may be mistaken in seeing the decision as being upheld by logic, the main point still remains, that two respected authorities can disagree in a case involving GP.

It should be noted that this behavioural pattern of the ECJ, appeasement, is not original. It is to be seen in the cases of John Marshall. For example, in the case of Gibbons v Ogden, the Court did not flatly hold that the commerce power was exclusive, that the state had no residium of power over commerce across state lines.[158] Friedmann said that because of the Federal licensing law "the thrust of the case was ambiguous and its full potential was veiled". He went on to make the interesting statement that, "perhaps the Court wished it that way".[159] Further Felix Frankfurter, when writing about Marshall stated, "Uncompromising as was his aim to promote adequate national power, he was not dogmatic in his choice of doctrine for attaining this end".[160]

If these views of Friedmann and Frankfurter are correct, then they have several important repercussions for EC law. First, it is suggested that the ECJ judges are well aware of the work of the Supreme Court and, as will be seen in their cases, make use of their methods of appeasement.

Second, the establishment of this policy of appeasement by the Supreme Court and the ECJ's awareness of the actions of "its closest legal relative" make this observation more credible.[161] At first sight, such an idea that the Court appeases is hard to comprehend, yet it is

suggested the idea is correct.

Third, having stated the validity of the ideas, the historical precedent demonstrated may show that appeasement of states is an approach that is both credible and complex and deserves study by academics.

The third major point to be answered is this, what, in a positive sense, did the Court actually do in this case? This question is of a more factual and objective nature than the others, though there is still room for subjective opinion. Its answer is best supplied by firstly quoting what Lord MacKenzie Stuart called the classic words of the ECJ.[162a] "The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble of the Treaty which refers not only to governments but to peoples. it is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens".[162b]

From this base the Court drew the conclusion "that the Community constitutes a new legal order of international law, for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of

Member States, Community law, therefore not only imposes obligations on individuals but also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations, which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".[162c]

It is contended that the Court is saying the following. By stating that the EC exists, it is in fact establishing the right of the Community to exist as a new legal order. Then it begins the task of protecting the newly-defined Community by attacking sovereignty. As Stein noted, the Belgian, Dutch and German governments appearing in the case all took the position most solicitious of national sovereignty.[163] By its decision, the Court attacked sovereignty in two ways. In the particular instance, by replacing the international law concept of the self-executing Treaty by the direct effect principle with the result that, as Stein noted, "the norms of EC law have progressively the status of quasi federal law in the national legal systems".[164] Second, in more general fashion, by declaring the existence of the EC and protecting that legal order by its actions. Thus as Pescatore stated, the creation of a new legal order, "is the consequence of a democratic ideal, meaning that in the community .... governments may not say any more as they are used to doing in international law "L'Etat c'est moi".[164b] Further the Court clearly sets out the hierarchy of integration, that is, that the means of integration (which are economic) are there in order to advance the

aims of the Community (which are political). Finally, it deals with the actual issue of the case by upholding the doctrine of direct effect.

The fourth point, actual use of GP, as opposed to the previous section where the decision to use GP was discussed, is perhaps, for this paper, the single most fascinating aspect of the Van Gend case. It is so, because it is maintained that the case could be seen as the first example of the use of values. Whatever its legal standing, it is a fact that the case was appreciated by the ECJ at the time, as being of great importance for EC law. Thus for this case, not only fundamental principles, but their underlying values were called upon. The words actually used by the Court, "This view is confirmed by the preamble to the Treaty which refers not only governments but to peoples"[164c] are, it is suggested, within the ambit of the previous analysis of the spirit of the law and thus constitute GP and underlying values. This point, that the ECJ refers specifically to the preamble (which not all legal theorists believe constitutes part of the treaties) and more specifically to "people" supports the argument that the ECJ has understood, and supports, the full implications in the GP or value of union, that it is meant to bring the peoples (not just governments) of Europe closer together. As Pescatore stated "the Community calls for the participation of everybody".[164d]

To reiterate, in what is perhaps the most important case in EC law, the judges, in their opinion, felt that fundamental GP and values were best suited to express their decision. Further the GP and values were

taken, not from the Member States, but from the Treaties themselves. In doing so the Court provided a clear example of the importance they, as opposed to the Member States, attached to the preamble and, in particular, to the value "union".

Point five is as follows. This judgment, having such depth and complexity, seems hard to understand unless viewed from the perspective that a great deal of intellectual effort has taken place previously in the ECJ to provide a schema. The Van Gend case is the clearest example of this schema in use. A point that might strengthen this contention was that the opinion of Advocate General Roemer was disregarded. It is normally the case that the Court pays great heed (in general), to the opinion of the Advocate General and that these opinions are usually of formidable logic.[165] The fact that on analysing the case, the Court decision seems of greater depth than the opinion of the Advocate General could again give a clue to preparatory analysis on the part of the Court. As Hamson stated, "It has not, I think, been sufficienty noted that the Court's decision was upon the "conclusions contraires" of its Advocate General, the person to whom it turns for impartial and considered advice upon the law which is its duty to apply".[166]

A further opinion which strengthens the theory that the ECJ judgment was one of great intellectual depth was that of Stein who concludes, "It is safe to say, with the benefit of hindsight, that had the Court followed the governments, Community law would have remained an abstract skeleton".[167]

Thus, the Court in going against this opinion and also the opinions of three Member States which taken together produce, as Hamson noted, a contention of considerable force, must have had considerable confidence in its own intellectual appraisal of the law of the EC.[168a]

Pescatore also was well aware of the force of these opinions. He wrote "The Court did not follow the course which was suggested to it with great authority".[168b] Seen in this light, a preparatory analysis tested against the facts in question is, it is suggested, the most likely explanation for the depth of the Court's judgment, and the confidence the Court had in seizing the opportunity to make it. As Pescatore stated "The important thing is to see what are the motives underlying this decision. The reasoning of the Court showed that the judges had "une certaine idee de l'Europe" of their own, and that it is this idea which has been decisive and not arguments based on the legal technicalities of the matter".[168c]

Point six is this. Several times in the previous paragraphs the case of Van Gend en Loos has been referred to as important. Judge Pescatore called it, "the fundamental judgment ... which forms a turning point in case law".[169] This section, building on the base that the case has an importance for EC case law is directed towards a subtly distinct point. Why did the case have such an effect, in a dynamic sense, upon EC law, and upon Community integration in general? The answers here, it should be noted, have no connection with any action by the ECJ. As a previous section stated, the ECJ is limited to giving judgments. The reception, save in a legal sense, by the

rest of the EC of such judgments is outwith its control. The first part of the answer can be found by analysing the work of Hamson. In his criticism of the decision of Van Gend en Loos, he noted "In 1963 the Community was not developing as rapidly and as happily as the founders had expected".[170a] Taken in conjunction with the statement given earlier on political troubles in EC law that disrupt integration, it is suggested that the EC decision, taken when there was an absence of normal institutional integration measures, had an accelerated impact. To given an analogy, where there is darkness the light of a candle assumes an unnatural degree of brightness.

The second part of the answer is a direct development from the above. From a political and pragmatic survey of the state of the EC and its institutions in the early sixties and also by reading the deeper implications of Hamson, it could be that the other institutions welcomed the ECJ decision as it stated what they themselves wished, but for political reasons could not legislate. Such a statement may seem strange but it is contended that is a perfectly valid argument for these reasons. First, as Murphy and Pritchett suggest a Court may be seen as an inherent part of the political structure.[170b] If so then it is natural for EC institutions to pass on their problems to the Courts or, more passively, to allow the Court to solve a political problem. Second, in the opinion of Karl Duetsch the above scenario already happens in an EC MS. He wrote, "at times there has been a tendency in the Federal Republic of West Germany to pass difficult political problems to the Court, and particularly to the Constitutional Court, so as to avoid the stresses and strains of

handling them through the legislative and executive institutions."[170c] Third, a recent EC matter, it is suggested, fits the pattern of the Institutions allowing the Court to be used to solve a knotty political problem.

In January 1983, the Common Market fishing policy was, once again, in disarray. A European MP, Kent Kirk (a Danish fishing boat owner) had declared that he would provoke an incident by fishing in UK territorial waters, specifically in order to bring the issue before the ECJ. Thus it seems that here the Commission/Council interface has again failed to produce the required legislation, and the Court, entirely outwith its wishes is to be used as an arm of the legislature.[171a] If so, then as in Van Gend and Costa there are many who will welcome this light in the darkness.

A second aspect of this proposed case is that it is of great relevance to various states, especially the United Kingdom and Denmark. Thus the case becomes, again outwith the ambit of ECJ action, a politically controversial macro case. In fact, whatever the Court decides will, in some way, be politically and economically unpalatable for a Member State.

The whole issue is an excellent illustration, even after twenty five years of practice, of the muddled and troubled process of legislation in a new legal order.

A further aspect of point six, the relative importance of a case is

that it helps to explain the importance of the ECJ in EC law and practice. Becker gives an excellent definition of judicial importance (which he terms judicial level of significance). It is the sum of relative judicial influence (or power) plus relative judicial impact.[171b] Previous analysis on this theme has shown that the ECJ has relatively wide power. Combining this factor with the "importance" or import of decisions such as Van Gend it can be seen that the ECJ has a high level of significance.

The seventh point in Van Gend is to analyse whether the decision most closely resembles political, economic or defensive integration. Its critics and even its supporters seem clear on one thing, namely that the case is one of dynamic political integration.[172] It has already been argued here that the Court is legally entitled to make decisions which have a political integration content, despite what its critics may say to the contrary. It is, however, argued that the decision is, in fact, one of defensive integration. The reasons for this are as follows:

Previous sections gave definitions of political and defensive integration and the circumstances best suited to a particular decision. In brief, political integration is a long term aim that really begins to happen, if at all, only at the later stages of integration. It then acts to take the EC in a new direction. Defensive integration is a short term aim which happens when the EC reaches a crisis point, or drastic slowdown in the continuing process of integration. It then acts to keep the EC going. It has no further

aim of its own. A careful reading of the actual wording of the statements by the Court together with an analysis of the situation as regards the progress of integration in the early sixties, to my mind, clearly puts the so-called dynamic integration case of Van Gend en Loos into the category of defensive integration.

Point eight deals with continuity, that is, is the ECJ consistent in its application of what it regards as fundamental principles? This question is answered unequivocally by Hamson and Pescatore. Hamson wrote that the principles set out in Van Gend en Loos have been developed in subsequent cases with a "high degree of consistency and logical coherence".[173] Pescatore stated that Van Gend en Loos "forms the starting point for a line of judgments of supreme importance".[174] He cited Costa v Enel, and Neumann as examples.[175] Further a more recent case, Simmenthal, provided a clear example of ECJ continuity.[176a] Pescatore wrote "the Simmenthal Judgement sums up the development by drawing the final conclusions from the logical sequence opened by Van Gend en Loos."[176b]

The facts in Simmenthal were reference to the Court under Article 177 of EEC Treaty by the Pretore di Susa (Italy) for a preliminary ruling in the action pending before that Court between the Italian Finance Administration and Simmenthal on the interpretation of Article 189 of the EEC Treaty, and, in particular, on the effects of the direct applicability of Community law if it is inconsistent with any provisions of national law which may conflict with it.

The Court ruled, "A national Court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the Court to request or await the prior setting aside of such provisions by legislative or other constitutional means."[176c]

Section 8 - Costa v ENEL

In Costa v ENEL the facts were as follows. In Italy an Italian nationalisation law was adopted, after ratification by the government of the EEC Treaty.[177a]

MF Costa, a lawyer practising in Milan, claimed he was not under an obligation to pay 1,925 Lire as demanded by the ENTE NAZIONALE PER L'ENERGIA ELECTTRICA (ENEL). He objected to this before a JP claiming the law of 6 December 1962 nationalising the electrical industry in Italy was contrary to certain EEC articles. Costa demanded and obtained a preliminary reference both to the Italian Constitutional Court and the ECJ under Article 177 EEC. The Justice of The Peace in Milan requested a preliminary ruling on the question of whether the EEC Treaty permitted such a nationalisation law. The Italian government however, intervened submitting that the request for a preliminary ruling was "absolutely inadmissable".[177b] Its reasoning was that the Italian Court could not apply the Italian law approving the EEC Treaty, and thus, could not ask for a preliminary ruling, since the nationalisation law was of more recent origin. If this latter law violated the EEC Treaty then the Commission should act under Article 169 EEC. The Italian Court had no choice, under Italian law it had to apply the more recent law.

The ECJ disagreed with this argument. It stated, "the executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the

objectives of the Treaty set out in Article 5(2) and giving rise to discrimination prohibited by Article 7" ... "The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories".[177c]

The case of Costa v ENEL is the complement of Van Gend en Loos. As the issues are so similar, the statements to be made as regards points one to eight, if given in full, would involve needless repetition. Thus only selected points will be examined and these in a comparatively brief manner.

The case is, of course, a macro case that is, the major legal issue, primacy, is of great importance to EC law and affects all states. Further the states themselves took a direct interest in the case even though only one, Italy, was directly involved. As to whether the issue was controversial Lord MacKenzie Stuart (writing in the late seventies) warned that the situation in Costa v ENEL should not be overdramatised.[178] However, it is probable that Pescatore was more accurate in his assessment when he wrote, "The Court was requested by an Italian Court to deal with an "explosive" preliminary question".[179]

Having established that Costa v ENEL was indeed a macro case and, therefore, one which admits of all the ramifications of "government by judges" it should be questioned whether the Court acted to appease its critics. There is support for the view that it did indeed act in this way. The appeasement consisted of two distinct actions or more

accurately one inaction and one action. The inaction was noted by Bredimas who claimed that while the Court proclaimed the primacy of Community law, "it did not come to grips with the substance of the case, viz nationalisation of the Italian Electric Industry."[180] This is, of course, a subjective assessment but a survey of the case does seem to bear out her contention. Secondly, the Court chose to use a broad interpretative method and GP and/or values. As Pescatore states, "Here again the arguments are drawn from a fundamental analysis and a view of the Treaty drawn as a whole".[181]

What did the ECJ actually do (in a positive sense) in the case? In brief, it enforced or upheld the GP of primacy of EC law over national law. The GP of primacy is too well known to need more than a brief explanation. The main idea behind primacy is the unity of European law. The European Community has a legal system that is common to several states. National law is relevant to one state only. There must, to safeguard the Community system as a unitary legal order, be a clearly defined hierarchy between Community law and national law. As Pescatore noted Costa v ENEL was, and is, the leading judgment on primacy.[182]

It is possibly more relevant to note the timing of the Costa judgment. It was this factor that gave the judgment its true significance. Pescatore wrote, "the full significance of this judgment can be appreciated only if it is borne in mind that it was given shortly after a judgment of the Italian Constitutional Court which had declared itself in a manner unfavourable to the pre-eminence of the

Community law".[183]

With the establishment of the doctrine, or GP, of primacy the Court has thus completed the work began in Van Gend, that is two major GP which underpin integration, direct effect and primacy, have been established in EC law.[184]

Further points are very similar to points made in Van Gend and are thus passed over without comment. This leads, therefore, to the question was Costa a political, economic or defensive integration decision? It is once again contended that the case resembles, most closely, the model of defensive integration. The reasons are similar to those in Van Gend. Further, an additional point should be made here which is relevant to both cases. No matter how deeply the cases of Van Gend en Loos and Costa v ENEL are examined and the list of actual pronouncements made by the court scrutinised for dynamic political instance or initiative, it is contended that they say nothing, either individually or collectively, that is either not explicitly written into, or that cannot, in a clear logical fashion, be deduced from the Treaties and preambles. If this is so, then, as MacKenzie Stuart noted, the arguments of the critics of the Court should in reality be directed against the Treaties themselves.[185]

The eighth point, the Court's consistency in its adherence to fundamental principles is again answered positively. Pescatore confirmed that the "same theme has been taken up in several judgments."[186]

Section 9 - Defrenne v SABENA

The case of Defrenne v SABENA illustrates two points in particular.[187a] The appeasement by the ECJ of its critics; its use of GP in doing so. Second the case demonstrates the mental "set" of the ECJ with regard to integration vis a vis other GP, that is, its use in this case of its schema.

In Defrenne v SABENA the facts were as follows: The case concerned an action between an air hostess and her employer SABENA S.A. over compensation claimed by her on account of discrimination in terms of pay as compared with male colleagues who were doing the same work. This resulted in the Cour du Travail, Brussels referring, under Article 177, EEC, two questions to the ECJ.

The first question asked whether Article 119 of the Treaty introduced "directly into the national law of each Member State the principle that men and women should receive equal pay for equal work and does it, therefore, independently of any material provision entitle workers to institute proceedings before national courts in order to ensure its observance and if so as from what date?"[187b]

The second question asked was "has Article 119 become applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community (if so, which, and as from what date?) or must the national legislature be regarded as alone competent in this matter?"[187c]

The Court ruled; "The principle that men and women should receive equal pay, which is laid down by Article 119 may be relied on before the national courts".[188a] The application of Article 119 was to have been fully secured by the original Member States from 1st January, 1962 and by the new Member States from 1st January, 1973. "Even in those areas in which Article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be achieved by a combination of Community and national provision.

Except as regards these workers who have already brought legal proceedings or made an equivalent claim, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment".[188b]

Before examining the two points in detail, it should be noted that Defrenne v SABENA conforms to macro case specifications. First, the case once again concerned, in the main, the GP of direct effect, which affects all EC MS. Second, Member States not directly involved in the case were also interested in the result of the case for both the United Kingdom and the Irish Republic put forward an argument against the direct effect of Article 119. Finally, the case was controversial in that a particular decision would cause resentment by some states. This was clear from a reading of the statement by Advocate General Trabucchi who noted; "the Governments of the United Kingdom and of the Irish Republic both of whom appear to be peculiarly sensitive to what

might be called the cost of the operation".[188c]

It is believed that the ECJ deliberately appeased its critics in this case in the following manner. It limited the direct effect of Article 119 to the judgment itself and subsequent EC law. Thus it was not made retroactive.

It is, of course, a subjective matter, but a reading of the entire case, and in particular the statement of Advocate General Trabucchi makes a strong argument, legally speaking, for retroactive effect. In particular Trabucchi, after giving the argument of the United Kingdom and the Irish Republic against the direct effect of Article 119 stated unequivocally that; "Arguments of this kind, however pressing on the grounds of expediency, have no relevance in law".[188d] Further, he followed up this remark with a most convincing precedent; "This Court did not deem it necessary to alter its interpretation of Article 95 which, in Germany, resulted in a large number of applications and created difficulties for the fiscal courts. The Court declared "This argument is not by itself of such a nature as to call in question the correctness of the interpretation (judgment of 3rd April 1968 in case 28/67 Molkerei-Zentrale Westfalen v Hauptzollamt Paderborn (1968) ECR at p.153)."[188e]

Further, an analysis of the work of Hamson confirms this opinion. He wrote; "It is an odd result. The interpretation ... is such that ... the Court is compelled to claim and to exercise a dispensing power which is, I believe, not known to any modern Court of any of the

Member States"[189] ..."Such a function does not appear to have been allocated to the Court of Justice by Article 164"[190] ..."the Court has decided to sever the legal world - the world in which it operates - from the world of what are called real or actual events."[191]

Finally, Bredimas also came to similar conclusions, she wrote that this case was "a clear example" of her theory of judicial appeasement given earlier in this section. She concluded the Court "gave heed to the observations submitted by the governments of Ireland and the United Kingdom".[192]

Why did the Court follow what it must have known was, legally speaking, a controversial course? The answer is, it is believed, that it deviated from its expected course regarding Article 119 in order to avoid what it saw as a greater evil. The statement by Schermers is an accurate assessment both of the problem and the solution chosen; "featuring that this would lead to monumental economic disturbances - the Court of Justice chose to extend the protection of legal certainty to an illegal situation".[193] More concisely, Hamson labelled the consequence of any other ECJ decision "chaos".[194] The recognition of state interests thus became a crucial factor for the ECJ to consider. This, it should be emphasised, is a legitimate factor for the Court to take into account. Lord MacKenzie Stuart has made this clear; "Moreover, although we are dealing with a Community and its progressive integration, we must not forget that we are also dealing with independent Member States, each with its own national interest. It is only realistic to recognise that the Community legal order, to

be effective, must also accommodate legitimate national requirements".[195]

If the above is correct, then the Defrenne case is a prime example of the ECJ bowing to the will of states. It is, in fact, the exact opposite of the government by judges theory favoured by ECJ critics. Here the wide scope of GP is again used to conceal the decision-making process and thus to forestall the wrath of critics. In direct contrast to Van Gend, here the critics purely from the legal point of view should be, not states but knowledgeable European practitioners e.g. Hamson.

The case reveals exactly how the ECJ's attitude operates. Once again, it is maintained that the decision, disagreeing with the Advocate General not on a major legal issue but on a vital practical issue, best be seen as being the result of a deep, predetermined conviction, defensive integration. Here defensive integration acts not to pull the EC through an existing dangerous situation, but to prevent one happening. Many theorists prophesied that chaos would be the result of retroactivity of Article 119.[196] Thus integration is threatened and in turn union would also be threatened and therefore integration becomes a consideration in the case. In order to uphold the perennial fundamental GP of integration, the ECJ elevates the GP of legal certainty to fundamental status. In this instance, in the case of Defrenne v SABENA legal certainty is the explicit GP but in reality it is merely the concrete expression of the Court's adherence to the implicit GP of integration.

A final point of interest in this case is the actual use (as distinguished from what was previously discussed, namely the decision to use) of GP by the Court.

A reading of the case illustrates one major facet of GP; their great flexibility when used as a tool to accomplish a task. This characteristic was noted by Schermers, who restricted himself to the mild comment that; "This is indeed an illustration of the wide scope legal certainty may have and an example of the vast discretion the Court exercises".[197] More appropriate perhaps might be a statement by the French jurist, Salleilles; "One wills at the beginning the result, one finds the principle afterwards."[198]

SECTION 10 - THE ERTA CASE

In ERTA the case turned on the validity of a deliberation of the Council relating to the negotiation of an agreement with third states.[199] The Council had tried to withdraw its work from the jurisdiction of the Court. Its reason was that the deliberation in question was a political consideration between states, and as such, outwith the ambit of judicial control. Pescatore termed this "an attempt to introduce into the Community the idea of an act of state."[200a]

The Court again disagreed with the above argument by the Council. It stated; "Under Article 173, the Court has a duty to review the legality of "acts of the Council .. other than recommendations or opinions" ..

"The objective of this review is to ensure, as required by Article 164, observance of law in the interpretation and application of this treaty."

"It would be inconsistent with this objective to interpret the conditions under which the application is admissible so restrictively as the limit the availability of this procedure merely to the categories of measures referred to by Article 189."[200b]

What is so exceptional about this case that caused Winter to designate it as even more daring and dynamic than Van Gend en Loos and Costa v ENEL; or in other words, why is ERTA a macro case?[201]

The first factor which gives the clue is that, as in other "exceptional" cases such as Van Gend and Defrenne, the Court went against the opinion of the Advocate General, here Dutheillet de Lamothe. The Advocate General had largely concurred with the opinion of the Council that there was no breach of Treaty obligation in the present case. He stated that the appeal should be declared inadmissible. It was also noted by the AG that an extensive interpretation of the treaty-making power of the Community would amount to law-making in the manner of the Roman Praetors and that such an operation would go far beyond anything the Court has ever done in the way of audacious treaty interpretation.

The Court's reaction to this was cool. As Winter noted; "It can hardly be said that the Court was impressed by the admonition of M. Dutheillet de Lamothe."[202]

The second and third factors, interest to EC law, interest to EC institutions and Member States with possibly controversial consequences can be clearly illustrated by setting out the positions of the opposing institutions. The Commission represented the interest of the Community and its institutions, claiming that the principle of attributed power should not be applied with the utmost strictness in the field of the Community's external powers in an area with so many international aspects as transport. The Council by contrast, favoured a narrow definition of the Community's external power and sought to protect the sovereignty of the MS in the foreign field from an allegedly illegal limitation by the Community.

These factors contained in the respective positions; Community interest; wide versus narrow definitions of law, sovereignty and the fight between the Community and the states over where power shall lie are the consistent themes that run through all "dynamic" or macro cases. Bearing in mind the attitude of the ECJ on such issues, the methods which were used to arrive at their decision are readily explicable.

This case, despite being a so-called daring and dynamic example of judicial activity, is also an example of counter measures against states. This was done by, once again, the deliberate choice of the ECJ to employ the teleological method of interpretation and the major employment of GP and or values in its reasoning. Thus, despite the arguments being concerned with rules, the judgment, to a great extent is based on principles. As Pescatore noted; "In the same vein (as Costa v ENEL and Van Gend en Loos) in ERTA the Court developed its conception on the contractual power of the Community in its relations with third states, starting from a consideration of the legal personality of the Community in conjunction with the general objectives defined by the fundamental provisions of the Treaty and the requirements of the effectiveness of Community Law. The specific rules applicable to these negotiations were similarly deduced from a consideration of the general system of powers in relation to external relations."[203a]

For example, in examining whether there was a Community competence in the external field in the sphere of transport, the Court first laid

the basis for its rejection on the GP of attributed competence; "One must turn to the general system of Community law relating to the agreements with non-member states ... regard should be had to the whole system of the Treaty no less than to its specific provisions."[203b]

As regards use of principles, two points emerge. First, as Winter notes it is not universally recognised that principles needed to play such a major part in the reasoning of the Court.[204] This lends support to Van Gerven's contention that the Court prefers principles to rules.[205a] The second point is that the ambiguity of the GP is a potent factor in practical decision-making. As Winter stated; "Proponents of the Council's view would consider that the "general system" or the "whole scheme of the Treaty" is apt to suggest their view."[205b] Thus, by use of GP the reasoning process is effectively shielded.

The method of appeasement used by the ECJ in this case was far from subtle. As stated, Bredimas has put forward the theory that the Court gave a conservative answer to the facts of the case in order to make the principle acceptable.[206] The ERTA case was mentioned by her as a major example of this theory in action. She wrote; "In the ERTA case this dichotomy can be clearly detected. Following the statement that the Commission has the power to negotiate International transport agreements, it was held that, on the facts of the case the Council should continue undertaking negotiations because the Commission had not taken the appropriate steps in time."[207]

Into what category, political, economic or defensive integration does the ERTA case fit? In general the case is a prime example of the struggle, within the legal framework of the Treaties, among the Institutions with the states as interested spectators. Equally the actual decision was a prime example of a long term policy judgment. Winter concluded his article on the ERTA case with a remark which reveals deep insight into the far-reaching implications of the judgment, "the Court's judgment in this case may well augur favourably for the possibility of enhancing the Community stature as an autonomous legal personality in the sphere of international relations. It seems to constitute one battle won over those who are loth to see the Community assume its proper dimensions and gain significant legal power."[208]

ERTA is thus a rare example of a decision of political integration. Clearly it is not a decision coming under the previously outlined scope of defensive integration; that is, there was no external crisis resulting in a need for basic re-statement of EC aims. A reading of the case, it is submitted, shows that the Court in fact said far more than this. As such the decision must be seen as a political integration policy statement, the final excuse, as in Defrenne that the decision could forestall a potential crisis, not applying here.

Section II - Macro Cases - Conclusions

Having made the bulk of comments on the ECJ and its handling of macro cases within the cases themselves, it remains only to re-emphasise the following major points.

First, the cases seen as a whole showed a strong element of continuity. That is, judicial decisions on constitutional law conformed to what the Court considered fundamental GP constituting the spirit of the law. It could be stated therefore, that Koopmans was correct in his assumption that; "The actual climate of European law appears to favour the evolution of stare decisis".[209] Further, it is argued that the Court was correct to be consistent in its judgments. Such action is for the good of the Community in that it upholds the GP of legal certainty. Further from the Court's own viewpoint, use of its power in this manner safeguards such power for the future. As Koopmans concluded; "If a Court's "awesome power" is not used with a minimum of consistency, its importance will rapidly vanish."[210]

Second, use by the Court both of GP and values in the macro cases, clearly showed the Court emphasised the spirit rather than the letter of the law. Such practice reserves for the Court the power to determine the future content of EC constitutional law. It should be noted, however, that this apparently wide power is curbed by the need for consistency in judgments.

Third, it is suggested that, by its deliberate emphasis on the "people" of Europe in Van Gend en Loos, the Court upholds the idea

that the Community is more than an agreement among states. That is, it repudiates the idea that the Community is run by, and for, the benefit of states and their institutions and interest groups.

Fourth, the macro cases introduced the GP of primacy and direct effect, the twin pillars upon which the GP of integration rests, into EC law. The effect of such action has been analysed in many books and periodicals.

The fifth point is a comment on the political content of ECJ action in macro cases. it is suggested that the Court has done no more than its legal duty in such cases. Further, its actions amount to no more than the establishment of a firm base for EC constitutional law. The following statements are possible reasons as to why the actions of the ECJ have gained an exaggerated importance. The natural administrative difficulties in starting a new legal order ensure that a disproportionate amount of work falls to the Court. The unfortunate failure to resolve such difficulties and the appearance of new problems lead to the situation described by Koopmans. He wrote (in 1982) that; "For the moment, however, and for the years to come the EC, with their weak political tradition and their defective legislative machinery, could scarcely do without this "awesome power" (of the Court)."[211] These problems, totally outwith the control and responsibility of the EC, tend to give EC case decisions a political importance in the eyes of EC institutions and subjects.

SECTION 12 - MICRO CASES

It might seem that the main force of this dissertation is exhausted now that the macro cases have, in the main, been dealt with. However in reality a more important aspect of use of GP by the ECJ is now dealt with, the micro cases involving GP.

Due to the aforementioned importance of Section 12 in itself and due also to the need for this section to be seen in its proper relationship to the foregoing sections dealing with macro cases, and to the thesis as a whole, eight points will be noted before going onto the classification of GP and analysis of cases.

The first point is to give an explanation of the concept micro cases. Speaking generally, micro cases are cases where the political and constitutional issues raised by macro cases are absent, that is where the main area of importance to all concerned with the case is the point or points of law at issue.[212] A more precise definition of micro cases and their interaction with GP may be given by using some analysis of Schermers as a starting point. Schermers wrote that one could distinguish three groups of GP, compelling GP, regulatory GP and GP native to the Community legal order. Further, he noted that compelling GP were subjectively decided by each society.[213] Section 3 of this chapter suggested that GP could be clearly categorised as fundamental GP and all other GP. Further for Community law the only compelling or fundamental GP was integration, along with any other principle or principles that upheld integration in any particular fact situation. Thus the specific definition of micro cases is that micro

cases are all cases that deal with GP other than compelling GP.

It should be noted that it is purely a subjective matter for the ECJ, MS, institutions and individual EC citizens to decide whether any particular case is a micro or macro case. Further not all parties need agree on the definition of any one particular case.[214] It should also be noted that the micro and macro cases distinction is not, and is not meant to be a total separation of such cases. That is, some micro cases will have macro elements and some macro cases will have micro elements.

Having stated what micro cases are the second point may now be broached. It is that this section will not be a complete record of every GP used by the ECJ. Nor will it cover all cases that deal with the selection of GP that are given. It is argued that such extensive analysis would produce little more information relevant to this thesis than can be gained from a selective study of cases. Further as new GP constantly enter EC law the worth of such work is doubtful. As Kutscher noted "the number of principles ... which the Court has at its disposal when interpreting the law is almost incalculable".[215]

The third point to be made follows closely upon the above. It is that no attempt will be made to speculate upon which GP that have not as yet been used by the Court, ought to be used in future cases.

The fourth point picks up again the analysis by Schermers noted in point one. Schermers (and others) attempt to force GP used in EC law into definite categories which have fixed weight vis a vis each other, that is they enforce on GP a definite hierarchy. This practice is not followed in this section for the following reasons. Chapter II noted that the weight on any GP vis a vis each other depends on the fact situation not on pre-determined theory. In that chapter it was stated that for EC law even the GP of integration, because it is a GP and not a rule, cannot always outweigh all other GP in all actual and potential fact situations. Finally the statement by Hartley is given to show that rigid clarification by weight is mistaken. Referring to a particular GP in EC law that has its origin in national law, which in most national classification systems is of light weight, he said, when speaking of a particular EC fact situation , "national provisions are more likely to have more weight than other GP. Further GP need arise only from the constitution of one MS".[216]

To sum up this important point, classification of GP into a rigid weight system shows a lack of understanding of the true nature of GP.

Point five argues that it is of little relevance to note from which Member States or Member State GP used by the ECJ eminate. Bredimas wrote "Indeed it is difficult to establish a definite influence of a certain MS".[217] Thus, as Bredimas noted, such analysis yields little positive evidence. Further even if it did show x state or states was influential this would mean little, for while many GP

derived from national sources are greatly similar in EC law, there is no necessity for the Court to make such a direct adaptation. Also worthy of consideration is the fact given by Usher that "for the most part the national concepts used by the Court are more general in nature".[218] Finally, the ECJ may adopt a GP from national law keeping the meaning that GP had in municipal use almost unaltered but then use it in a new way for a new purpose.[219]

Equally relevant is the statement by Warner on what the comparative process is not. He wrote "The comparative process does not consist in a competition between the MS each striving to transfer as much as it can of its own law into the common system".[220]

It should also be noted that the court itself has no inclination to devote its time to explaining where GP were taken from and what importance (if any) this fact has for EC law. As Mann said "only rarely has the Court elaborated its reference to a GP of municipal law".[221]

Finally the view of Lord Mackenzie Stuart is given. His statement, it is submitted, goes some way to explaining such judicial reticence. It is also, it is believed, equally applicable in the fields of academic research. He quotes Lord Porter who stated: "The human mind tries, and vainly tries to give a particular subject matter a higher degree of definition than it will admit". Lord Mackenzie Stuart then goes on to plead for the simpler approach stating "However much one may admire the intellectual capacity to define a concept out of existence, a

judge is unlikely to find in such a result the assistance he needs".[222] In short the Court, it is suggested, sees this task as relatively unimportant. Further paying undue attention to national law concepts might call the GP of primacy of EC law into question.

Point six continues from point five. While, as stated, it is of little value to over-analyse points of origin of GP, it is relevant to find all possible sources of GP, i.e. the reservoir of GP and how such GP are adapted to fit the needs of the Community legal order. This has already been done in section 4. Further it is also relatively important to note the number of ways GP can enter the particular case. This will be done in passing during the course of this section.

Point seven deals with the hierarchy of cases, that is, it attempts to find whether certain cases are more important than other cases. If so, they should receive more attention than other cases involving GP. Such a question can, of course, only produce a subjective answer. For example with regard to the major themes of this thesis individual macro cases are worthy of deeper study than individual micro cases. Subjectively, and perhaps objectively speaking, there can be little doubt that the single macro case of Van Gend, for example, is more important for EC law than any micro case. The statements in the section dealing with that case, especially those of Pescatore and Stein make clear that they regard Van Gend as a case of major import for EC law. However it will be shown later that, collectively speaking, the micro cases are more important for the long term future

development of EC law than are all macro cases, even when seen collectively.

Unlike the macro cases, the individual micro cases have no deep political points. Their range of influence is limited to the legal issues raised by that case. The intellectually provocative handling of GP by the Court, to a large degree is absent.

Of greater relevance than individual micro cases are various groupings of micro cases. For example where there is little or no law e.g. competition law concerning provisional validity of agreements between undertakings, a GP may be an important, or perhaps the most important factor in settling a specific fact situation. A series of such cases provides an opportunity to study both how the case law develops and how the ECJ attempts to define the meaning of the relevant principle or principles through the cases. Such a series of cases is examined in Chapter VII.

This point is concluded with some theoretical observations taken, in the main, from Chapter II. No series of cases can totally define a GP. The number of potential dissimilar fact situations to which one GP can apply is almost infinite. The relevance of a GP to any case may vary from being a minor consideration among others to the major or only source of action depending on the actual fact situation.

Point eight concerns the fact that section 12 uses a classification system for GP.[223] It lists some of the arguments for and against

use of such a system. The main arguments against employing a system are these: First, most people when creating such a system endow it with a subjective hiearchial order e.g. that the GP of legal certainty and all GP coming under it are, for EC law, fundamental GP. This goes against the previously stated opinion that GP have a constantly evolving weight vis a vis each other. Second, no system can ever be complete. While this is a fairly obvious danger it is still comparatively easy, once the work is completed, to reply too much upon the system and fail to keep up to date with any developments of established GP or any new GP that arise in practice.

Third, no system is ever free of some degree of overlap between headings and, in some cases, there may be wrong or disputed classification of a particular principle or principles.

The major arguments for classification are, it is contended, that principles do fall into loose natural groups. Also it is possible to construct a system without loading it with a hierarchy of importance. A more minor, but still important point is that a well thought out system speeds the task of listing, and retrieving when wanted, every GP that comes before the Court. On balance therefore it is worthwhile to employ a classification system.

As to the system used in Chapter 12, it is, as stated, a loose classification of GP into various groups. Principles that do not naturally come under any group are listed individually. Some principles e.g. legal certainty and fundamental human rights are given

a dual role - as head of taxonomic groups, as GP in their own right. For the sake of clarity all GP serving as group headings are underlined in the synopsis that follows. Further the system attaches no importance to the order in which the material is presented. Finally as to the system used in this thesis it must be pointed out that it is based, in the main, on the system used by Schermers, this system being, in the opinion of the author, both comprehensive and comprehensible.[224]

SURVEY OF GENERAL PRINCIPLES

1. Legal Certainty

2. Specific Time Limits

3. Acquired Rights

4. Non-Rectroactivity of Legislative Acts

5. Legitimate Expectations

6. Use of Understandable Language

7. Fair Application of the Law

8. Equity, Natural Justice and Fairness

9. Proportionality

10. Good Faith

11. Solidarity

12. Fundamental Human Rights

13. The Right to be Heard

14. Non Bis in Idem

15. Freedom of Trade Union Activity

16. Equality or the Prevention of Discrimination

17. Unjust Enrichment

18. Force Majeur

19. Legitimate Self Defence

20. Estoppel

21. Community Preference

22. Res Judicata pro Veritate Accepitus

23. Cessante Ratione Legis, Cessat et Ipsa lex

24. Continuity of the Legal System

25. Unity of the Market

Before starting to analyse the twenty-five GP listed it should be noted that, while using actual ECJ cases as the major, and most authorative, source of reference material the work of various eminent authors on GP in EC law, Hartley, Mertens de Wilmars, Schermers, Toth and Usher is used as a secondary source.

1. Legal Certainty

The concept of legal certainty springs from the need for the application of the law to a specific situation to be predictable. The GP of legal certainty has been seen as having great importance for all legal orders. For example Schermers designated it as "a principle underpinning any legal system",[225] while Usher noted that "it is a principle so general that it cannot really be ascribed to any particular national source".[226] As such it ought to be of importance to Community law.[227] Hartley for example believes it to be the most important GP of Community law.[228] Mertens de Wilmars, the ex-President of the Court of Justice said of legal certainty "The principle that vested rights must be respected and that all laws must not be retroactive provides the basis of legal certainty in all the legal systems of the MS. It may be said that the case law of the Court of Justice has adopted those principles as they stand, whilst at the same time it should be recognised, and is recognised in the legislation of the MS, that in exceptional cases they may be adapted to a certain extent".[229]

The principle has many concrete applications within Community law. Usher stated, "it is now often used as a means of interpreting Community acts in such away as to ensure their validity rather than as a criterion to determine their validity".[230] Further, "the modern use of the principle of legal certainty often conflicts with lawfulness, that is, the two GP's are weighed against each other in a particular case".[231]

In order to illustrate the GP of legal certainty within the EC some cases involving the concept are examined.

In the Bosch Case the facts were as follows.[232] In 1903 Bosch granted Van Rijn the exclusive rights to sell all its products in the Netherlands market. To protect the exclusive rights of sale, both of Van Rijn and all other agents similarly bound Bosch concluded with each national purchaser, within the framework of a sales contract that "Except with our written permission Bosch products may not be exported abroad either directly or indirectly".[233] During 1959 and 1960 de Geus imported Bosch products into the Netherlands from Germany. The German sellers were bound by an undertaking not to export them abroad.[234]

The court ruled that "In general it would be contrary to the general principle of legal certainty - a rule of law to be upheld in the application of the Treaty - to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies".[235]

In Portelange v Marchant the facts were as follows.[236] On 1st July 1961 Smith Corona Marchant granted to Portelange exclusive sale and distribution rights in Belgium and Luxemburg on certain of their products. When Smith Corona Marchant made a new product, electric copying machines, these were included, by implication, in the contract. On 6th October 1966 Smith Corona Marchant repudiated the contract soley with regard to the copying machines.

The above sequence of events resulted in a case where the following arguments were expounded. Smith Corona Marchant pleaded in Court that the agreement was void under Article 85(1) of the EEC Treaty. Portalange maintained that even if the agreement was contrary to that article it had provisional validity since it had been notified to the EEC Commission within the time limit laid down by regulation No17/62 and the Commission had not yet taken a decison under Article 85(3).

The ECJ was asked for a ruling by the Tribunal de Commerie under Article 177 EEC "How are Article 85 of the EEC Treaty and the implementing regulations adopted under it to be interpreted as regards the effects of the provisional validity acknowledged in the case of agreements which have been notified in due time to the Commission of the European Communities, before the commencement by the latter of the procedure provided for in Article 9 of Regulation No17?".[237]

The Court said - "it would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85(3) of the Treaty, they are not completely efficacious.

Although the fact that such agreements are fully valid may possibly give rise to practical disadvantages the difficulties which might arise from uncertainty in legal relationships based on the agreements notified would be still more harmful".[238]

Thus the ruling was that Agreements referred to in Article 85(1) of the Treaty, which have been duly notified under Regulation No 17/62, are fully valid so long as the Commission has made no decision under Article 85(3) and the provisions of the said regulations.

The facts of the Brasserie de Haecht v Wilkin-Janssen Case facts were as follows.[239] In 1963 Brasserie de Haecht concluded contracts with Wilkin-Janssen who undertook to exclusively obtain supplies of beer, liquors and soft drinks from de Haecht. In consideration of the above agreement de Haecht loaned Wilkin-Janssen furniture and a sum of money. When Wilkin-Janssen failed to honour their exclusive purchase obligation, de Haecht (in 1966) went to the Tribunal de Commerie of Liège for repayment of the loan, return of the furniture and payment of damages. In May 1967 the Tribunal de

Commerie referred a preliminary question on the interpretation of Article 85 to the ECJ. This was answered by the Court in its judgement of 12 December 1967.[240]

The ECJ in answer to the preliminary questions of the Tribunal de Commerce stated in 1972.

"There is, therefore, room for distinction in applying Article 85(2), between agreements and decisions existing before the implementation of Article 85 by regulation No.17, hereinafter called old agreements and agreements and decisions entered into after that date, hereinafter called new agreements.

In the case of old agreements, the general principle of contractual certainty requires, particularly when the agreement has been modified in accordance with the provisions of Regulation No.17, that the Court may only declare it to be automatically void after the commission has taken a decision by virtue of that Regulation.

In the case of new agreements, as the Regulation assumes that so long as the Commission has not taken a decision the agreement can only be implemented at the parties' own risk, it follows that notifications in accordance with Article 4(1) of Regulation No.17 do not have suspensive effect.

Whilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot however, absolve the Court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity".[241]

In general it could be said that the importance of the GP of legal certainty was and is cleary recognised by the ECJ. Equally it should be noted that, as the Second Brasserie de Haecht Case shows, the principle of legal certainty has not degenerated into a rule that automatically applies in every instance, that is, the principle has limitations. To quote Schermers "... legal certainty is not a compelling legal principle which must be safeguarded at all costs. The Court rather regards legal certainty as a desirable end but as one which can be outweighed by more momentous legal rules or even by considerations of a more pressing economic or practical character".[242]

2. Specific Time Limits

The first subheading under legal certainty is specific time limits. As Schermers noted "Time limits and periods of limitation serve to ensure legal certainty. Uncertainty about the possibility of acts being annulled or of the state of inaction being changed is terminated on the passing of the prescribed time limit".[243] For the Community legal order the relevant question has been thus phrased by Schermers, "Can a time limit be invoked as a general principle of law when no

express provisions have been made?"[244] This question has been discussed several times by the Court. The following cases are given as examples.

In the Steel Subsidies Case the relevant considerations of the Court were as follows.[245]

"It follows, however from the common purpose of Articles 33 and 35 that the requirements of legal certainty and of the continuity of Community action underlying the time limits laid down for bringing proceedings under Article 33 must also be taken into account - having regard to the special difficulties which the silence of the competent authorities may involve for the interested parties in the exercise of the rights conferred by Article 35".[246]

"Thus it is implicated in the system of Articles 33 and 35 that the exercise of the right to raise the matter with the Commission may not be delayed indefinitely".[247]

In the Riva Case the Commission charged a levy after an eight year period had passed.[248] Riva submitted that such action was contrary to the GP of legal certainty. The Court held "The absence of provisions relating to the barring by time of the powers of organisations competent to draw up estimates of their own authority of the quantities and periods for which undertakings are subject to the duty to contribute to the equalisation scheme is explained by the desire of the legislature that in this respect the principle of distributive justice should prevail over that of legal certainty".[249]

Other relevant cases that came before the court were those of Premiums for Grubbing Fruit Trees, Lorenz and the Pfützenreuter Case.[250] Of particular interest are The Quinine Cartel Cases and the Dyestuffs Cases.[251] They are excellent examples of how the ECJ continually develops its use of a GP in similar fact situations. The Quinine Cartel Cases concerned the fact that "the provisions governing the power of the Commission to impose fines in cases of infringement of the competitoin rules did not provide for a statute of limitations".[252] In the Quinine Cartel Cases Chemiefarma was fined for acts committed between four and six years earlier and attempted to invoke such a Statute. The Court refused to apply the Statute and held "In order to fulfill their functions of ensuring legal certainty limitation periods must be fixed in advance".

"The fixing at their duration and the detailed rules for these applications come within the powers of the Community Legislature" "Consequently the submission is unfounded"[253]

In Buchler v Commission the relevant ECJ statement was, "The applicant complains that the Commission did not take into account the fact that proceedings in respect of the alleged infringement are barred having regard to the period which elapsed between the date of the acts and the initiation of the administrative procedure by the Commission".

"The provisions governing the Commission's powers to impose fines for infringement of the rules on completion do not lay down any period of

limitation. In order to fulfill their function of ensuring legal certainty limitation periods must be fixed in advance. The fixing of their duration and the detailed rules for their application come within the powers of the community legislature". "Consequently the submission is unfounded".[254] In Boehringer Mannheim v Commission Consideration 5, 6, 7 repeated considerations 5, 6, 7 of Buchler.

The next set of cases watered down this declaration. As Schermers noted "This may have been too strong a statement. A statute of limitations is not only a regulatory measure; in extreme cases it does provide an element of justice towards the people concerned and may therefore be a compelling legal principle.[255] In the Dyestuffs Cases the Court repeated its previous ruling (quoted above) but in ICI v Commission, added this sentence "Although in the absence of any provisions on this matter, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose fines, its conduct in the present case cannot be regarded as constituting a bar to the exercise of that power as regards participation in the concerted practices of 1964 and 1965".

"Therefore the submission is unfounded"[256]

In Francolor v Commission [257] and Casella v Commission [258] the considerations 37, 38 and 25, 26 respectively, merely repeated ICI v Commission considerations 49 and 50.

Hoechst v Commission stated "Although the provisions governing the Commission's power to impose fines in cases where Community rules have been infringed do not lay down any period of limitation, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose fines"[259]
In ACNA the relevant considerations were 31, 32, 33 [260]

The matter ended when the Council regulation on limitation periods was enacted. Though the reasons for such ECJ action in Dyestuffs must remain speculative it is believed the action was motivated by the desire of the ECJ to generally appease its clients. This policy is, it is believed, present in micro as well as macro cases.

An example of such practice was given by Allen in his analysis of the Dyestuffs Cases. [261] He noted that, following the decision of the Commission in the Dyestuffs Cases the UK government submitted an "Aide Memoire" to the ECJ summarising its views.[262] This view can be summed up as a most restrictive view of antitrust jurisdiction. As Allen stated it made "a sharp contrast with the submission of the Advocate General".[263] However, it represented, again in the words of Allen, "a declaration by an important future member of the European Community".[264]

This "Aide Memoire" had, it is suggested, a great influence on the decision of the ECJ. As Allen wrote "The Dyestuffs Cases were the

first situation upon which the Court could have squarely confronted the problem of jurisdiction over foreign corporations. Unfortunately .... the Courts judgment might be regarded as anticlimatic, for the Court may have taken the easy way out".[265]

3. Acquired Rights

A second subheading under legal certainty is acquired rights. This is a GP holding that cases must be decided according to the law as it stood at the time of its application. Its relationship to legal certainty is that it is inherent in legal certainty that acquired rights be respected. Schermers and Toth note that the GP of acquired rights bears a close resemblance to the GP of protection of legitimate expectations.[266] The major difference is that legitimate expectation is based on subjective considerations and can exist even while lacking a right, an acquired right can only arise from the explicit provision of positive law.[267] Some cases dealing with this GP are now given.

The Klomp Case had as Schermers noted "to decide about the regime of privileges and immunities which had been modified in the intervening period between the events which led to the case and the discussion of the case in Court"[268]

The Court held "the procedure provided for by Article 16 of the Protocol on the Privileges and Immunities of the ECSC, which was applicable at the time when the dispute arose and the provisions on

preliminary rulings for interpretation of the Treaties establishing the EEC and the EAEC have an identical objective namely to ensure a uniform interpretation and application of the provisions of the Protocol in the six Member States. In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman Law, when legislation is amended, unless the legislature expresses a contrary intention, continuity of the legal system must be ensured. Accordingly the Court has jurisdiction to give a ruling on the request for interpretation".[269]

In Algera the Court held, "It emerges from a comparative study of this problem of law that in the six member States an administrative measure conferring individual rights on the person concerned cannot in principle be withdrawn, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reversing its decision. This is true in particular of the appointment of an official.

If on the other hand, the administrative measure is illegal, revocation is possible under the law of all the Member States. The absence of an objective legal basis for the measure affects the individual right of the person concerned and justifies the revocation of the said measure. It should be stressed that whereas this principle is generally acknowledged, only the conditions for its application vary.

.... In agreement with the Advocate General's opinion, the court accepts the principle of the revocability of illegal measures at least within a reasonable period of time, such as that within which the decisions in question in the present dispute occurred".[270]
In the Simon Case it was stated by the Court "If the administrative authority becomes aware that a certain allowance has been granted as a result of a wrong interpretation of a legal provision it has the power to amend the previous decisions.

Even if in certain cases in view of vested rights withdrawal on grounds of unlawfullness does not have a retroactive effect it always takes effect from the present"[271]

In the Herpels Case it was held, "Although the retroactive withdrawal of a wrongful or erroneous decision is generally subject to very strict conditions, on the other hand the revocation of such a decision as regards the future is always possible"[272]

The Fifth Reinarz Case had the following relevant considerations by the Court, "Article 99 (3) of the ECSC Staff Regulations which comes under Title VIII concerned with transitional and final provisions, provides that the amount of the resettlement allowance due to established officials under the old ECSC Staff Regulations who terminate their service after the new Regulations come into force shall not be less than the amount which the person concerned would

have received under the provisions of Article 12 of the former ECSC General Regulations.

A transitional provision issued on the transaction to a less generous system does not normally seek to give employees greater rights than they would have had under the system which is revoked.
Such a provision cannot therefore be interpreted as allowing a combination of the more favourable method of calculation of one system with the more favourable salary scale of another".[273]

4. Non-Retroactivity of Legislative Acts

Non-retractivity of legislative acts is a GP which in Schermer's words "promotes legal certainty"[274] Its basic premises have been clearly stated by the ECJ. In the Cervais-Danone Case it was held "A regulation adopted under Regulation No. 97/69 is of a legislative nature and cannot have retroactive effect".[275] The 2nd Racke Case held "A fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it".[276]

Further the Neumann Case made it clear that regulations cannot enter into force immediately unless specific reasons for doing so exist.

"This wide liberty granted to the authors of a regulation cannot, however, be considered as excluding all review by the Court, particularly with regard to any retroactive effect. An institution

cannot, without having an adverse effect on a legitimate regard for legal certainty, resort without reason to the procedure of an immediate entry into force.

"... any interval between the publication and the entry into force of the regulations might in this case have been prejudical to the community".[277]

The Post Clearance Recovery Case continued ECJ observations on this GP.[278] There it held "Although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force this is not the case with substantive rules. On the contrary, the latter are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them.

This interpretation ensures respect for the principles of legal certainty ...".[279]

In the Mrs P Case it was stated, "According to a generally accepted principle a law amending a legislative provision applies, save as otherwise provided, to the future effects of situations which arose under the previous law. Thus an amendment to Article 27 of Annex VIII, which moreover reflects an alteration in the attitude of the law towards the divorced wife, must, save as otherwise provided, apply

from the time of its entry into force to all divorced wives of deceased officials".[280]

Legal force should begin from the publication day of the act in question. The Exportation des Sucres Case made this clear. There it was held that, in the absence of relevant reasons for retroactive effect a regulation published on 2 July 1976 had to apply from that date and not from 1 July when it was to have entered into force.

It should be noted that retroactivity is not automatically rejected in all instances by the Court. Circumstances where the Court may choose to uphold retroactivity were compiled by Schermers and are as follows.[282]

First there is the situation where "pressing economic reasons demand retroactive legislation".[283] An example of this is the alteration of EC agricultural prices after revaluations and devaluations. Schermers stated that the Court "has always accepted that such adjustments have retroactive effect as from the date of the parity change".[284] He cited this First Rewe Case where it was held that "Until a system of aids for German agricultural producers was established it was necessary to avoid any interruption in the maintenance of the level of agricultural prices existing in Germany at the time of the revaluation of the German Mark.

The transitional protective measures authorised by the decisions of 30 October 1969 would not have been capable of attaining their

objectives fully if they had not been applicable from the entry into force of the new parity of the German Mark.

It was thus proper to fix at this same date the point when the protective measures authorised could take effect. The decision of the Commission of 30 October 1969 and those of 31 October and 3 November 1969 which supplemented it are consequently not invalid to the extent to which they have retroactive effect".[285]

Second, retroactivity may be acceptable to the ECJ in order to ensure continuity in legal relations. Here the choice for the Court is which is the lesser of two evils, allowing the creation of a gap between two regulations or legal uncertainty caused by the retroactivity of the new regulation. Relevant cases are First and Third Remunerations Adjustment Cases, the Fifth Roquette Case, the Maizena Case and the Second Tunnel Refineries Case.[286] Schermers, citing the Second Tunnel Refineries Case stated that "the Court accepted retroactivity in order to restore a situation upset by the annulment of a previous rule of law".[287] Further he thought the decision was correct rectroactivity being, in his opinion, the lesser of the two evils stated above.[288]

Third, retractivity may operate where financial compensation charged or paid to alleviate currency instability problems can be established only at the end of the relevant period of time. The pertinent case being the IRCA Case where it was held "with regard to monetary compensatory amounts, the fact that the factors necessary for their

calculations are only determined after the period during which the said amounts have become applicable is frequently inherent in the system itself, and cannot therefore be considered, on such grounds, as giving the rules a retroactive effect".[289]

A further ECJ concern over retroactivity is that the legislator who makes decisions on retroactivity consequently exercises a high degree of discretion.[290] The Neumann Case made it clear that this discretion must be subject to judicial review.[291]

5. Legitimate Expectation

The GP of legitimate expectation is, as Schermers puts it, that "the law should not be different from what could be reasonably expected".[292] The principle is taken from the legal orders of many states, the major derivation being from the administrative law of the Federal Republic of West Germany. There it is called Vertrauensschutz. According to Hartley it is a GP that serves as a foundation of a rule of interpretation as well as a ground for annulment of a Community measure.[293] He states however that it is most often used as the basis of an action for damages for non-contractual liability.[294] Some relevant comments on the GP are made by Toth. He stated "the principle does not by its very nature lend itself to mechanical application ... The existence of legitimate expectations worthy of protection can be established only on the merits of each individual case. It is determined by the extent to which a prudent economic operator can be considered justified in relying on the continued existence of a promise or an advantageous

legal provision or situation even though he must be aware that the law creating that situation or is underlying premises, have, or are about to be, altered.[295] Some cases dealing with this GP are now examined.

The Second Toepfer Case included the following relevant considerations.[296] "The applicant also claims that the regulation at issue constitutes a breach of the principle of the protection of legitimate expectation". "The submission that there has been a breach of this principle is admissible in the context of proceedings instituted under Article 173, since the principle in question forms part of the Community legal order with the result that any failure to comply with it is an 'infringement of the Treaty or of any rule of law relating to its applications" within the meaning of the article quoted". "Nevertheless the submission has not been substantiated".[297]

In Lucchini v Commission the Court declared, "Secondly, the applicant states there has been an infringement of general principles of law, in particular of the principle of legitimate expectation and that of the prohibition of discrimination. The Commission, it claims, has failed to fulfill its legitimate expectations by adopting temporarily a permissive attitude towards other undertakings guilty of the same actions and putting aside this conduct with regard to Lucchini. The applicant claims that the Commission also discriminates against it in relation to those undertakings, more precisely with regard to the additional charge for small quantities".

"It is necessary to observe first of all that a concession on the part of the authorities cannot make an infringement legitimate still less justify making that infringement more serious. The fact that the Commission may have shown some laxity as regards alignment not on specific price lists but on a basic price formed by the minimum price in no way justifies selling at prices lower than the minimum prices or the failure to take into consideration extras for that quality or quantity. Moreover, it has not been shown that producers in other Member States benefited from a concession enabling them not to charge the extras for quality or quantity".[298]

The GP of protection of legitimate expectation will not automatically be the major consideration in each case it is relevant to. As the Luhrs Case showed considerations of public interests may be of more immediate importance.

"It follows from the stated circumstances that Regulation no.348/76 was adopted pursuant to an overriding public interest which required that the rules adopted should enter into force immediately".[299]

In fact Waelbroeck has shown that even where public interest is not a relevant factor the protection of legitimate expectation is, as Schermers stated "possible only under strict conditions."[300]

Waelbroeck's examination of ECJ case law led him to distinguish six conditions which must be fulfilled before legitimate expectation can

be upheld "(1) the commercial operation for which protection is claimed must be irrevocable, (2) the legal rule which caused the expectation must definitely lead to the result expected, a chance is not enough, (3) the benefit for which protection is claimed must be a forseeable result of the previous rules, unforseen collateral rules are not protected, (4) the protected interest must be worth protection (5) the change in legislation should not be foreseeable at the moment when the operation for which protection is claimed was performed, (6) transitional provisions of the new legislation must be insufficient".[301]

A noteworthy feature of the use the ECJ had made of this GP is pointed out by Mertens de Wilmars. He wrote that the GP, in the MS, had only been applied by the Courts to individual administrative measures.[302] In EC law this theory has been extended to legislative measures - or at least to some of them - in particular "in the area of the organisation of the agricultural markets".[303] He gives as the reason for this the fact that within the agricultural system "a number of measures intended to guide or encourage traders, although adopted in the form of a regulation, are, from the economic point of view so sectoral or specific and limited in time that their effects are very similar to those of an individual decision".[304] He cited the CNTA case as an example.[305]

6. Use of Understandable Language

The final principle under the umbrella of legal certainty is use of understandable language. The case of Farrauto dealt with this point "The national Courts of the Member States must nevertheless take care that legal certainty is not predjudiced by a failure arising from the inability of the worker to understand the language in which a decision is notified to him".[306]

As well as the above the Court has also made use of the words "legal clarity" this being "imperative" where uncertainty may lead to the application of "serious sanctions" [307] The Court held in the First Conservation Measures Case that "This obligation to introduce implementing measures which are effective in law and with which those concerned may readily aquaint themselves is particularly necessary where sea fisheries are concerned, which must be planned and organised in advance, the requirement of legal clarity is indeed imperative in a sector in which any uncertainty may well lead to incidents and the application of particularly serious sanctions". [308]

7. Fair Application of the Law

A second principle that functions as a group heading is that of fair application of the law. This principle it is suggested, could equally well be a value concept. As such it is in most instances too general by itself for concrete application and is broken down into the following four categories.

First, equity, natural justice and fairness; second, proportionality; third, good faith; and fourth solidarity.

8. Equity Natural Justice Fairness

Equity, natural justice and fairness are three separate though clearly related GP. Due to this relative closeness they are brought together under one heading. All three principles are recognised in many municipal legal orders. Equally all three principles have a place in Community law. For example in the Walt Wilhelm Case the Court referred "to a general requirement of natural justice".[309] The Lührs Case showed that the Court takes the view, as regards interpretation of a text that natural justice demands the interpretation least onerous for the individual.[310]
In the Lührs Case the Court held. "Thus the appropriate answer is that in view of the uncertainties inherent in Regulation no. 348/76, natural justice demands that for the purpose of converting the tax on exports into national currency the exchange rate which at the material time was less onerous for the taxpayer concerned should be applied."

"In view of the foregoing it does not appear feasible within the framework of the existing rules to satisfy the requirements of natural justice in possibly a few special cases, since provision can be made for such requirements only by the Community legislature through appropriate hardship clauses (Härteklauseln) of the kind found in German revenue law and in that of other Member States".[311]

This is not to say however, as Schermers has noted, that the Court will always regard upholding the rights of the individual applicant as fulfilling the requirement of natural justice.[312]

In Zerbone the Court held "If the burden or advantage represented by the compensatory amounts for the person paying or receiving them were displaced in time there would be added to all the inconveniences already existing and resulting from the absence of fixed parities a new inconvenience arising from the fact that during the period elapsing between the date of import or export and that of payment the trader would unfairly have to face an uncovered balance with loss of value or would profit quite as unfairly from a delay in payment with a consequent advantage over his competitors."[313]

9. Proportionality

The second subheading is proportionality. According to Schermers, this GP is related to the GP of equity.[315] The roots of the GP of proportionality are extensive. It arises both from the Municipal law and International law. Lord MacKenzie Stuart notes an equally valid origin of proportionality, he wrote it was also derived from universal good sense.[316] The particular legal order that has closest association with it is, according to both Mertens de Wilmars and Hartley, the Federal Republic of West Germany.[317] There it is called Verhaltnismassigkeit and is regarded as underlying certain provisions of the German constitution. Toth is of the opinion that proportionality also has roots in certain provisions of Community law.[318]

Within the EC legal order the GP of proportionality lays down that the Community institutions and the national authorities may impose upon Community citizens only such obligations and restrictions as are strictly necessary for the particular public interest purpose to be attained. Hartley believes that proportionality is particularly important in the sphere of economic law since this frequently involves imposing taxes, levies, charges or duties on businessmen in the hope of achieving economic objectives.[319] Mertens de Wilmars wrote that from the economic point of view the rule embodies two concepts fundamental to the mixed economy systems .... the principle that the intervention of the authorities might be subsidiary in nature and that there must be a connection between an intervention threshold and the safeguard of individual liberties.[320] Further he noted that "Articles 5 and 57" ECSC reflect these ideas.[321]

The principle of proportionality has a wide application. Some examples are as follows. As Toth states "The principle requires that in the exercise of their powers the Community institutions should always act with the utmost care and should avoid imposing upon commercial operators burdens and charges which are manifestly out of proportion to the object in view."[322] Proportionality "requires that action of the institutions in response to a wrongful act of Community subjects, should be proportionate to the gravity of that act. Further it may invalidate retroactive authorisation by the Commission of protective measures to be taken by a Member State."[323]

The use of proportionality involves a precise judgment on the part of the ECJ in all these matters. The Second Schlüter Case gives an example of this.[324] Here the Court held "in exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that the obligation must be measured in relation to the individual situtions of any one particular group of operators.

Given the multiplicity and complexity of economic circumstances such an evaluation would not ony be impossible to achieve, but would also create perpetual uncertainty in the law.

An overall assessment of the advantages and disadvantages of the measures contemplated was justified, in this case, by the exceptionally pressing need for practicability in economic measures which are designed to exert an immediate corrective influence; and this need had to be taken into account in balancing the opposing interests".[325]

The Second Schlüter Case can, it is believed, be seen as an example that bears out Hartley's opinion that proportionality has a particular importance in the sphere of economic law. As to the other examples of proportionality in the cases, the following cases are of interest for various reasons. Both Hartley and Usher agree on two points regarding the cases of Fédération de Belgique v High Authority and Internationale Handelsgesellschaft v EVGF.[326] They both state that

the former is of some interest as the first example of the GP of proportionality in EC law. The latter case was of greater importance. As Hartley stated "It was in the Internationale Handelsgesellschaft case that the concept first made an impact on EC law". [327] In the former case the relevant statement of the Court was... "in accordance with a generally accepted rule of law such an indirect reaction by the High Authority to illegal action on the part of the undertakings must be in proportion to the scale of that action".[328]

As Usher wrote they said little more than "the punishment must fit the crime". [329]

The opinion of A.G. Dutheillet de Lamothe in the latter case gave a definition of proportionality which, again in the opinion of Usher gives that GP "its real importance in Community law". [330] The AG said "citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes to be attained". [331]

The final example of proportionality in this section is the Skimmed Milk Powder Cases. [332] It is, in the words of Mertens de Wilmars, a classic example of the breach of the principle of proportionality".[333] In order to reduce the problem of surplus milk products the Council made the grant of Community aid in that sector subject to the obligation to purchase, at a fixed price decided by the Council, certain quantities of such products from intervention

agencies. The price was felt to be too high and a number of feedstuff producers contested the validity of the regulation. Their argument was that while the obligation to purchase was compatable with the Treaty, the obligation to buy at such a high price was in breach of the GP of proportionality. In essence it constituted a discriminatory distribution of the burden of costs between the various agricultural sectors and moreover the fixing of the price at that level was not necessary to attain the desired objective of disposing of the skimmed milk powder. This lucid definition of what constituted a breach of the GP of proportionality in this fact situation was at one with the view of the Court. It declared the regulation invalid.[334]

A last point to note on proportionality relates to the theoretical consequences of use of GP spoken of earlier in this chapter. As Hartley states "the most striking thing about proportionality is that it leaves a great deal to the judgment of the court". [335]

10. Good Faith

The third subheading is the GP of good faith. It is present in many legal orders. For EC law it is that the actions of the Community institutions, both in administrative and in contractural spheres must always be carried out with due respect to the principle of good faith. The principle has been upheld in several ECJ cases eg Lachmuller and the First Hoogovens Case. [336]

In Lachmuller the Court held "the conduct of an authority in adminstrative as in contractual matters, is at all times subject to an observance of the principle of good faith.

The contracts at issue, which come under administrative law, are subject to observance of this principle and the fact that they were provisional or temporary does not exempt them from this requirement. Consequently the contested decisions of dismissal must, in order to terminate those contracts, be justified on grounds relevant to the interests of the service and there must be nothing arbitrary about them, such, for example as the need to dispense with the services of an unqualified servant or of one occupying a post which has been abolished in the interests of the service.

The statement of the grounds on which an administration measure is dictated by the public interest must be made in terms which are specific and capable of being challenged for otherwise the official concerned would have no means of knowing whether his legitimate interests have been rejected or infringed and furthermore any review of the legality of the decision would be hampered.

In the present cases the letter of dismissal did no more than notify the applicants, without giving any reasons of the administration intention to terminate their contracts". [337]

In the First Hoogovens Case the Court held ".... the competent authority can withdraw an exemption with retroactive effect only by

taking into account the fact that the beneficiaries of the revoked decision could assume in good faith that they would not have to pay contributions on the ferrous scrap in question and could arrange their affairs in reliance on the continuance of this situation".[338]

Analysis by the Court then confirmed that Hoogoven could not reasonably have made such an assumption.

11. Solidarity

The GP of solidarity is the final subheading in this group. It has been taken by the ECJ to imply the following for MS: that it is the duty of MS to take account of the consequences which their acts might have for other members. The Rediscount Case and the Premiums for Slaughtering Cows Case are relevant as regards this GP.[339]

The Rediscount Case stated that "The solidarity which is at the basis of these obligations, as of the whole of the Community system, in accordance with the undertaking provided for in article 5 of the Treaty, is continued for the benefit of the States in the procedure for mutual assistance provided for in Article 108 where a Member State is seriously threatened with difficulties as regards its balance of payments."[340]

In Premiums for Slaughtering Cows the disturbance of the balance between advantages and obligations flowing from Community membership was seen by the ECJ as a "failure in the duty of solidarity accepted

by Member States by the fact of their adherence to the Community". [341]

This case again stresses the point that, in binding themselves to a Treaty the Member States accept not only rules but principles inherent in the rules.

12. Fundamental Human Rights

The GP of Fundamental Human Rights is the final taxonomic heading. The basic GP of fundamental human rights as such is dealt with more fully in the next chapter. However, other major rights under this principle are listed here in order to complete classification. They are (13) the right to be heard; (14) non bis in idem (15) freedom of trade union activity.

13. The Right To Be Heard

In the Hoffmann la Roche Case the Court held "Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings. [343]

The right to be heard, as the Court has stated, is an important GP of EC law that arises with regularity in cases concerning EC staff. The Alvis Case is an example. [344] Here it was held "According to a generally adopted principle of administrative law in force in the

Member States of the European Economic Community, the administrations of these States must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them. This rule which meets the requirements of sound justice and good administration must be followed by Community Institutions". [345]

Schermers was of the opinion that by 1977 this "principle in force in the Member States has clearly developed into a general principle of Community Law."[346] In the 1977 Moli Case the court put it thus "... the general principle that when any administrative body adopts a measure which is liable gravely to prejudice the interest of an individual it is bound to put him in a position to express his point of view." [347]

It must not be thought that the right to be heard is relevant only in staff cases. By Regulation 99/63 of the Commission that institution must inform an undertaking of objections lodged against it. The Commission may not act, under Article 85 EEC, to enforce competition rules until it has done so.

In the Transocean Marine Case the Court held "it is clear, however, both from the nature and objective of the procedure for hearings and from Articles 5,6 and 7 of Regulation No.99/63, that this Regulation, notwithstanding the cases specificially dealt with in Articles 2 and 4, applies the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule

requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions which, as in this case, impose considerable obligations having fast-reaching effects."[348]

For English lawyers the case is of special interest as it is (as Hartley notes) the first example of the ECJ drawing on English law for the elaboration of the GP. [349] The principle was advanced not by the parties to the case but by the Advocate General. He said that, "There is a rule embedded in the law of some of our countries that an administrative authority, before wielding a Statutory power to the detriment of a particular person, must in general hear what that person has to say about the matter, even if the statute does not expressly require it. "Audi alteram partem" or, as it is sometimes expressed 'audiatur et altera pars'". He stated the GP was well established in the law of England where "It is considered to be a "rule of national justice"". He considered for French law that "It appears that the principle here in question is of fairly recent origin and that its scope is not yet settled." "The position in Belgium and Luxembourg is similar, though the Conseil d'Etat of these countries seem to have been less hesitant in developing the principle than that of France",

"that review, which I sought to keep short, of the laws of the Member

States, must, I think, on balance lead to the conclusion that the right to be heard forms part of these rights which 'the law' referred to in Article 164 of the Treaty upholds, and of which, accordingly, it is the duty of this Court to ensure the observance."[350]

The Case of Mollet v Commission allows an opportunity to assess whether the Court has modified its conception of the GP the right to be heard. [351] The "somewhat broad statement" (As Hartley put it) of the Court in Transocean was narrowed from "interests perceptibly affected" to "measure which is liable gravely to prejudice the interest of an individual". [352] In Mollet the Court stated "that opportunity was not given to the applicant, with the result that the Commission violated the general principle that when any administrative body adopts a measure which is liable gravely to prejudice the interest of an individual it is bound to put him in a position to express his point of view." [353]

In Grundig the folowing ECJ statement is of interest "The proceedings before the Commission concerning the application of Article 85 of the Treaty are administrative proceedings, which implies that the parties concerned should be put in a position before the decision is issued to present their observations on the complaints which the Commission cousiders must be upheld against them. For that purpose, they must be informed of the facts upon which their complaints are based. It is not necessary however that the entire content of the file should be

communicated to them. In the present case it appears that the statement of the Commission of 20 December 1963 includes all the facts the knowledge of which is necessary to ascetain which complaints were taken into consideration. The applicants duly received a copy of that statement and were able to present their written and oral observations. The contested decision is not based on complaints other than those which were the subject of those proceedigs". [354]

14. Non Bis In Idem

The principle of non bis in idem is, once again not the sole property of any one legal order. In some MS eg The Federal Republic of West Germany, it is a right guaranteed by Article 103 (3) of the Constitution. Schermers notes that this GP has not gained total acceptance from the ECJ.[355] He wrote the right not to be proceeded against more than once for the same act "... has been accepted, albeit only to a limited extent by the Court of Justice."[356] According to Toth, non bis in idem is a necessary consequence of res judicata.[357] The principle non bis in idem functions to prevent "The institution of double criminal administrative or disciplinary proceedings and the imposition of double punishment, fine or sanction in respect of the same act which has already been the subject of a decision which has acquired the status of res judicata."[358]

It should be noted the GP only applied "to proceedings instituted before the authorities of the same jurisdiction with a view to imposing the same kind of sanctions." Thus a gap is left for

duplication of proceedings and sanctions within different jurisdictions, eg Community and national jurisdications. In point of fact it could be within the same jurisdiction if the proceedings and sanctions were of a different nature. Thus non bis in idem allows the institution of parallel competition before the EC and national (or third state authorities) with regard to the same agreements. In the latter case however as Toth points out "a general equitable requirement implies that any previous negative decision should be taken into accont in determining any further sanctions". [359]

The following cases are relevant examples of ECJ usage of the GP. In Gutmann the Court held "The applicant alleges that the rule non bis in idem was violated by the decision of 20 and 21 January 1965.

This rule prohibits not only the imposition of two disciplinary measures for a single offence, but also the holding of disciplinary proceedings more than once with regard to a single set of facts."[360]

In Gutmann the GP non bis in idem was invoked against two proceedings with regard to a single act, both proceedings started by EC institutions. In Walt Wilhelm an act was proceeded against both by Community and national authorites. [361] Here the Court stated that "The possibility of concurrent sanctions need not mean that the possibility of parallel proceedings pursuing different ends is unacceptable.... the acceptability of a dual procedure of this kind

follows in fact from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice, ...demands that any previous punitive decision must be taken into account is determining any sanction which is to be imposed. In any case so long as no regulation has been used under Article 87 (2)(e) no means of avoiding such a possibility is to be found in the general principles of community law." [362]

In the First Boehringer Case an undertaking was prosecuted by an EC institution and a non-Member State, Boehringer being fined both by the Commission and by a United States court. [363] Boehringer pleaded non bis in idem but the ECJ considered that the US fine related to competition restrictions that has taken place outwith the Community and thus could not be taken into consideration. The Second Boehringer Case showed a continuity of ECJ ideas on this situation. [364] They held "In fixing the amount of a fine the Commission must take account of penalties which have already been borne by the same undertaking for the same action, where penalties have been imposed for infringements of the cartel law of a Member State and, consequently have been committed on Community territory. It is only necessary to decide the question whether the commission may also be under a duty to set a penalty imposed by the authority of a third state against another penalty if in the case in question the actions of the applicant

complained of by the Commission , on the one hand, and by the American authority, on the other, are identical.

The Community conviction was directed above all towards the gentleman's agreement for the division of the common market and Great Britain." [365] (the applicant being convicted by the US and the offence relating only to the US)

15. Freedom of Trade Union Activity

Freedom of Trade Union Activity has been defined by the Court in the Union Syndicale Case, where it was held "Under the general principles of labour law, the freedom of trade union activity recognised under Article 24a of the Staff Regulations means not only that officials and servants have the right without hinderance to form associations of their own choosing, but also that these associations are free to do anything lawful to protect the interest of their members as employees." [366] Further this statement was repeated in the Syndicat General Case. [367] As the above statement shows the ECJ accepts that the general principles of labour law it recognises allows trade unions to be formed.[366]

The remaining GP to be examined are those that fit into no particular category. They are thus given in their own right. No inference is attached to the order of presentation.

16. Equality

The first such GP to be discussed goes under more than one name. It is the GP of equality, or alternatively, the GP of prevention of discrimination. Louis classified equality as a fundamental GP. [368] Hartley stated that, as regards its origins equality may in a broad sense, "be said to be a GP of almost every legal system". [369] In EC law Mertens de Wilmars states the principle..."is merely the transportation into economic law of the constitutional principle of the equality of citizens before the law and with regard to taxes." [370]

Mertens de Wilmars also notes with regard to application, and frequency of application, of the principle that, "The Court has on many occasions and in a very wide range of fields expounded the principle of non discrimination, both in its positive form whereby institutions are obliged to treat identical situations in the same way and in its negative form whereby to treat different situations in the same way may be contrary to Community law." [371] Schermers was of the opinion that the GP of equality was most used in combating discrimination between MS between goods from different MS or between their nations. [372] He wrote "The Court of Justice has repeatedly condemned this kind of discrimination." [373] Examples of other forms of discrimination the ECJ attempts to prevent are eg discrimination between the sexes (Article 119 EEC), discrimination on ground of nationality (Article 7 EEC and many other regulations), and the

general case, ie what the Court sees as discrimination contrary to the GP in the EC legal order.

17. Unjust Enrichment

A further principle that has, on occasion, been used by the ECJ is unjust enrichment. Toth wrote that the wording "unjustified enrichment" is more accurate. [374] He stated this implies that a person unjustly enriched at the expense of another person, causing him a corresponding loss must repay the money or return the object whereby he has been enriched. [375] It was noted by Schermers that taxes and levies prescribed by the Community are collected by the Member States. [376] If unlawfully collected then recourse by aggrieved parties is to the laws of the Member States which "apply with respect to legal actions for repayment. Only in staff cases may undue payment have been made to or by the Community" [377] Noteworthy cases were Kuhl, Meganck and Danvin. [378]

In the Danvin Case the applicant asked the Commission for compensation for work he had done claiming the Commission had been unjustly enriched obtaining work of a higher level than was actually paid for. The Court held "without prejudice to the question of the applicability to the relationship between the Community administration and its officials of the concept of unjust enrichment, it cannot, in any case be accepted that the Commission was unjustly enriched by reason of the applicant's activities. Moreover, according to a generally accepted principle in the national legal systems, the applicant's action would

only be well founded if he had suffered loss corresponding to the alleged enrichment of the other party. In this case, the applicant had not proved his claim....." [379]

18. Force Majeur

Another GP considered at some point by the ECJ is force majeur. Force majeur has again according to Toth, "acquired a peculiar Community law meaning, different from and broader than that usually known in the Municipal laws of the Member States which in each case is determined by reference to the legal context in which it is intended to operate."[380] Schermers believes that any definition of force majeur "which would also include any impossibility of fulfulling a factual condition which must be satisfied in order to qualify for a particular benefit" is not within the scope the GP has in Community law. [381] Cases that helped to define the concept were Schwarzwald Milch, Handelgesellschaft, Fleischkontor, Pfutzenreuter, Kampfmeyer and Reich. [382]

In Schwarzwald Milch the Court held "the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect". [383]

Fleischkontor held "With regard to the reference to the existence of a general legal principle governing cases of force majeure, it is true that the legal system of the Member States provide, in certain contexts and legal relationships, for the possibility of derogation

from the strict requirements of the law, especially from the legal consequences resulting from the non-fulfilment of an obligation, on account of force majeure". [384]

In Kampffmeyer, the Court stated that the precise meaning of force majeur had to be decided by reference to the legal context in which it is intended to operate but the concept was not limited only to absolute impossibility. [385] In Reich v Hauptzollant Landau the Court implied a force majeur clause into a regulation that did not contain one; the basis being that such clauses were contained in parallel regulations. [386]

These cases are interesting examples of the new legal order evolving, as with equality and legitimate expection, new GP of law or adapting old GP to radically new meanings exclusive to Community law. [387]

19. Legitimate Self-Defence

A close relative of force majeur is the GP of legitimate self-defence. The First Modena Case given an excellent definition 'legitimate self-protection presupposes an action taken by a person which is essential to ward off a charge threatening him. The threat must be immediate, the danger imminent, and there must be no other lawful means of avoiding it'. [388]

20. Estoppel

The GP of estoppel though considered here independently follows on from good faith. It is that no one may plead a situation created by his own conduct in order to escape an obligation, a sanction, or a judicial proceeding. The cases of Klockner v High Authority and Mannesmann v High Authority showed that an administrative authority is not always bound by its previous actions in its public activities to the same extent as private individuals. [389] As estoppel does not exist in the legal systems of the MS within the Civilian System it was not expressly recognised, though similar principles were expressed by the Court. However as Usher, for example, noted the Court had considered the doctrine under non venire contra factum proprium. [390] In Klöckner the Court stated "Moreover the administrative authority is not always bound by its previous actions in its public activities by virtue of a rule which, in relations between the same parties, forbids them to venire contra factum proprium." [391] As however estoppel is a definite principle of the Anglo-Americal system it is likely it is an acceptable principle within Community law.

Various cases of interest are as follows:

In the Alfieri case a staff member was dismissed on the grounds of ill health but refused to co-operate with the subsequent required medical examination procedure. [392] He then pleaded illegal dismissal as no medical examination had taken place. The Court held "This complaint must emphatically be rejected owing to the fact that the applicant refused to appear before the Committee." [393]

The Premiums for Slaughtering Cows Case saw the Court holding "the defendant cannot in any case be allowed to rely on a fait acc ompli of which it is itself the author so as to escape judicial proceedings."[394]

The Court held in the Continental Can Case that the addressee of an act cannot refuse to take cognisiance of an act and plead lack of proper notification of that act. [395]

In the Meganck Case the court held "Thus having placed himself in an irregular situation by his own conduct ...(the applicant)... cannot rely on his good faith to be released from the obligation to return the sums overpaid during this period". [396] The facts in the Unil-It Case were that Unil-It had failed to obtain importation certificates demanded by Common Market regulations. [397a] This led to Italy charging Unil-It for imported goods from other EC Member States as if such goods had their origin outwith the EC. Unil-It however showed that, at the time , it was impossible to obtain the relevant certificates. Accordingly, the Court held ".... the Member State which has not adopted substantive measures to implement this decision cannot claim that traders have failed to fulfil the obligations which it involves and must, provisionally, allow other means of proof to be used which are appropriate to the fulfilment of these conditions." 397b

21. Community Preferences

The principle of Community preference is yet another GP that is derived directly from the treaties. This principle is stated within the framework of the Common Agricultural Policy, in Article 44 (2) of the EEC Treaty according to which minimum prices must not be applied so as to form an obstacle "to the development of a natural preference between MS". The same principle is stated in the 1973 Act of Accession, Article 55, with regard to trade betwen the new MS and the original MS. Mertens de Wilmars wrote that Community preference "implies a degree of priority is to be given to intra-Community trade over and above trade with non member countries." [398] It could be said that this GP justifies goods coming from MS being preferentially treated to goods coming from third countries.

It should be noted that, as the Balkan Import Exprort v Hauptzollamt Berlin Packhof Case shows, there is no GP in the treaties requiring the Community to afford equal treatment to third countries in all respects. [399]

A further noteworthy point is seen in the Providence Agricole Case [400] This recent case again shows the ECJ applying a GP in a narrow fashion. As Mertens de Wilmars wrote "the Court... interpreted the principle rather restrictively by refusing to apply it to systems of monetary compensation amounts which must be strictly confined to neutralising variations in exchange rates in both extra-Community trade and intra-Community trade. [401]

22. Res judicata pro veritate accepitus

The GP is to the effect that a judicial decision is conclusive until reversed, and that its verity cannot be contradicted. It is common within all the Member States. The principle also has full application as regards decisions of the ECJ. As stated previously this principle should be studied along with non bis in idem.

According to the principle of res judicata a judgment of the EC is binding only between the parties in the particular case and in respect of that case.

The EC Treaties have no provisions that exempt ECJ judgments from res judicata. Thus the ECJ has, in theory, great freedom when giving its judgments.

The res judicata effect of any ECJ judgment stems from the operative part of the judgement taken together with the decisive ground on which it is based.

Strictly speaking the case law of the ECJ cannot be regarded as a formal source of EC law. In practice however, as for example Toth notes, the case law of the ECJ may be regarded as a quasi-source of Community law.[402]

23. Cessante ratione legis, cessat et ipsa lex

Cessante ratione legis, cessat et ipsa lex states that, when a rule loses its raison d'etre it must cease to be applied. [403] It is based on considerations which also underly rebus sic stantibus and doctrines of contract and treaty law in many legal orders. In EC law it also is mainly employed in the regulation of economic relationships which are subject to rapid changes. The comments of AG Trabucchi, in the First Roquette Case are of interest. [404]

The First Roquette Case concerned a reference to the Court under Article 177 of the EEC Treaty by the Tribunal d'instance of Lille for a preliminary ruling in the action pending before that court between Roquette Freres ... and French State customs administration, on the interpretation of certain provisions of Regulation No. 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States, as amended by Regulation No. 509/73 of the Council of 22 February 1973. [405]

AG Trabucchi said

"... if, because of the contention of the Commission and the Danish Government for a literal interpretation, the Court felt unable to accept my suggestion and place a restrictive interpretation on the concept of "charge on importation" it would perhaps be necessary to invoke a principle which achieves its full significance in the regulation of economic relationships. This principle embodied in the

maxim 'cessante ratione legis, cessat et ipsa lex'; its application would mean that, at least in part the rules would cease to apply." [406]

He also continued this theme further on in his statement, "Returning to the general principle laid down in the basic regulation, which echoes the old maxim that, when a rule loses its raison d'etre, it must cease to be applied." [407]

24. Continuity of the Legal System

This is a principle common to the legal systems of the MS which may be traced back to Roman law. [408a] It is a GP that has been applied in EC law. Toth explained the GP thus "when legislation is amended, unless the legislature expresses a contrary intention, continuity of the legal system must be ensured. Accordingly, where a law which repeals an earlier law does not include any transitional provisions for the resolution in the future of disputes arising under the old law the jurisdictional and procedural rules of the new legislation which usually become immediately applicable are to be applied to such disputes..." [408b] These disputes however remain governed by the substantive provisions of the previous law. The comments by AG Gand in the Klomp Case are of interest here. [408c] He stated "First the repeal as from 1 July 1967 of Article 11 (b) of the ECSC Protocol, the substance of which is re-entered by Article 13 of the 1965 Protocol does not preclude an appraisal of the plaintiffs position with regard to a contribution charged for 1959, and any right which he may have to exemption, with reference to the provisions in force at the later

date, that is, the provisions of the former Protocol. That is a principle common to the laws of the Member States."

"... as soon as a law of this kind is repealed by another law it is no longer possible to apply the former law for the resolution of disputes, even if such disputes relate to facts or legal relationships which arose while the former law was still in force. This rule which the commission has expounded and which it supports by an analysis of legal opinion seems to me correct. It is, however, qualified by certain fairly wide reservations drawn from the doctrines of vested rights and no doubt essentially justified by a concern for legal certainty; hence proceedings begun under a given law may be continued even if such proceedings are no longer possible under a new law". [409]

25. The GP of Unity of the Market

This GP can be said to have evolved almost directly from the law of the Community. It is that the rules of the Treaty must be interpreted systematically so as to ensure conditions which are as close as possible to those prevailing in an internal market. Mertens de Wilmars notes that this GP "dominates a large part of the case law of the court and in particular the case law relating to Articles 30 and 36 which are concerned with the free movement of goods." [410] He cites as "particularly significant" the cases of Casis de Dijon and Fietje. [411]

Of even more significance however was Polydor.[412] This was defined by Mertens de Wilmars as a "most remarkable judgment".[413] The ECJ case arose through English Court of Appeal asking whether Articles 14 and 23 of the association agreement betwen the EC and Portugal, which prohibit measures having an equivalent effect to quantative restrictions and are drafted in terms almost identical to those of Articles 30 and 36 of the EEC Treaty must be interpreted in the same way as those two provisons. Mertens de Wilmars notes that "It is well known that the court adopts a broad interpretation of Article 30 which prohibits measures having equivalent effect, and a restrictive interpretation of Article 36, which allows derogation from that prohibition, in particular on grounds relating to the protection of industrial and commercial property. The Court systematically endeavours to reduce the partitioning of the market resulting from the territorial effect of industrial and commercial property rights."[414] In the case the Court made clear that its case law on Articles 30 and 36 must be seen against the background of the creation of a single market having the features of an internal market. The Court then stated that the association agreement between the EC and Portugal despite the almost idential wording to that of Articles 30 and 36 does not seek to achieve the same purpose. Therefore within the framework of the association agreement, restrictions on trade in goods resulting from national industrial property legislation may be regarded as admissable even if in the Community context they are inadmissable.

This case will undoubtedly cause much interest among legal theorists. For the purposes of this thesis however the major point of interest is, once again, how rules are to be interpreted in the light of principles, and the consequent power that such principles have with regard to the true meaning of apparently clear rules.

Micro Cases - Conclusions

As Kutscher noted, and the preceding catalogue showed there are present within EC law many GP and many cases involving GP. The wealth of material provided by these GP and cases is such as to present a variety of options to legal theorists. Many topics of value to EC law could have as their starting point one or more aspects of GP and micro cases. With regard to this thesis and its major themes of how the ECJ arrived at and carries out what it sees as its duty, the promotion of integration, GP and micro cases are most valuable seen from a collective aspect. That is, the real significance of GP and micro cases, for this thesis, are the implications that can be drawn from the body as a whole rather than from any of its parts. These implications are now broken down into individual points and discussed.

The first point to be tackled is that it is suggested that it is accepted beyond any real dissention from legal theorists that it is the duty of the ECJ to call upon GP in certain situations. Further the need for GP by the law of the Community is particularly strong at this time, that is, in the early years of the new legal order. The statement by Schermers sums up the basic situation well "On account of it not being mature and as yet very detailed the Community legal order has the necessity of even greater recourse to GP for its completion than ... most other legal orders".[415] Some further aspects of point one are these. As the Treaties have been strongly (though not exclusively) influenced by the Civil Law tradition, the EC should be receptive to use of GP. Equally it could be said that the civilian

background of ECJ judges imbues them with a positive attitude about the use of GP in the cases. The statement of Lord MacKenzie Stuart touches upon this latter theme "I find it difficult to point out any specific decision of the Court where the horor vacui has been a decisive element, yet in terms of general approach I find it all pervasive. However sparse or intractable, the available sources of Community law must somehow be persuaded to reveal an answer .. The litigant, or the national judge must not be sent away without an answer. This would truly be a denial of Justice".[416] During the course of his statement Lord MacKenzie Stuart takes the opportunity to address actual or potential critics of the Court. "Accordingly if, from time to time, you are tempted to think that in its search for a solution the Court has made too much of too little, please remember the spirit that has informed the attempt".[417]

The second point follows directly upon this theme. It is to note that the percentage of cases which had GP present constituted and still constitutes a high proportion of all ECJ cases. As Green stated in 1968, "almost every judgment of the ECJ refers to principles which enable it to interpret Community law and decide the particular case".[418] Kutscher in an article in 1976 wrote that Green's analysis "could still apply today".[419] It is believed that the 1980's will follow this trend, that is, that GP are still present in a high proportion of cases.

Thus taking these first two points together it can be said that the ECJ, of necessity, has consistently used GP in a great many aspects of EC law over a period of approximately twenty five years. Further the backgrounds of most ECJ judges is such as to allow these judges to bring a knowledge of, and enthusiasm for, GP to the cases.

Point three begins the important series of implications which are deduced from these facts. It relates to how the case law of the ECJ may be seen. For as Toth noted ECJ case law is not a formal source of law. However he also added the rider that "it remains true that over the years the Court has created a body of law which ... has taken on a near binding effect".[420] If so, then it could be said that ECJ case law could be seen as creating a new common law of the European Community.

Point four is of a jurisprudential nature. It relates to the nature of GP as outlined in Chapter II; the implications drawn from the introduction of GP in International law by Schwarzenberger, and the ideas of the "father of European Law" Jean Monnet. Chapter II spoke of the depth of compexity of GP and, in particular, made the points that they were capable of being used for many more tasks than filling gaps. Schwartzenberger noted that by GP entering International law they brought with them a certain force or dynamism, that is their very existence in a system had implications for that legal order beyond any limitations imposed on them by institutions. As regards the EC it is suggested that a reading of the works of Monnet shows he too believed that GP, in particular the fundamental GP that constituted the spirit

of the law, had an inherent dynamism. That is, such GP, once introduced into the system develop beyond the ability of any one institution or authority to limit them. They will continue to develop in strength as a natural consequence of existing.

It is believed that this idea is related to the previously quoted statement by Donner that the most significant thing about the ECJ was that it existed. Surely a part of the thinking behind his statement was that as a consequence of its existence the ECJ will develop to the point of playing an important role in EC law by becoming, in practice as well as in theory, the guardian of the law.

It is submitted that the beginnings of the realisation of the above ideas are to be seen in the points which follow.

Point five discusses the implications of ECJ use of GP in micro cases for the legal orders of the MS. This implication was clear to Bredimas who wrote "The recourse to them (GP) becomes an ingenious way of indirectly achieving harmonisation of national laws".[421] Further A.G. Lagrange was equally well aware of the effect of ECJ case law on the MS legal orders. He stated 'Two or three advisory opinions of the court concerning basic legal principles are more conducive to harmonisation of national laws than years of scholarly discussion between those attending even the most outstanding congresses of comparative law'.[422]

Thus the action of the ECJ produces two distinct effects, a legal unification of the laws of states, pressure on the MS to take further steps in the development of the EC. The former effect, independent of any other developments that result from GP is, it is believed an important step towards the eventual political unification of Europe. It is possibly an insidious method by which to achieve such a worthy goal but none the less effective for that. It will, it is hoped, help to bring about unifications of Europe by degrees, by the growing realisation by individuals as well as governments that unification is a natural consequence of mutual trade and peaceful coexistence.

As to the latter effect the harmonisation of MS laws may produce a desire to promote the idea of unity of European peoples by first strengthening and developing the existing concrete expression of this idea, the EC. That is, the MS proceed to unify through the vehicle of the EC.

Point six relates to the harmonisation of the law of the Communities and its future implications for the EC. As point three suggested the ECJ is developing a common law of the EC. The implications of such action (which it is believed were foreseen by Monnet) are of tremendous importance for the future development of the EC. Bredimas, writing in 1978 had no doubts as to these implications or as to their importance. She wrote "The Court has proved its creative capacity to amalgamate the law of the treaties into a body of law which may be the forerunner of a single European law .. This body of case law is

likely to have favourable implications for the eventual political unification of Europe".[423]

It is an important fact to note that the analysis of Bredimas seemed to give credit to the Court for its role in bringing the above state of affairs about. She wrote "The Court has operated as an instrument of European unity, as a federator rather than as a conservator .... the court has given thrust to the process of integration".[424]

Point seven analyses the above statements, that is, it is contended that Bredimas is correct, both in her appraisal of the potential that now exists for eventual political unification and also in her attribution of a major part in the creation of the situation being down to the deliberate work of the ECJ. An analysis of how it is believed this boost to political integration was achieved by the Court now follows.

The Court achieved its long term results by a judicious mixture of action and inaction in the micro cases. The micro cases delve into almost every aspect of EC law. It is here within the body of EC law, where as Chapter V noted "real rights and duties begin" that the Court reveals its true strength. In the micro cases the Court actively seeks to clarify and enforce such rights and duties. It deliberately, as section Four noted, uses a method of interpretation which seeks out the objective of the text in dispute and tries to give practical effect to it. In short it looks for a solution that makes things work.

Further, as the catalogue of GP and cases showed, the Court was able to draw from several sources (but mainly from the Municipal laws of the MS) GP to aid them in this task. It was also shown in the preceding examination of various cases that the Court had successfully adapted these GP for their purposes. For example, as Mertens de Wilmars noted the ECJ occasionally extended the use of a GP with a well known core of meaning to new areas of law. Also as Usher stated the ECJ broadened the municipal definitions of GP. Finally it was shown that several references were made by the ECJ to GP originating from the Treaties themselves.

An equally relevant factor was the actual handling of GP by the Court. GP, it is suggested, were always looked upon as tools with which to find solutions to the particular problems before the Court. Thus in effect GP are tools which serve the needs of the ECJ and its subjects.

In short they help the legal order function.

Such actions on the part of the Court are not to be confused with so called "government by judges". Though as Chapter VI Section 6 noted there is no clear cut law division between law and politics such action it is contended does not constitute, and is not meant to be seen, as political interference by judges with EC law.

In fact it is at this point in the cases that the deliberate inaction policy of the Court takes over, that is, having tried to the best

of its ability to solve the problems before it precisely as any other court faced with similar problems would (and should) do, it goes no further. That is, in the great majority of micro cases it does not seek to find political issues so as to make broad political statements. The Dyestuffs Cases were an excellent example of such judicial policy. Nor will it attempt to load every case with dynamic judgements of great import. Lord Mackenzie Stuart has attempted to make this clear. He wrote "Commentators both kind and critical have referred to the approach of the Court as "activist" or dynamic, but with great respect I wonder whether these adjectives do not obscure the issue ... For one they conjure up a vision of the Court rising from its collective bed with - ... - "a glad cry upon its lips" saying "let us be dynamic today".[425]

It is, as Lord MacKenzie Stuart has pointed out, this phase of inaction by the ECJ that seems to cause confusion among commentators. Further as the idea of deliberate inaction is of relevance to this thesis in explaining the success of the Court in the development of its ideas several comments are made as regards the idea of inaction and its benefits.

It should be recognised that a deliberate use of inaction is in fact a most subtle and powerful weapon. The concept and importance of inaction can be explained by relating it to the Zen teaching of leaf and snow. There it is pointed out that the leaf frees itself of its burden by allowing the weight of the falling snow to build up to the point where the snow will slip off the leaf. It is not suggested that

the ECJ is influenced by such concepts but rather that the Court does pursue a policy of deliberate inaction at certain instances and that this is an important policy which should be recognised as such and not dismissed as involuntary behaviour and mere happenstance.

A reason to pursue a policy of inaction was also shown by the example of the Supreme Court. McCluskey wrote: "In the critical literature of the past generation or two, one has read much about judicial tyranny .... In truth the Supreme Court has seldom, if ever, resisted a really unmistakable wave of public sentiment. It has worked on the premise that constitutional law, like politics itself, is a science of the possible".[426] In short, as Chapter VI, Section 5 has noted the ECJ cannot push the EC in a direction it does not wish to go.[427] Further it was also noted previously in that section that the Court was conservative in its character and that it desired to meet the expectations of its audience. Given that these statements are correct, then the notion of an active dynamic political Court (in every case) becomes, as MacKenzie Stuart pointed out, a trifle absurb. In short the court is only "active and dynamic" in its search for the solution to a particular problem before it.

Thus the ECJ does not load its judgments in micro cases with political statements and attempt to "push" EC law is a new and, to most EC members, unwelcome direction.

A result of, in the main, functioning as an "ordinary" court is that the ECJ is respected by its clients. By being prudent in its

functions the ECJ has gained some rewards. Kutscher noted that "It cannot be said the case law of the Court has encountered difficulties. Its judgments have been "accepted" and followed by those affected.... (including) the Member States. At most there has been a certain delay before acceptance.[428] The above should not be taken to mean that the Court does not have, or does not pursue, a policy. Instead it should be taken to mean that the Court pursues its policy of advancing integration with intelligence and discretion. It is suggested the Court realises the most effective way to pursue this policy is by, in the main, inaction as regards direct political pronouncements. Instead the Court has noted and analysed the various meanings of integration and their interrelationship. Thus the Court is aware that political integration cannot be contemplated before the economic integration aspect of the Treaties is made to function. Thus the best way for the Court to promote integration is to do no more and no less than its duty in protecting economic rights and enforcing economic duties.

By doing so, such action effectively aids political integration. This is because political integration can only be the choice of a Community in an advanced state of economic integration. It requires a deliberate act of will, at that stage, to go further. By promoting economic (and legal) integration as described, the ECJ helps advance the EC to the stage where the MS feel ready to take the next step. Thus ECJ action could be said to be promoting political integration.

Point eight discusses the relationship between the micro and macro cases. As has just been stated it is believed the micro cases, precisely because of their domestic-law type nature, act as a catalyst for political integration. The majority of macro cases, as has also been stated, are of a defensive and not an offensive nature. Though, as in Van Gend, their outward appearance is dramatic and, it must be admitted, their individual influence on EC law considerable, the majority of such cases are saying no more than could be deduced with little effort from a reading of the Treaties. They do not lead integration in a new direction, they act to keep it alive.

It should be noted that one of the factors that makes macro cases acceptable to EC subjects, including MS is their infrequency. Thus the mass of micro cases could be said to function as a cushion to soften the detrimental effects defensive macro cases, and the occasional undeniably political macro case such as ERTA, have on the MS relationship with the EC.

Further it is in the micro and not macro cases that the real work of the Court takes place. The day to day solving of complex fact situation problems is the real stuff and substance both of the law and of the work of the Court. An analogy might be that macro cases are the ingredients that provide an occasional exotic meal while micro cases are the bread and potatoes that sustain life. Overall therefore, taking a long term view, the steady work of the Court in micro cases is of far greater importance to EC law than the occasional so called dynamic decision.

NOTES - CHAPTER VI - SECTION 1

1. C.J. Mann, "The Function of the Judicial Decision in European Economic Integration", (1972) p.236.

2. Felix Frankfurter, "John Marshall and the Judicial Function", pp. 533-557 in Philip B. Kurland (Editor); "Felix Frankfurter on the Supreme Court", (1970).

3. Commenting on the function of the "Closest Legal Relative of the ECJ", (A.G. Lagrange, see chapter III fn. 8), the United States Supreme Court of the 1820's Robert G. McCloskey, "The American Supreme Court", (1960), p.20 wrote, "it has been the duty of the Court to make policy decisions".

   A most valuable insight into judicial thinking in general is the work of Supreme Court Justice Benjamin N. Cardoso, "The Nature of the Judicial Process", (1921).

   See also J.A.G. Griffith, "The Politics of the Judiciary", (2nd edition, 1981); Theodore L. Becker, "Comparative Judicial Politics", (1970); Glendon Schubert, "The Judicial Mind", (1965); Walter Murphy, "Elements of Judicial Strategy", (1964).

4. F.E. Dowrick, "Overlapping European Laws", ICLQ, Vol.27. 1978 pp.629-660. See the previous chapter for an account of his analysis.

5. C.J. Mann (fn. 1), p.227.

6. See this chapter further on for details.

   See also Altiero Spinelli, "The Growth of the European Movement since the Second World War", pp. 43-68 at pp. 43-47, in Michael Hodges (Editor), "European Integration", (1972). Spinelli wrote, p.43, that "The question of European unity has been recurring for a number of centuries in the political literature of the

Continent". This article is hereinafter cited as Spinelli.

7. Spinelli (fn. 6), p.48. On national sovereignty see Karl. W. Deutsch, "Nationalism and Social Communication: an inquiry into the Foundations of Nationality", (1953).

8. Spinelli (fn. 6), p.48.

9. Spinelli (fn. 6), p.49 noted that among the neutral countries were Switzerland and Sweden.

10. Spinelli (fn. 6), p.49.

11. Spinelli (fn. 6), p.49-50. See also Jean Monnet, "Memoirs", (1978), Part 2, "A Time for Unity", pp.215-524, where he describes in detail his meetings with, and his opinions of, the statesmen of Europe.

12. See Monnet (fn. 11) pp. 215-524 for an authoritative analysis of the reasons (and the forces) behind European union. It is suggested the ideas discussed in the text arose from individuals rather than governments.

13. See Chapter V (fn. 12).

14. Winston Churchill - speech at the Hague Congress of 1948.

15. Jeremy Bentham, "Principles of International Law", (written 1798 but not published until 1839). One chapter of this book is devoted to a "Plan for Universal and Perpetual Peace". Bentham took his argument one step beyond Rousseau and maintained that European unity was positively in the interests of the people. He advocated among other things free trade. See also Jean Jaques Rousseau, "Of the Social Contract", (1982).

N.B. It should be noted that Rousseau in his summary of Abbe de Saint-Pierre's, "Projet de paix perpetuelle", (1756) thought the

plan workable only if based upon the agreement of people instead of sovereigns, See also Charles Irenee de Saint-Pierre, "L'a'abbe de Saint-Pierre : l'homme et l'euvre/Joseph Droust", (1912).

See Lord Gladwyn, "The European Idea", (1966), pp.27-40 for a history of early European thought on integration.

For accounts of the ideas of the great philosopher, Jeremy Bentham, see M.H. James, "Bentham and Legal Theory", Northern Ireland Legal Quarterly, Volume 24, Number 3, (1973); J.H. Burns/H.L.A. Hart, "An Introduction to the Principles of Morals and Legislation", (1982).

16a Immanuel Kant, "Philosophic Project for Perpetual Peace", (1975), see generally. That law must be based upon a federation of free states was a firm belief of Kant. See W. Hastie, "Kant's Principles of Politics : including his essay on perpetual peace : a contribution to political science", (1891).

Comte de Saint-Simon 1814, "De La Reorganisation de La Societe European", Comte de Saint-Simon attempted to re-organise European unity. On Saint-Simon generally see Frank E. Manuel, "The New World of Henri Saint-Simon" (1964); Felix Markham (Editor), "Social Organisation: the science of man and other writings", (1964); Ghita Ionoscu (Editor) "The Political Thought of Saint-Simon", (1976). August Comte - he was influenced by Saint-Simon. He proposed a republic consisting of five great powers and associate members including the United States of America. It was he who first propounded the idea of common currency. See Stanislav Andreski "The Essential Comte", (1974);

Edward Caird, "The Social Philosophy and Religion of Comte", (1893).

See also W. Penn, "Essay towards the Present and Future Peace of Europe", 1693. Penn foresaw the Assembly by proposing a European Diet, Parliament or state.

For more modern views see the writings of Count Richard Coudenhove-Kalergi, "Pan-Europa" 1926, and "Europe Must Unite" (1940). Others advocating European unity were e.g. Hallstein - "United Europe" (1962). See also Lord Gladwyn (fn. 15).

16b See (among others) Pierre Joseph Proudhon "De la creation de l'order politique", (1927); Robert L. Hoffman, "Revolutionary Justice: The Social and Political Theory of Pierre Joseph Proudhon", (1972); Edward Hyam, "Pierre-Joseph Proudhon: his revolutionary life, mind and works".

Stuart Edwards "Selected writings of Pierre Joseph Proudhon", (1969) for an insight into the ideas of Proudhon.

17. The quote is in Monnet (fn. 11) p.195.

18. It is submitted that the book by Monnet (fn. 11) should be regarded as an important document on the origins, both theoretical and practical, of the EC. It is strongly argued that it was individuals such as Monnet who took most credit (or otherwise) for the creation of the EC and not governments or law. See also the conclusions of this dissertation in Chapter VIII. If so, the moral values of Monnet are worthy of the most careful study for they are part of the spirit of the law.

19. Monnet (fn. 11), p.310.

20. Monnet (fn. 11), p.359.

21. With this moral overtone it would be designated a policy based on priciple by Dworkin, (see Chapter II).

22. It is argued (in Chapter VIII) that, as Chapters V and VI noted, by the ECJ fulfilling their role in upholding union all other major fundamental GP are more easily achieved by the EC as a whole, e.g. Gaston Thorn in "Europe 82", (Jubilee Review), p.10 noted "the people of Europe have seen the absurdity and the futility of fractricidal strife. Secondly, a number of milestones have been passed on the road to economic and political unity. Thirdly, Europe is now the main source of aid to the Third World".

NOTES - CHAPTER VI - SECTION 2

23. A. Bredimas, "Methods of Interpretation and Community Law" (1978), p.181. See p.177-184 generally.

24. L.V. Prott, "The International Judge" (1979), p.146.

25. Opperman, "Deutsche und Europische Verfassungsrechtsprechung", 6 Der Staat (1967), p.464.

26. Stuart A. Scheingold, "The Role of Law in European Integration", (1965); A.W. Axline, "European Community Law and Organisational Development", (1968).

27a P. Pescatore, see "Les Objectifs de la Communaute Europeenne comme Principes d'Interpretation a la Cour de Justice des Communitees", II Miscellanea Ganshof van der Meersch (1972), p.325 on. See also P. Pescatore, "The Law of Integration" (1974) generally. A.M. Donner "La Justice: element d'integration. Volkenrechtelujke Opstellen aangeboden an Prof van der Molen (1962), p.62 - see also generally.
Also see Lagrange (Advocate General and co-author of Treaty), "The Court of Justice as a factor in European Integration" pp.709-725. AJCL 1966/1967 at p.710.

27b Kutscher (fn. 46) p.46.

28. On political integration see generally the following:- E.B. Haas, "The Uniting of Europe", (1958); E.B. Haas, "Beyond the Nation State", (1964); L.N. Lindberg, "The Political Dynamics of European Integration", (1963); L.N. Lindberg and S.A. Scheingold, "Europe's Would-be-Polity", (1970).
For a European view (the above are all American), see Sidjanski, "Dimensions Europeenes de la Science Politique" Paris (1963).
See also "Proceedings of the Lyons Symposium" on "La Decision

dans les Communautes Europeenes" Brussels (1969).

See also Monnet (fn. 11); W. Hallstein, "United Europe", (1962) and "Europe in the Making", (1972).

29. Lord MacKenzie Stuart, "The European Communities and the rule of Law", (1977), p. 14. Professor Dagtoglou C.L.J. (1973), p. 259.

30. It is sugggested that aims are deliberately framed with some obscurity.

31. Monnet (fn. 11), p.709.

32. Lagrange (fn. 27), p. 709.

33a e.g. See Hallstein (fn. 28), "United Europe", (1962), p. 64 and also the Chapter "The Politics of European Integration". e.g. Gerhard Behr, "Judicial Control of the European Communities", (1962), p. 9. "The primary objectives of the Community are economic but their long term goal is undeniably political. The approximation of the economic goals, the growing merger of the national markets into a Common Market of the Community will, one day, demand a similar process on the political level". See also Behr, "Development of Judicial Control of the European Communities", (1981). See also Anna Bredimas (fn. 23), pp. 177-184.

It is also worth quoting again from the article in "Europe 82" (April 82), p.10; by Gaston Thorn, 7th President of the European Commission. He wrote, "a number of milestones have been passed on the road to economic and political unity".

33b Pescatore "The Law of Intergration" (1974) p.23.

34. Werner Feld, "The Court of the European Communities", (1964), pp. 116-117.

35. Feld (fn. 34), p. 116.

36. Feld (fn. 34), p. 116.

37. Feld (fn. 34), p. 116.

38. On economic integration, see generally Dennis Swan, "The Economics of the Common Market" (3rd edition 1975); B. Balassa, "The Theory of Economic Integration", (1961); J. Viner, "The Customs Union Issue" (1950), J.E. Meade and others, "Case Studies in European Economic Union; The Mechanics of Integration", (1962).

    The last three mentioned are generally considered to be the pioneer (and classic) works on this subject.

    Balassa (p.2) considered economic union as having been achieved where there was free movement of products and factors of production between a group of countries and also "some degree of harmonisation of national economic policies in order to remove discrimination that was due to disparties in these policies".

39. P. Pescatore, "The Law of Integration" (1974), p.23. See also pp. 23-25; See also Spinelli (fn. 6), pp. 43-47.

40. See the Preamble to the EEC Treaty.

41. "Few do not set a higher value on money than on good faith" (attributed).

42. Karl. W. Deutsch, "The Analysis of International Relations", (1968), p. 191; See also pp. 191-202 "Attaining and Maintaining Integration".

43. Ralf Dahrendorf, "A New Goal for Europe", pp. 74-87 at p. 76 in Michael Hodges (Editor) "European Integration", (1972); See also R. Dahrendorf, (Editor), "Europe's Economy in Crisis", (1982) for

an up-to-date general survey of the economic situation in Europe.

44. Barend Biesheuvel, Edmund Dell, Robert Marjolin, "Report on European Institutions presented by the Committee of Three" (1980), p.50; See pp. 49-55 "Elements in the Commissions Decline".

45. Gaston Thorn, Europe 82, April Jubilee Review, p.10. He wrote also "A further cause for concern is the referendum of 1981 in favour of withdrawal from the EEC by Greenland".

46. H. Kutscher, "Methods of Interpretation as seen by a judge at the Court of Justice", p.39. The text can be found in "Judicial and Academic Conference" (27-28 September, 1976).

47. "Felix Frankfurter on the Supreme Court" (fn. 2), p.557.

NOTES - CHAPTER VI - SECTION 3

48. This idea of Plato's is universally known, eg it is quoted in Robet Hyman, (compiler) " A Dictionary of Famous Quotations", (1967) p.247 No62 "Our object in the construction of the state is the greatest happiness of the whole, and not that of any one class". To see this statement in context see Plato, "The Republic of Plato", (1942) (translated by Francis MacDonald Crawford) p. 107 "Our aim in founding the Commonwealth was not to make one class specially happy but to secure the greatest possible happiness for the Community as a whole". As eg Trevor J. Saunders (Editor), "Plato - The laws", (1970) notes p.134, Plato's method of setting up, and putting into effect, an ideal society "will usually call for an unpalatable degree of coersion". For further analysis of Plato and his views on this topic, and also his views on other questions relating to society see eg Robert W. Hall "Plato", (1981). There are of course numerous analyses on Plato in print.

49. Henry G. Schermers, "Judicial Protection in the European Communities", (1976), p.20.

50. Hans Josef Ruber, "Der Gerichtshof Der Europaischen Germeinschaften und der Konkretislerung allgemeines Rechtsgrundsatze" (1970), pp. 25-33. See also, for the content of the compelling legal principles accepted in Western Europe Ernst-Werner Fuss, "Die Europaischen Gemeinschaften und der Rechtsslaatsgedanke", p.17.

51. Jean Victor Louis, "The Community Legal Order," (1980), p.67.

52. Schermers (fn. 49), p.20.

53. Akos Toth, "The Individual and Community Law", Volume I, p.88 in

"Legal Protection of Individuals in the European Communities" (1978), Volumes I and II. N.B. All further citations refer to Volume 1; M. Hilf, "The Protection of Fundamental Rights in the Community" p.147 in F.G. Jacobs (Editor), "European Law and the Individual," (1976).

54. Virally, See Chapter IV, (fn. 8).

55. 43/75 Defrenne v SABENA (1976) ECR 455. (2nd Defrenne Case).

56. See Waldock, Chapter IV, (fn. 13).

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57. Kutscher (fn. 46), gives an excellent preparatory analysis of basic interpretive methods, pp. 5-6. "European jurisprudence has not so far developed any doctrine of legal interpretation which could be described as conforming to an opinio communis. Nevertheless, there is a common body of scarcely disputed concepts of the methods of interpreting law. You have to start with the wording of a provision, with its ordinary or special meaning. The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connection with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is part may be taken into consideration. Considerations based on comparative law are admissible or necessary. In new fields of law, the Court must feel its way from case to case. The (above) said methods of interpretation are applied by the Court of Justice". The whole article pp.5-50 is worthy of study. On interpretation of EC law by the ECJ, see also H.G. Schermers (fn. 49), p.10 on; F. Dumon, "The Case Law of the Court of Justice - A Critical examination of the methods of interpretation", p. 7-162 and especially chapter IV - "Methods of Interpretation" and chapter V "General Survey of the Work of the Court of Justice in the Field of Interpretation". The article is in "Judicial and Academic Conference", (27-28

September, 1976). Anna Bredimas (fn. 23) pp. 177-184; Norman Marsh Q.C. "Interpretation in a national and International Context" (1973); Papers given by C. Ehlermann and I. Sinclair, "The Interpretation of Community Law" at University of London, Kings College (June 11,1976). C.J. Hamson "Methods of Interpretation - A Critical Assessment of the Results" in "Judicial and Academic Conference", (27-28 September 1976).

58. Schermers (fn. 49), p.10.

59. Schermers (fn. 49), p.10.

60. See 40/64 Sgarlata v Commission (1965) ECR 215 at 227 where the Court stated, "These considerations, which will not be discussed here cannot be allowed to override the clearly restrictive wording". See also Kutscher (fn. 46) pp. 17-21.

61. Kutscher (fn. 46), p.21 - "Historical interpretation can mean two things: Reference back to the actual intention of the legislature, that is a subjective historical method, or reference back to the "objective" intention of the legislature, and in particular to the function of a role at the time it was adopted (an objective historical method)". See also pp. 21-22 on Historical Interpretation generally - "As far as I can see there is no trace in case law of objective historical interpretation. This is understandable. The aims of the Treaties are an increase in integration, an ever closer union among the peoples of Europe and economic and social progress. Interpretation based on the original situation would in no way be in keeping with a Community law orientated towards the future", (paraphrased), "Viewed as a

whole, historical interpretation plays only a subordinate part in Community law; it fulfills at most a subsidiary function".

62. See 29/69 Stauder v Ulm (1969) ECR 419, p.425 consideration 51. See also the statement by Kutscher (fn. 46), p. 9 - "There are a great number of vague rules and concepts in Community law e.g. Article 30 EEC, Article 85, 86 abuse of a dominant position. As far back as 1963, at the Europaischen Arbeitslagung in Cologne, Von Simsen stressed that vague rules and concepts were a part of the technique of the Treaty".

63. In 14/70 Bakels v Oberfinanzdirektion Munchen (1970) ECR 1001, the Court stated that the explanatory notes made under the Convention on Nomenclature 1950 "cannot be ignored when the Community provisions come to be interpreted". See also 30/71 Siemers v Hanptzsllant Bad Reichenhall (1971) ECR 919 consideration 5, 185/73 Hauptzollant Bielfeld v Konig (1974) ECR 607, p. 619, consideration 18.

64. 59/75 Pubblico Ministero v Manghera (1976) ECR 91, consideration 5. The Court considered that as regards its interpretaion on state monopolies, EEC Article 37 (i) "must be considered in its context in relation to the other paragraphs of the same article and in its place in the general scheme of the Treaty". In 85/75 Bresciani (1976) ECR 129, consideration 7, the Court stated "The position of these articles at the beginning of that part of the Treaty is sufficient to indicate their crucial role in the construction of the Common Market".

65. This is also called the "functional approach". Schermers (fn. 49), p.14; Bredimas (fn. 23), "effect utile", or the "purposive"

approach, Lord MacKenzie Stuart (fn. 29), p. 76. Schermers, p.24 actively opposes use of term "functional".

66. Pescatore, "The Law of Integration" (1974), p.88 - "Contrary to a widespread idea, this is not simply one method among others. The rule of law being in its nature a provision with a certain objective, the teleological method is, in the last analysis, the decisive criterion of every legal interpretation. This is doubly true in the context of the Treaty which proceeds by laying down objectives rather than substantive rules."

67. Bredimas (fn. 23), p. 178. As her book is the most comprehensive analysis on this particular subject, her conclusion is thus accordingly weighty. See also Schermers (fn. 49), pp. 10-19.

68. Lord MacKenzie Stuart (fn. 29), p. 76 - "Accordingly the Court in seeking guidance, looks frequently to the purpose of the text in dispute - what has now become fashionable to call the teleological approach".

69. See Lord MacKenzie Stuart (fn. 29), p. 72-74; Schermers (fn. 49), pp. 15-16; Bredimas (fn. 23), pp. 37-40. All these authors also make the point that the use of different official versions of the Treaties can have some positive aspects. This is not disputed. See also the comments by Dowrick (Chapter V) on Article 164, on the various language versions.

70. Lord MacKenzie Stuart (fn. 29), p.73.

71. Professor Lyon-Caen (1966) Revue Trimestrielle du Droit Europeen, p. 693.

72. See later on in Chapter VII, Fundamental Rights, where Stauder v Ulm (fn. 62) is extensively analysed.

73. Lord MacKenzie Stuart (fn.29), p. 74.

74. Lord MacKenzie Stuart (fn. 29), p. 74; See 36/75 Rutili v Minister for the Interior 1975 (ECR) 1219. See also the coming section on limitations on judicial power. As Lord MacKenzie Stuart says p. 74, "of these difficulties pace certain commentators, the Court is only too well aware".

75. Advocate General Gand described there as words "ambiguous - no doubt intentionally ambiguous", Cases 5, 7 and 13-24/66 Kampffmeyer v Commission (1967) ECR 262.

76. Lord MacKenzie Stuart (fn. 29), p. 75, calls them "intentionally ambiguous". In the Convention presented by the drafting committee of Experts to the governments of the Six Member States in 1968, it was stated that, "The Committee has not specified what should be understood by "civil and commercial matters" nor has it ruled on the problems of qualifying the expression by determining the law according to which it should be interpreted", see Bulletin of the European Communities, Supplement 12/72 English version, p.17.

77. Lord MacKenzie Stuart (fn. 29), p. 75. He states that Community law has been compared, as regards its development to the 18th Century English law. Equally appropriate is USA commerce law in the 1820's.

78a Dr C.D. Ehlermann, "The Interpretation of Community Law" paper (University of London, King College, June 11, 1976).

78b As L.N. Brown and F.G. Jacobs, "The Court of Justice of the European Communities", (1977) pp. 212-213 state "As part of its teleological approach the Court not infrequently refers to the

principle of effectiveness (l'effect utile)... In Community law it may come to mean that "preference should be given to the construction which gives the rule its fullest effect and maximum practical value".

79a See generally Cardoso, Griffiths, Becker and Schubert (all at fn. 3) See also Joel Grossman, "Social Backgrounds and Judicial Decisions: Notes for a theory", Journal of Politics, 29, 1967 pp. 334-351; Jack W. Peltason "Fifty-Eight Lonely Men" (1961). All the foregoing references are to studies of judges. (Mainly American judges) and their influences. They are not studies about the judges of the ECJ. e.g. Peltason's book is a statement of the way in which United States federal district court and circuit court judges' attitudes affect their interpretation of a vague Supreme Court edict.

79b Brown and Jacobs (fn. 78b), pp 190-191, consider the collegiate character of the Court well suited to help it perform its duties. The major advantage of a collegiate court is enhancement of its authority. Other advantages are that no particular judge is identified with a particular decision; the court as a whole finds it easier to depart from its previous case law; judicial independence, both of the individual judge and the court is strengthened.

80. Lord MacKenzie Stuart (fn. 29), p. 70 makes plain his dislike of over-analysis of the teleological approach. See also Lord Porter, who, in giving advice to the Judicial Committee of the Privy Council stated, "The human mind tries, and vainly tries, to give a particular subject matter a higher degree of definition

than it will admit". Commonwealth of Australia v Bank of New South Wales, 1950 AC 591 at 628.

81. Kutscher (fn. 46), p. 6.

82. P. Pescatore, "The Law of Integration", (1974) p. 88.

83. Bredimas (fn. 23), p. 128.

84. Bredimas (fn. 23), p. 128.

85. Mann (fn. 1) p. 352.

86. Bredimas (fn. 23), p. 134. This is but one example of what is a widespread opinion.

87. Bredimas (fn. 23), p. 124. 3-18, 25 and 26/58 Barbara Erzbergbau v High Authority (1960) ECR 1731. See also T.C. Hartley, "The Foundations of EEC law" (1981), p. 122.

88. 21/58 Walwerke v High Authority (1959) ECR 99.

89. On comparative analysis in EC law see generally Kutscher (fn. 46) "Judicial and Academic Conference, 1976", pages 23-29. Dumon (fn. 57), Judicial and Academic Conference, 1976, pages 106-108. Bredimas (fn. 23), pages 125-137; Toth (fn. 53), pages 86-88; W. Lorenz "General Principles of Law" AJCL (1964), pp. 1-29.

90a Bredimas (fn. 23), p. 126. See also Usher p. 368 "The influence of National Concepts on Decisions of the European Court" ELR 1975-1976 pp. 359-374. "At the simplest level, comparative studies may be carried out by the Court staff to supply background information relevant to the case before the Court". See 9/74 Casagrande v Landeshauptstadt, Munchen (1974) ECR 773. 15/74 Centra farm v Sterling Drug Co (1974) ECR 1147; 16/74 Centra farm v Winthrop (1974) ECR 1183. It can be noted that

reference to these studies is seen, not in the judgments, but in the opinion of the Advocate General.

90b For an authoritative account of the general procedure during the course of a case see John Usher, "European Court Practice", (1983).

91. Bredimas (fn. 23), p. 126.

92. Bredimas (fn. 23), p. 126.

93. Toth (fn. 53), p. 86.

94. Bredimas (fn. 23), p. 126.

95. Toth (fn. 53), p. 86-87.

96. Toth (fn. 53), p. 87.

97. Toth (fn. 53), p. 87.

98. Toth (fn. 53), p. 87.

"Likewise, a general principle common to the laws of the Member States must remain outside the Community legal system if the question is already governed by a rule or a principle belonging to this system, which is independent of or different from the national principles."

99. Bredimas (fn. 23), p. 125-126.

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100. See the following section for an analysis of the phrase "government by judges".

101. In point of fact, this is not quite accurate. As H.J.M. Boukema points out in "Preservation of the Judiciary in the EEC" LIEI 1981 at p.93 the Court can indicate its policy even when not deciding cases, "The Members of the Supreme Court should be active - give lectures, publish articles, teach at law schools etc. Through these activities they can publically announce a (new) policy of the Court". See also R.M. Dworkin, "Taking Rights Seriously," pp. 131-149 where he argues that judicial activism fits into the constitutional theory on which the Western democracies rest.

102. Lord MacKenzie Stuart (fn. 29), p. 36.

103. Bredimas (fn. 23), p. 145.

104. Bredimas (fn. 23), p. 145. See also the Chapter on Problems of Jurisprudential Policy pp. 144-148. See also Green, "Political Integration by Jurisprudence", (1969), generally.

105. A.M. Donner, CMLRev 1974 Volume II, p. 127-140 at p. 138, "The Constitutional Power of the European Court of Justice of the European Economic Community" - "We should not travesty the reality by speaking of quasi-legislation or government by judges".

106. This fact is well known see e.g. Lord MacKenzie Stuart (fn. 29), pp. 45-46. See also Montesquieu "L'espirit des Lois" Book 2 Chapter 6 for the basis of the idea of separation of power. It should be pointed out, however, that the systems of checks and balances, in practice, is failing to work (that is, the

Commission is weakening at the expense of the Council). See the Report on the European Institutions (1980) (fn. 44), pp. 45-59.

107. Robert G. McCloskey (fn. 3), p. 20.

108. F.A. Mann "Industrial Property and the EEC Treaty" ICLQ No. 24 (1975) pp. 31-43 at p. 43.

109. This article appeared in Le Monde (a widely read and influential paper) on 24.4.1971, p. 19.

110. There are numerous examples of divergent opinion on ECJ decisions e.g. see C.J. Hamson (fn. 57). His article contains critical comments on Defrenne v SABENA (fn. 55) and 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) ECR 1.

111. McCloskey (fn. 3), p.20.

112. The evil doer hates the light (attributed).

113. Bredimas (fn. 23), pp. 144-148. Another relevant quote was on p.145, "The Court has been very prudent in the exercise of its functions".

114. Prott (fn. 24), p. 146. Its audience is composed of Member States, other EC Institutions, Companies, individuals etc.

115. It is suggested that an appropriate analogy is the Greek legend of Sisyphus, King of Corinth who was condemned in Tartatus to roll a stone up a hill for eternity. The task of the ECJ may be seen likewise. If the Court pushes the stone (the EC), up the hill towards integration too quickly the stone will roll up, out of control and then roll down to crush the ECJ. If the Court rolls the stone too slowly, then progress towards integration (as directed by the ECJ) stops.

Thus the progress made towards integration is actually dictated

by the EC and not the Court.

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116. Where "some" Member states are mentioned in the text without reference to any one member state in particular, the term is used in the collective sense; that is no one Member State in particular is automatically included in, or excluded from, this grouping. Further where the singular term "Member State" is employed in the text, it is meant to be seen as a theoretical model. No allusion is made to any Member State in particular.

117. The concept national sovereignty is of great importance for it has a profound effect on EC law. Therefore, an extensive analysis of the concept is now given. Andre M. Donner, "The Role of the Lawyer in the European Community" (1968) pp. 22-23 wrote that, "National sovereighty ... is in large part a legal work of art. It was conceived by the Capetian lawyers and perfected by the crown lawyers of the sixteenth and seventeenth centuries". A more extensive discussion of the history of sovereignty was by Djura Nincić, "The Problem of Sovereignty in the Charter and Practice of the UN", (1970), pp. 1-3. Note 4 page 3 is quoted below.

"Bodin is usually considered to be the founder of the modern theory of sovereigty and his famous "Six Livres da la Republique" to provide the first comprehensive formulation of that theory. A century before Bodin, however, we find the following fairly accurate definition of sovereignty; "Souverain est celui dont la seigneurie ne releve d'aucune autre seigneurie". (See Redslob, "Traite du droit des gens", Paris, 1950, p.73). Francisco de Vitoria also seeks to elaborate the notion of State and the concept of independence (... est per totum, id est quae non est

alterius rei publicae pars, sed quae habet proprias leges, proprium consillum et proprios magistratus). Classical, nonetheless, remains Bodin's definition of a State as the "droit governement de plusieurs menages et de tout ce qui leur est propre avec puissance souberaine," and of sovereignty as the "absolute and perpetual authority of a State" ("les Six Livres da la Republique de" J. Bodin, Angouin, Paris, chez Jaques du Puys, 1576, Cf. L.I.IX.125). Charles L'Oyseau, who is a generation younger than Bodin, seeks to probe somewhat more deeply into the essence of sovereignty: "... la souverainete est du tout inseperable de l'Estat, duquel si elle etait ostee, ce ne serait plus en Estat et celui qui l'aurait, aurait l'Estat en tant et pour tout qu'il aurait la Seigneurie souveraine ... Car enfin la Souverainete est la forme qui donne l'estre a l'Estat voir meme l'Estat est ainsi appele, per ce que la Souverainete est le comble et periode de puissance ou il fait que l'Estat s'arrete et s'etablisse". (Ch. L'Oyseau, Parisien, "Traicte des Seigneuries", Paris, 1609, pp. 24-25). It will be observed that in these writings sovereignty already appears as an essential and substantive attribute of state power, as the attribute which endows it with the quality of "state" power which tends to become synonymous with that power and with the State itself. Grotius and Pufendorf hold similar views on sovereignty and on the possibility of its being limited. Of particular interest for the further development of the theory of sovereignty in international law, are the writings of Emeric Vatel. In Vatel's opinion, the State is the supreme judge of its own behaviour and its

sovereignty is almost absolute, as not even the international community may impose its "collective" will upon indvidual States. Vattel at the same time endeavours to define the concept of sovereignty by posing, as the sole indispensable conditions for a State to take its place in the international community, that it be "genuinely sovereign and independent, which means that it should govern itself, through its own authorities and under its own laws". (Vatel, "La droit de gens ou principes de la loi naturelle, apliquee a la conduite et aux affaires des nations et des souverains". London, 1758, p. 18). Vatel, it will be seen, equates sovereignty with independence, and then clearly sets forth the meaning of both concepts".

Modern definitions of sovereignty are as follows - Nincić (ibid) p.2, "The essence of sovereignty is constituted by the independence of state power from any other power"; D.D. Raphael, "Problems of Political Philosophy", (1976), p.55, "Sovereignty means supremacy. To say that a state is sovereign is to say that its rules, the laws, have final authority. While the rules made by other assocations or comunities are subordinate to the authority of the state's rules"; Raphael, also (p.55) raises an interesting point when he speaks of the need (according to some theorists) for a definition of political sovereignty in terms of power instead of legal authority. However, as yet political sovereignty is according to Raphael "simply a confusion".

118. Spinelli (fn. 6), p.65.

119. Spinelli (fn. 6), p.65.

120. An interesting analogous situation was the problem facing the US

Supreme Court in the late 18th and early 19th Century as to the scope of their power under the constitution. See McCloskey (fn. 3), Chapter 1, "The Genesis and Nature of Judicial Power", and Chapter 2, "Establishment of the Right to Decide".

121. Peter Wallington and Jeremy McBride, "Civil Liberties and a Bill of Rights", (1976), p.29. "Our overall assessment is that judges today are rather cautious men... and conservative in their views".

122. This is a noteworthy factor in the "struggle" of the ECJ against member states. See Chapter VIII for further explanation.

123. H. Lauterpacht, "The General Works", Volume I (1970), p. 443.

124. Lauterpacht (fn. 123), p. 443. The following quote is, due to the importance of the points within to EC law, given in full, "In recent years criticism of the sovereignty of the State as a characteristic trait of International law has abated. In the years which followed the World War, this criticism spread to the point of becoming almost popular, and of being applied without discrimination. To a certain extent that has sapped its strength. Secondly it has produced in International Institutions, which one thinks of as potential brakes on the sovereignty of the State, a continual and visible regression. Thirdly, there has arisen the development of the omnipotent power of the State, directly as a political ideology in certain countries, indirectly and by necessity in others. All these factors have contributed to the restoration of power, if not the prestige of the sovereignty of the State".

125a Kutscher (fn. 46), p. 31.

125b Lauterpacht (fn. 123) p. 443.

126 Douglas Bence and Clive Branson, "Roy Jenkins - A Question of Principle?", (1982), p. 221.

127a Andre M. Donner (fn. 117), p. 22

127b Andre M. Donner (fn. 117), p. 22. It is suggested that the quote by Nincic (fn. 117) in his Introduction is of equal relevance for EC law. "The problem of sovereignty is undoubtedly one of the most fundamental problems of International law and International relations in general".

127c Walter Murphy and C. Hermann Pritchett, "Courts, Judges and Politics", (1961), p. 7.

127d Becker (fn. 3), p. 345.

128 232/78 Commission v France (1979) ECR 2729, (Sheepmeat case).

129 Report of the Renton Committee on the Preparation of Legislation (1975) Command 6053). See p. 19.

"We conclude that acts drafted in a simpler, less detailed and less elaborate style than at present would present no great problems providing that the underlying purpose and the general principles of the legislation were adequately and concisely formulated. The real problem is one of confidence. Would Parliament be prepared to trust the courts? We refer again to the evidence given by Lord Emslie and Lord Wheatley: "It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that judges cannot be trusted to give proper effect to clear statements of principle. This with respect is wholly unfounded".

130. Anna Bredimas (fn. 23), p. 147.

131. "Report on European Institutions presented by the Committee of Three to the European Council", (fn. 44), p. 63.

132. Anna Bredimas (fn. 23), p. 147.

133. Lord MacKenzie Stuart (fn. 29), p.78. It is suggested that the rest of the Court is equally aware of its critics.

134. L.B. Bodin, "Government by Judiciary" Political Science Quarterly 1911; J.P. Colin "Gouvernment des Juges" (1960). There are also other works that have helped the term come into being.

135. Dumon (fn. 57), p. 5. See pp. 55-58 on "Government by the Court".

136. H. Kelsen, "The Pure Theory of Law" (2nd edition, 1967), p. 349.

137. Anna Bredimas (fn. 23), p. 149, note 2.

138. H. Schermers (fn. 49), p. 57.

139. Anna Bredimas (fn. 23), p. 179; J. Dugard, "The South West Africa/Nambia Dispute" (1973), p. 36.

140. H.J. Boukema, "Preservation of the Judiciary in the EC" LIEI 1980, p. 85, pp. 87-98.

141. Quoted by D. Swann (fn. 38), p. 11.

142. Kutscher (fn. 46), p. 11.

143. P. Pescatore "Les Objectifs de la Communaute Europeen comme Principes d'Interpretation dans la Jurisprudence de la Cour de Justice" in Miscellanea W.J. Ganshof van der Mersch, Volume II, p. 325.

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144. 43/75 Defrenne v SABENA S.A. (1976) ECR 455. (Second Defrenne case)

145. Eric Stein, "Lawyers, Judges and the Making of a Constitution" pp. 771-796 in Herbert Berstein/Ulrich Drobnig/Hein Kotz (Editors), "Festschrift fur Konrad Zweigert" (1981). Stein made a major survey of "more than a thousand opinions" (p.773) but selected only ten cases for analysis as "major cases in which constitutional law was made" (p.773).

146. E.G. 3 out of 4 cases in this particular section were also among the ten cases chosen by Stein (fn. 145).

147a 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) ECR 1. To avoid unnecessary repetition, no footnotes will be given every time the case name is mentioned in the text, save where a direct quote is taken from the case.

147b Pierre Pescatore "The Doctrine of Direct Effect; An infant disease of Community Law;" ELR 1983 Vol 8 No 3 pp. 155-177 at p. 156.

147c Van Gend en Loos Case (fn. 147a) Question 1, p.3.

148. Lord MacKenzie Stuart (fn. 29), p.18.

149. Lord MacKenzie Stuart (fn. 29), p. 19. On the subject of submissions by MS See the articles by K. Mortelmanns "Observations in the cases governed by Article 177 of the EEC Treaty; Procedure and Practise" 16 CMLRev 1979 pp. 557-590; C.A. Chrisnam and K. Mortelmanns "Observations of Member States on the Preliminary Rulings Procedure before the Court of Justice of the European Communities: some Analytical and Comparative Remarks", pp. 43-69 in David O'Keefe and Henry G. Schermers (Editor)

"Essays in European Law and Integration", (1982).

150a Hamson (fn. 57), p.9.

150b Pescatore (fn. 147b), p.156.

151. Stein (fn. 145), p.781.

152. Stein (fn. 145), p.781.

153. Anna Bredimas (fn. 23), p.145; L.V. Prott, (fn. 23), p.146.

154. Anna Bredimas (fn. 23), p.145. It should be noted that this particular case, Van Gend is an exception to this theory. See however the other cases in this section.

155. Hamson (fn. 57), p.8 was of the opinion that "a hesitant or timorous Court could, I think, have legitimately declined jurisdiction upon the ground of any of the preliminary objections proposed to it".

156. P. Pescatore, "The Law of Integration" (1974), p.87.

157. Hamson (fn. 57), p.15 and p.25.

158. Lawrence M. Friedmann, "A History of American Law" (1973), p.231.

159. Friedmann (fn. 158), p. 231.

160. Felix Frankfurter, "Felix Frankfurter on the Supreme Court"; Editor Philip B. Kurland, (1970), p.539.

161. The phrase was used of the Supreme Court by A.G. Lagrange (See Chapter III).

162a Lord MacKenzie Stuart (fn. 29), p.23.

162b Van Gend en Loos (fn. 147a) p.12.

162c Van Gend en Loos (fn. 147a) p.12.

163. Stein (fn. 145), p.777.

164a Stein (fn. 145), p.794.

164b Pescatore (fn. 147b), p. 158.

164c Van Gend en Loos (fn. 147a), p.12.

164d Pescatore (fn. 147c), p.158.

165. See the table (appendices) where it is shown that in the ten constitutional cases analysed by Stein (fn. 145), the position of the Advocate General on major constitutional issues (as opposed to his views on other points) are taken up by the Court in all ten cases except Van Gend. See also A. Dashwood, "The Advocate General in the Court of Justice of the European Communities", Legal Studies 1982, p.202.

166. Hamson (fn. 57), p.9.

167. Stein (fn. 145), p.776.

168a Hamson (fn. 57), p.9. See also Brown and Jacobs (fn. 78b), p.35 who quote W. Feld. Feld remarked, "The broad knowledge possessed by some of the justices in the field of economics, finance and administration may be a significant factor in arriving at decisions which transcend narrow judicial considerations".

168b Pescatore (fn. 147b), p.157.

168c Pescatore (fn. 147b), p.157.

169. P. Pescatore, "The Law of Integration" (1974), p.87.

170a Hamson (fn. 57), p.25.

170b Murphey and Pritchett (fn. 127c), p. VII.

170c Karl Deutsch "The German Federal Republic" in Roy Macrides and Robert E. Ward (Editors)" Modern Political Systems; Europe" p.358.

171a To date (April 23 1983) the case has gone on appeal in the UK. There has since been concluded a new fishing agreement between the MS. It could be argued that the action by Kent Kirk, using

the ECJ as a "threat" provoked or embarrassed the MS into agreeing this policy.

171b Theodore L. Becker (fn. 3), p.347.

172. E.G. F.E. Dowrick, "Overlapping European Laws", ICLQ 1978, Volume 27 pp.629-660, p.630 wrote that this was a dynamic ECJ decision.

173. Hamson (fn. 57), p.10.

174. Pescatore, "The Law of Integration" (1974), p.87.

175. 6/64 Costa v ENEL (1964) 585. 17/67 Neumann (1967) ECR 456.

176a 106/77 Amministrazione delle Finanze dello Stato v Simmenthal, (1978) ECR 629.

176b Pescatore (fn. 147b), p.156.

176c Simmenthal Case (fn. 176a), p.645-6.

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177a Costa v ENEL (fn. 175).

177b Costa v ENEL (fn. 175) p.593.

177c Costa v ENEL (fn. 175), p.594.

178. Lord MacKenzie Stuart (fn. 29), p.16.

179. P. Pescatore, "The Law of Integration" (1974), p.85.

180. Anna Bredimas (fn. 23), p.145.

181. P. Pescatore, "The Law of Integration" (1974), p.87.

182. P. Pescatore, "The Law of Integration" (1974), p.94.

183. P. Pescatore, "The Law of Integration" (1974), p.94. It should be noted that the opinions of Pescatore are quoted at length because, as a judge of the ECJ, these opinions produce valuable insight into the judicial mind.

184. To quote again from Pescatore, "The Law of Integration" (1974), p.92, "Van Gend en Loos is and remains the Magna Carta of the doctrine of direct effect".

185. Lord MacKenzie Stuart (fn. 29), p.78.

186. P. Pescatore, "The Law of Integration" (1974), p.94.

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187a 43/75 Defrenne v SABENA (1976) ECR 455. (2nd Defrenne Case) 1976.

187b Defrenne v SABENA (fn. 187a) p.457.

187c Defrenne v SABENA (fn. 187a) pp.457-8.

188a Defrenne v SABENA (fn. 187a) p.481 consideration 1.

188b Defrenne v SABENA (fn. 187a) pp.481-2 consideration 4 and 5.

188c Defrenne v SABENA (fn. 187a) p.492.

188d Defrenne v SABENA (fn. 187a) p.492.

188e Defrenne v SABENA (fn. 187a) p.492.

189. Hamson (fn. 57), p.15.

190. Hamson (fn. 57), p.15.

191. Hamson (fn. 57), p.18.

192. Anna Bredimas (fn. 23), p.146.

193. Schermers (fn. 49), p.44.

194. Hamson (fn. 57), p.15.

195. Lord MacKenzie Stuart (fn. 29), p.26.

196. Hamson (fn. 57), p.15; Schermers (fn. 49), p.44.

197. Schermers (fn. 49), p.44.

198. Salleilles, "De La Personnalite Juridique" the quote is taken from Cardoso (fn. 3). p.45. The full quote (pp. 45-46) is "One wills at the beginning the results; one finds the principle afterwards; such is the genesis of all juridical construction. Once accepted the construction presents itself, doubtless in the ensemble of legal doctrine, under the opposite aspect. The factors are invested. The principle appears as an initial clause, from which one has drawn the result which is found deduced from it".

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199. 22/70 Commission v Council (1971) ECR 263 (The ERTA Case). For articles on this case, see Winter "Annotation of the ERTA case 22/70" 1971 CMLR p. 550-556. See also Brinkhorst (1970) SEW 479-484. Also see the comments of Pescatore in The Law of Integration (1974), pp.111.

200a Pescatore (fn. 199) p. 86.

200b The ERTA Case (fn. 199) pp 276-7, considerations 38-41. (paraphrased)

201. Winter (fn. 199), p.551.

202. Winter (fn. 199), p.551.

203. Pescatore (fn. 199), pp. 87-88.

204. See Winter's article generally. He also notes that the Court gave the Commission more than it actually asked for p. 551; "The Court offered more than the Commission had bargained for".

205. Walter Van Gerven; "De grenzen van de rechterlijke functie, en het gevaar van overschrijding, in het Europese Recht", Rechtsgeleerd Magazijn Therius (1974) p.645. Van Gerven was of the opinion that the Court would prefer to apply legal principles in cases where it has a choice to apply either such principles or an express treaty provision. He cites the 25/70 Koster Case (1970) ECR 1173 as an example. Schermers (fn. 49), p.23 supports this opinion but only for cases where the Treaty provisions and the legal principles do not conflict.

206. Anna Bredimas (fn. 23), p.145.

207. Anna Bredimas (fn. 23), p.145-146.

208. Winter (fn. 199), pp.400-401.

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209. T. Koopmans, "Stare Decisis in European Law", pp. 11-29 at p.27 in David O'Keefe/Henry G. Schermers (Editors) "Essays in European Law and Integration", (1982).

210. Koopmans (fn. 209), p.27.

211. Koopmans (fn. 209), p.27.

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212. These issues are absent in one of two ways. First the issues may not be present or implied in any part of the case. Second these issues may be present or implied in the case but the Court chooses not to deal with them. See the Dyestuffs Cases (fn. 251) for an example of this latter statement.

213. Schermers (fn. 49), pp. 20-21.

214. See Chapter VII for examples of cases where such disagreements arose.

215. Kutscher (fn. 46), p.5. See also Lord MacKenzie Stuart (fn. 29), p.33 who noted "The list (of GP) is not closed since we are dealing with an evolving system".

216. T.C. Hartley "The Foundation of European Community Law", (1981) p.126.

217. Bredimas (fn. 23), p.136.

218. John Usher "The Influence of National Concepts on Decisions of the European Court" EL Rev 1975-1976 pp. 359-374 at p.360.

219. See the statement by Ex-President of the Court of Justice of the European Communities J. Mertens de Wilmars "The Case-Law of the Court of Justice in relation to the review of the legality of Economic Policy in Mixed-Economy System". LIEI 1982/1 pp. 1-16 at p.14.

220. Warner "Some Aspects of the European Court of Justice" Journal of the Society of Public Teachers of Law, 1976, p.30.

221. C.J. Mann (fn. 1), p.353.

222. Lord MacKenzie Stuart (fn. 29), p.72.

223. As to classification of GP used by Community law, see H. Schermers, "Judicial protection in the European Communities" (3rd

Edition, 1983) pp. 26-75. J. Usher (fn. 218), pp.359-374; Dumon, "The Case Law of the Court of Justice" (fn. 27), pp. 60-78; Toth (fn. 53), pp. 85-94 and also pp. 226-234; T.C. Hartley (fn. 216), pp. 138-140; Mertens de Wilmars (fn. 219), pp.9-16. Usher also notes that a problem in listing those principles of Community law which have been derived from national sources is that the same principle may (in effect) be known by more than one tag p. 362.

224. See Schermers (fn. 223), pp. v-vi "Table of Contents".

225. Schermers (fn. 223), p. 45.

226. Usher, (fn. 218), p. 366.

227. Schermers (fn. 223), p. 45; "In Community law an important role is played by the principle of legal certainty". Toth (fn.53), p.88; "Apart from the principles mentioned under (a) the principle of legal certainty is perhaps the most important GP of Community law, pervading all its aspects substantive and procedural alike". Usher (fn. 209), p.366; "It is of considerable importance in the case law of the Court".

228. Hartley (fn. 216), p.129.

229. Mertens de Wilmars (fn. 219), p.15.

230. Usher (fn. 218), p. 366. He quotes the two Deuka Cases as examples - see p. 366-7 and also Case 78/74 Deuka v EVGF (1975) ECR 421, 5/75 Deuka v EVGF (1975) EGR 759.

231. Usher (fn. 218), p. 367: "This follows the decisions in the second Brasserie de Haecht case and in BTR v Sabam to the effect that Article 85 (1) and 86 EEC produce direct effects and could not therefore be modified or limited by Regulation 17 of the Council". See 48/72 Brasserie de Haecht v Wilkin-Janssen (1973)

ECR 77.

232. 13/61 Bosch v Van Rijn (1962) ECR 45.

233. Bosch v Van Rijn (fn. 232), p.48.

234. Bosch v Van Rijn (fn. 232), pp 47-48.

235. Bosch v Van Rijn (fn. 232), p.52.

236. 10/69 Portelange v Marchant (1969) ECR 309.

237. Portelange v Marchant (fn. 236), p.311.

238. Portelange v Marchant (fn. 236), p.316, considerations 15,16.

239. 48/72 Brasserie de Haecht v Wilkin-Janssen (1973) ECR 77. (Second Brasserie de Haecht Case)

240. 23/67 Brasserie de Haecht v Wilkin and Wilkin ECR (1967) 407 at pp 414-416.

241. Brasserie de Haecht v Wilkin-Janssen (fn. 239), p.86, considerations 8,9.

242. Schermers (fn. 223), p.46.

243. Schermers (fn. 223), p.47.

244. Schermers (fn. 223), p.47.

245. 59/70 Netherlands v Commission (1971) ECR639 (Steel Subsidies Case).

246. Steel Subsidies Case (fn. 245), p.653 consideration 15.

247. Steel Subsidies Case (fn. 245), p.653 consideration 18.

248. 2/70 Riva v Commission (1971) ECR 97.

249. Riva Case (fn. 248), p.109 consideration 13.

250. 30/72 Commission v Italy (1973) ECR 161. (Premiums for Grubbing Fruit Trees); 120/73 Lorenz v Germany (1973) ECR 1471; Einfunr-und Vorratsstelle Getride v Pfützenreuter (1974) ECR 589.

251. Quinine Cartel Cases, 41/69 ACF Chemiefarma v Commission (1970)

ECR 66; 44/69 Buchler v Commission (1970) ECR 733; 45/69 Boehringer Mannheim v Commission (1970) ECR 769 (First Boehringer Case). Dystuffs Cases, 48/69 ICI v Commission (1972) ECR 619; 54/69 Francolour v Commission (1972) ECR 851; 55/69 Cassella v Commission (1972) ECR 887; 56/69 Hoechst v Commission ECR (1972) 927; 57/69 ACNA v Commission (1972) ECR 933.

252. Schermers (fn. 223), p.47.

253. Chemiefarma v Commission (fn. 251), p.683 considerations 19,20,21.

254. Buchler v Commission (fn. 251), pp. 750-1 considerations 5,6,7.

255. Schermers (fn. 223), p.48.

256. ICI v Commission (fn. 251), p.633 considerations 49 and 50.

257. Francolor v Commission (fn. 251), p.873.

258. Cassella v Commission (fn. 251), p.913.

259. Hoechst v Commission (fn. 251), p.928 consideration 9.

260. ACNA v Commission (fn. 251), p.949-50, considerations 31-33.

261. Allen, N.L. "The Development of European Economic Community Anti-Trust Jurisdiction over Alien Undertakings" LIEI 1974/2 pp. 35-78.

262. Allen (fn. 261), p.56.

263. Allen (fn. 261), p.57.

264. Allen (fn. 261), p.57.

265. Allen (fn. 261), p.57.

266. Schermers (fn. 223), p.50; Toth (fn. 53), p.89.

267. Toth (fn. 53), pp.89-90.

268. Schermers (fn. 223), p.50.

23/68 Klomp v Inspektie der Belastinger (1969) ECR 43.

269. Klomp Case (fn. 268), p.50 considerations 12,13,14.

270. 7/56 and 3 to 7/57 Algera v Common Assembly (1957) ECR 39 at pp.55-56.

271. 15/60 Simon v Council of Justice (1961) ECR 115, at p.123.

272. 54/77 Herpels v Commission (1978) ECR 585, P.599 consideration 38.

273. 177/73 and 5/74 Reinarz v Commission (1974) ECR 819 (Fifth Reinarz Case) p.829 considerations 21,22,23.

274. Schermers (fn. 223), p.51.

275. 77/71 Gervais-Danone v Hauptzollamt Bad Reichenhall (1971) 1127. (First Gervais-Danone Case) see consideration 8 p.1137.

276. 98/78 Racke v HZA Mainz (1979) ECR 79. (2nd Racke Case) See p.84 consideration 15.

277. 17/67 Neumann v Hauptzollamt Hoff (1976) 441. See p.456.

278. 212-217/80 Post Clearance Recovery Case (1981) ECR 2735.

279. Post Clearance Recovery Case (fn. 278), p.2751 considerations 9,10.

280. 40/79 Mrs P. v Commission (1981) ECR 361. See p.373 consideration 12.

281. 88/76 Exportation des Sucres v Commission (1977) ECR 709.

282. Schermers (fn. 223), pp. 52-57.

283. Schermers (fn. 223), p.52.

284. Schermers (fn. 223), p.52.

285. 37/70 First Rewe Case (1971) ECR 23. See p. 36 consideration 15-17.

286. 81/72 First Remunerations Adjustment Case (1977) ECR 575, 59/81 Third Remunerations Adjustment Case (1982) ECR 3329 138/79 Fifth

Roquette Case (1980) ECR 3333, 139/79 Maizena Case (1980) ECR 3393, 114/81 Second Tunnel Refineries Case (1982) ECR 3189.

287. Schermers (fn. 223) p.53.

288. Schermers (fn. 223) p.53.

289. 7/76 IRCA v Amministrazione delle Finanze dello Stato (1976) ECR 1215. See p.1229 consideration 29.

290. Schermers (fn. 223) p.53.

291. Neumann Case (fn. 277).

292. Schermers (fn. 223), p.57.

293. Hartley (fn. 216), p.132.

294. Hartley (fn. 211), p.132.

295. Toth (fn. 53), p.89.

296. 112/77 Töpfer v Commission (1978) ECR 1019. (2nd Töpfer Case)

297. Töpfer Case (fn. 296) pp.1032-3 considerations 18,19,20.

298. 1252/79 Luccini v Commission (1980) ECR 3753.

299. 78/77 Lührs Case (1978) ECR 169.

300. M. Waelbroeck "Examen de Jurisprudence 1971 à 1977", 22 RCJB (1978) pp. 76-77; Schermers (fn. 223), p.59.

301. Schermers (fn. 223) p.59.

302. Mertens de Wilmars (fn. 219), p.14.

303. Mertens de Wilmars (fn. 219), p.14.

304. Mertens de Wilmars (fn. 219), p.15.

305. 74/74 CNTA v Commission (1975) ECR 533.

306. 66/74 Farrauto v Bau-Berufsgenossenschat (1975) ECR 157.

307. 32/79 Commission v United Kingdom (1980) 2403. (First Conservation Measures Case) p.2445, consideration 46.

308. Conservation Measures Case (fn. 307) consideration 46.

309. 14/68 Walt Wilhelm Case (1969) ECR 1, page 15 consideration 11.

310. 78/77 Lührs v Hauptzollamt Hamburg-Jonas (1978) 169.

311. Lührs case (fn. 310) p.180 considerations 13 and 17.

312. Schermers (fn. 223) pp. 64-65.

313. 94/77 Zerbone Case (1978) ECR 99.

314. Zerbone Case (fn. 313).

315. Schermers (fn. 223) p.65. On proportionality in the EC see Lord MacKenzie Stuart "The Court of Justice of the European Communities and the Control of Executive Discretion" 13 Journal of the Society of Public Teachers of Law (1974) pp. 22-26.

316. Lord MacKenzie Stuart (fn. 29), p.31.

317. Mertens de Wilmars (fn. 219), p.13. Hartley (fn. 216), p.137.

318. Toth (fn. 53), p.90.

319. Hartley (fn. 219), p.137.

320. Mertens de Wilmars (fn. 219), p.13.

321. Mertens de Wilmars (fn. 219) pp.13-14.

322. Toth (fn. 53) p.90.

323. Toth (fn. 53) p.90.

324. 9/73 Schlüter v Hauptzollamt Lörrach (1973) ECR 1135. (Second Schlüter Case)

325. Second Schlüter Case (fn. 324) p.1156 consideration 22. See also 62/70 Chinese Mushrooms Case (1971) ECR 909.

326. 8/55 Fédération Charbonnière de Belgique v High Authority (1956) ECR 245.
11/70 Internationale Handelsgesellschaft v EVGF (1970) ECR 1125.
Hartley (fn. 216) p.137. Usher (fn. 218) p.362.

327. Hartley (fn. 216), p.137.

328. Fédération Charbonnière Case (fn. 326), p.299.

329. Usher (fn. 218) p.362.

330. Usher (fn. 218), p.363.

331. Internationale Handelsgesellschaft Case (fn. 326)
AG Dutheillet de Lamothe, p.1146.

332. 114/76 Skimmed Milk Powder Case (1977) ECR 1211.

333. Mertens de Wilmars (fn. 219), p.14.

334. Skimmed Milk Powder Case (fn. 322) consideration 8, p.1221.

335. Hartley (fn. 216), p.137.

336. 43,45 and 58/59 Lachmuller v Commission (1960) ECR 463; 14/61 Hoogovens v High Authority (1962) ECR 253. (First Hoogovens Case).

337. Lachmuller Case (fn. 336), pp.474-5.

338. First Hoogovens Case (fn. 336), p.273.

339. 6 and 11/69 Commission v France (1969) ECR 523. (Rediscount Rates Case).
39/72 Commission v Italy (1973) ECR 101. (Premiums for Slaughtering Cows Case).

340. Rediscount Rate Case (fn. 339) p.540 consideration 16.

341. Premiums for Slaughtering Cows (fn. 339) p.116 consideration 25.

342. 32/62 Alvis v Council (1963) ECR 49, 35/67 Van Eick v Commission (1968) ECR 329. (First Ván Eick Case)

343. 85/76 Hoffmann - la Roche v Commission (1979) ECR 461 (3rd Hoffmann la Roche Case) p.511 consideration 9.

344. 32/62 Alvis v Council (1963) ECR 49.

345. Alvis Case (fn. 344) p.55.

346. Schermers (fn. 223) p.40.

347. 121/76 Moli v Commission (1977) ECR, 1971 p.1979 consideration 20.

348. 17/74 Transocean Marine Paint v Commission (1974) ECR 1063. pp. 1079-80 consideration 15.

349. Hartley (fn. 216) p.138.

350. Transocean Marine Case (fn. 348) pp. 1088-9.

351. 75/77 Mollet v Commission (1978) ECR 897.

352. Hartley (fn. 216), p.138.

353. Mollet v Commission (fn. 351), p.908 consideration 21.

354. 56 and 58/64 Consten and Grundig v Commission (1966) ECR 299 at p. 338.

355. Schermers (fn. 223) p.43.

356. Schermers (fn. 223) p.43.

357. Toth (fn. 53) p.92.

358. Toth (fn. 53) p.92.

359. Toth (fn. 53) p.92.

360. 18 and 35/65 Gutmann v Commission (1966) ECR 103, p.119.

361. 14/68 Walt Willhelm v Bundeskartellamt (1969) ECR 1.

362. Walt Willhelm Case (fn. 361) p.15 consideration 11.

363. 45/69 Boehringer Mannnheim v Commission (1970) ECR 769. (First Boehringer Case).

364. 7/72 Boehringer Mannheim v Commission (1972) ECR 1281. (Second Boehringer Case).

365. Second Boehringer Case (fn. 364) p.1289 considerations 3,4,5,6.

366. 175/73 Union Syndicale - Amalgamated European Public Service Union - Brussels, Demise Massa and Roswitha Kortner v Council (1974) ECR 917, consideration 14 p.925.

367. 18/74 Syndicat General v Commission (1974) ECR 933 consideration 10 p.944.

368. Louis (fn. 51), p.76.

369. Hartley (fn. 216), p.140.

370. Mertens de Wilmars (fn. 219), p.12.

371. Mertens de Wilmars (fn. 219), p.12.

372. Schermers (fn. 223) p.62.

373. Schermers (fn. 223) p.62.

374. Toth (fn. 53) p.93.

375. Toth (fn. 53) p.93.

376. Schermers (fn. 223) p.69.

377. Schermers (fn. 223) p.69.

378. 71/72 Kuhl v Council (1973) ECR 705 see pp. 712-3 considerations 8-16; 36/72 Meganck v Commission 1973 (ECR) 527 see p.534 consideration 17; 26/67 Danvin Case (1968) ECR 315 see p.322.

379. Danvin Case (fn. 378) p.322.

380. Toth (fn. 53) p.91. See also Usher (fn. 218) p.367.

381. Schermers (fn. 223) p.70.

382. 4/68 Schwarzwald Milch Case (1968) ECR 377;
11/70 Handelsgesellschaft Case (1970) ECR 1125;
186/73 Fleishkontor Case (1974) ECR 533;
3/74 Pfützenreuter Case (1974) ECR 589;
158/73 Fourth Kampffmeyer Case (1974) ECR 101
64/74 Reich Case (1975) ECR 261.

383. Schwartzwald Milch Case (fn. 382), p. 385.

384. Fleischkontor Case (fn. 382) p.544 consideration 7.

385. Kampffmeyer Case (fn. 382) p.110 consideration 8.

386. Reich Case (fn. 382) p.268 consideration 3.

387. Toth (fn. 53) p.90.

388. 16/61 Modena v High Authority (1962) ECR 289. (First Modena Case) p.303.

389. 17 and 20/61 Klöckner v High Authority (1962) ECR 325; 19/61 Mannesmann v High Authority 1962 ECR 357 (Third Mannesmann Case).

390. Usher (fn. 218) p.368. This (he notes) however is a rare occurrence.

391. Klöckner Case (fn. 389) p.342.

392. 3/66 Alfieri v European Parliament (1966) ECR 437.

393. Alfieri Case (fn. 392) p.451.

394. 39/72 Premiums for Slaughtering Cows Case (1973) ECR 101 at p.112 consideration 10.

395. 6/72 Continental Can Case (1973) ECR 215, see p.241 consideration 10.

396. 36/72 Meganck v Commission (1973) ECR 527, p.534 consideration 17.

397a 30/75 Unil-It v Amministrazone dello Stato (1975) ECR 1419.

397b Unil-It (fn. 397a) p.1428 considertaion 18.

398. Mertens de Wilmars (fn. 219) p.10

399. 5/73 Balkan Import Export v Hauptzollamt Berlin Packhof (1973) ECR 1112.

400. 4/79 Providence Agricole de la Champagne v ONIC (1980) ECR 2832.

401. Mertens de Wilmars (fn. 219), pp.10-11.

402. Toth (fn. 53) p.82. See also section 219 of his book, on Res Judicata.

403. Toth (fn. 53) p.93.

404. 34/74 First Roquette Case (1974) ECR 1217.

405. Roquette Case (fn. 404) pp.1217-8.

406. Roquette Case (fn. 404), AG Trabucci p.1238.

407. Roquette Case (fn. 404), AG Trabucci p.1238.

408a Toth (fn. 53) p.93.

408b Toth (fn. 53) p.93.

408c 23/68 Klomp v Inspektie der Belastingen (1969) ECR 43.

409. Klomp Case (fn. 408c), pp.54-55.

410. Mertens de Wilmars (fn. 219), p.11.

411. 120/78 Cassis de Djon (1979) ECR 649; 27/80 Fietje (1980) ECR 3839.

412. 270/80 Polydor (1982) ECR 329.

413. Mertens de Wilmars (fn. 2198), p.11.

414. Mertens de Wilmars (fn. 2198), p.11.

415. Schermers (fn. 49), p.20.

416. Lord MacKenzie Stuart (fn. 29), p.63.

417. Lord MacKenzie Stuart, (fn. 29) p.63.

418. A.W. Green "Political Integration by Jurisprudence - The Court of Justice of the European Communities in European Political Integration", (1969), p.416.

419. Kutscher (fn. 46), p.5.

420. Toth (fn. 53), p.83.

421. Bredimas (fn. 23), p.136.

422. The quote comes from the opinion of the AG in 11/70 Internationale Handelsgesellschaft (1970) ERC 1125. He was also quoted in Bredimas (fn. 23), p.136.

423. Bredimas (fn. 23), p.181.

424. Bredimas (fn. 23), p.181.

425. Lord MacKenzie Stuart (fn. 29), p. 77.

426. McCloskey (fn. 3), p.22.

427. See Chapter VII for an example of the truth of the statement with regard to the early FR cases.

428. Kutscher (fn. 46), p.47.

CHAPTER VII : FUNDAMENTAL RIGHTS

I. Introduction

This chapter deals with the use, by the ECJ, of GP in the series of cases concerning fundamental rights. The issue of fundamental rights has, over the past decade, become one of great importance to legal orders in Europe and to EC law in particular.[1] With regard to this dissertation this subject has several points of interest which, as will be shown, justify a chapter on Fundamental Rights.

2. The GP of Fundamental Rights - an Explanation

The GP of fundamental rights has, in the eyes of various people, changed in weight. In the early seventies the principle became so important that it was the main issue in Community law. This situation was recognised by Hilf. He wrote, "The absence of a catalogue of fundamental rights in the Community seems to be the outstanding feature of the Community treaties. And this seems to some on the Continent sufficient reason to pass a negative verdict on the Community Legal Order."[2]

It seems relevant, in view of the weight of the GP of fundamental rights, to give an explanation of the basic concept as a necessary preliminary to examining its initial reception into EC law.

As Hilf observed, a definition of such a complex concept is a difficult task.[3] This task is made easier as fundamental rights can be linked to GP. If there were a generally acceptable definition of what constitutes a fundamental principle, as opposed to which principles are fundamental, it might be that fundamental principles are principles which people subjectively believe are closely linked to values. In law it might be said that fundamental principles are those GP with a close attachment to moral values such as justice. Fundamental rights are of a similar ilk. They are principles based on values relating to the human being. Such values, being too general to obtain action in their own right, are therefore crystalised into specific

principles, which in turn are directly applicable to fact situations.

In relation to a legal system, fundamental rights are all those legal rights and situations which must not be violated by an action of the public authorities, whether by the legislature, the executive or the judiciary.[4] These rights can be classified into two basic categories, negative rights and positive rights.[5] Negative rights are basic political rights. Such rights require that authorities and other persons should not interfere when the holder of these rights chooses to exercise them. They are thus rights of a defensive nature. Stein and Shand claim such rights can be safeguarded in any country, whatever its economic situation.[6] Positive rights are mainly economic and social rights. Their implementation depends upon the state of the economic and social development of the individual country. Such rights are more aggressive or offensive in nature, for example the right to demand entrance to state universities. It is the latter rights that are most relevant to EC law.

3. FR in EC Law

As there are no provisions in the Treaties specifically dealing with fundamental rights, not unnaturally the question first entered the EC through the cases.[7] In dealing with cases on this subject it is helpful to split them into two definite groups, those in which the plea invoking FR was rejected and those in which the plea was given credence. Cases in the first group included the Stork Case, the Second Ruhrverkohlen Case and the Sgarlata Case.[8]

In Stork the plaintiff, a German company sought the annulment of a decision of the High Authority of the ECSC which had an adverse effect on its business operations. In support of its claim, Articles 2 and 12 of the Basic Law of the Federal Republic of West Germany were invoked. This guaranteed the free development of the human personality and the unhampered exercise of one's profession.

In the Second Ruhrverkohlen Case similar decisions of the High Authority were at stake. One of the plaintiffs, Firma Nold invoked Article 14 of the Basic Law of the Federal Republic which guaranteed the right to private property.

In Sgarlata, various Italian citrus fruit producers sought the annulment of a number of EEC Regulations dealing with agricultural matters. To support their argument that Article 173 EEC should be interpreted to give them standing to challenge

the Regulations, basic rights were again invoked. However, they were introduced into the arguments not as components in a constitutional system but as "fundamental principles applicable in all Member States". Pescatore noted, "that the plaintiffs did not develop their arguments further".[9] Neither did the Court nor the Advocate General attempt to investigate this plea. This was a possible flaw in the ECJ's actions for as Usher has stated, "the Court is not dependent solely upon the arguments which the parties choose to put before it".[10] In all cases the arguments of the plaintiffs were rejected. The grounds were that the Court had competence only to apply Community law, and that therefore it did not have to concern itself with rules of national law. Having thus dismissed these arguments, the further question, whether similar guarantees were provided by the Community itself, was ignored.

Why did the Court reject the arguments of the plaintiffs in all these cases? There are several reasons, it is suggested, for such action.

The first reason is simply that the Court was totally unprepared for the question to arise at all. As Pescatore has stated, "one may even wonder how a problem concerning human rights could possibly arise in an organisation whose tasks are mainly of an economic, social and technical nature".[11] Secondly, an examination of the interaction between Community law and fundamental rights by the Court convinced them that the concept

was of little relevance to Community law. Pescatore, in an article written after the cases cited above had been heard by the Court wrote, "These examples tend to show that ... the protection of fundamental rights and freedoms will never become a question of paramount importance in the Communities".[12] A third reason is the general attitude, as opposed to intellectual schema, of the ECJ. As Chapter II suggested the Court has a conservative attitude, due both to the general nature of courts and the specific character of the ECJ. Pescatore in his defence of the decisions in the first fundamental rights cases referred to "This purely defensive attitude of the Court..."[13] Thus the Court would tend to reject any new and potentially disruptive element, as the "introduction of appraisal criteria drawn from the constitutional law of one Member State would result in compromising both the unity and the efficacy of Community law".[14]

The fourth reason is self-explanatory in view of the role of the Court as guardian of the Treaty, "the problem of basic rights arose for the first time in the case law of the Court of Justice and this in a very typical way: to evade the provisions made by the Community authorities, some litigants invoked the guarantees given by their national constitutions".[15] This reason is, strictly speaking not a proper one for a Court to consider, as it is irrelevant to the validity, or otherwise, of the plaintiffs' case. However, it is an excellent illustration of the working of the judicial mind. It supports the argument that EC law is a struggle between various parties. The Court thus would tend to

reject such individual pleas in order to safeguard the overall good of the Community. The fifth reason is that, as stated, the cases, with the exception of Sgarlata, invoked national guarantees. This provoked concern by the Court for the primacy of Community law.[16] To sum up it could be said that the ECJ saw the first FR cases as micro cases. Further they routinely allowed the GP of integration and primacy to override what they thought were GP of Municipal law.

In fairness to the Court however, it should be noted that logically, on the Van Gend/Costa v ENEL doctrines that Community law is a distinct, independent legal order, national law must be irrelevant to measure or judge the legality of EC law.[17] Primacy, being a principle of Community law closely related to integration would be given more weight, in such circumstances, than the seemingly unimportant concept that the national laws contained.[18]

Overall, therefore, the attitude of the Court to the above cases is readily explicable. The next set of cases to be examined however will show a marked change in attitude. What caused this change of attitude by the ECJ, this expiation for their "sins of youth".[19]

The reasons are as follows. In brief, certain events took place which resulted in the concept of fundamental rights becoming a threat to Community fundamental principles. The events in question were doctrinal discussions that developed in Italy and

Germany and which eventually resulted in judicial disputes in both countries. The Italian Corste Constituzionale in its decision of 18 December 1973 refused any national control over secondary rules of Community law. It reserved, however, the possibility to question the basic act of ratification should the Community interfere unlawfully with the rights of its citizens.[20] On the same subject, and of greater political importance, was the majority opinion of the Bundersverfassungsgericht.[21]

The majority said: "Article 24 of German basic law does allow a transfer of sovereign powers to an interstate organisation. But there are limits. Article 24 does not open the way to altering or affecting the inalienable and essential part of the constitutional structure of the Basic law, including, beyond any doubt, the system of protection of fundamental rights. The new organisation should have at least an equivalent system and in the opinion of the five judges this is not yet the case for the EEC.

The case law of the ECJ may have its merits, but as long as the Community does not have a codified catalogue of Fundamental Rights which have been approved by a Parliament, which is generally applicable and is equivalent to that contained in the Basic law, the Constitutional Court will retain its powers to control Community law (or more precisely to control acts of the German public authorities such as lower courts applying for Community law) in respect of the fundamental rights guaranteed in the Basic law. The Constitutional Court does not claim to be

able to invalidate Community law which would in any case remain effective for eight other Member States. But it maintains its power to declare such a conflicting rule of Community law as inappropriate within the territory of the Federal Republic of Germany".

These decisions had implications of enormous importance to the EC and thus to the ECJ. Pescatore stated them clearly, "Such notions not only justify the introduction of national concepts, but they result once again in the affirmation of the primacy of the national constitutional concepts and provisions over Community law. This left the door wide open for challenging yet again the very basis of Community law".[22] Thus fundamental rights constituted a direct and dangerous threat to the fundamental principles of Community law; the autonomy and primacy of the legal order. Such threats, as various analysts noted, demanded a speedy response from the EC. Pescatore wrote, "To prevent such developments, it became urgent to draw up, within the Communities, a system for protecting such rights."[23] Hartley stated, "it became imperative for the European Court to take action to head off a possible "rebellion"."[24]

In this light the probable subsequent intentions of the ECJ in the following cases becomes clearer. The objective of the Court is not primarily to promote fundamental rights but to defend fundamental Community principles and thus protect both the Community itself and the process of integration. The following

cases will now be examined:

Stauder, Internationale Handelsgesellschaft, Nold, Rutili and Hauer v Land Rheinland-Pfalz.[25]

The Stauder v Ulm case was as follows: On February 12, 1969 the Commission authorised the Member States to make butter available, at reduced prices, to certain groups of consumers receiving social assistance, where their income did not permit the purchase of butter at normal prices. Article IV of this decision, in the German version, stated that, "The Member States shall take all measures necessary to ensure that ... the beneficiaries of the measures provided for in Article 1 receive the butter only upon the presentation of a voucher issued in their name." The plaintiff was entitled to receive the low cost butter but felt that the conditions of the offer constituted a violation of human dignity.

Thus the Verwaltungsgericht Stuttgart requested a preliminary ruling. The relevant question as regards this chapter was whether the original version of the German text violated the basic human rights of Mr Stauder (the right not to be humiliated), and in particular whether the ECJ would have to apply such human rights.

The Court held that, "the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law, and protected by the

Court".[26]

The case itself was solved on the basis of the principles of interpretation applicable in such cases of disagreement between different linguistic versions of the same text. Thus Mr Stauder was not required to disclose his name.

Yet the last statement quoted from the judgment contains one essential difference from previous decisions. By use of general principles it had filled the gap in Community law as regards FR. Thus if a threat to "basic rights" had been sustained it would have been upheld.

Though basic rights or FR was now within, or to put it more accurately, overtly recognised in Community law, the concept needed clearer definition. Furthermore, the weight of this new concept vis a vis other Community principles was also in doubt. More cases were needed to begin to tackle these tasks. The next chance came in 1970 with the advent of the Internationale Handelsgesellschaft case.

The facts of the case were as follows: Internationale Handelsgesellschaft obtained an export licence for 20,000 tons of cornflour, valid until 31 December 1967. On the grounds of Article 12, paragraph 1(13) of Council Regulation 120/67 EEC of 13 June 1967, a deposit on 0.50 units per ton was required as a guarantee that the export would be realised. When

Handelsgesellschaft did not export the full amount of cornflour, a notice for forfeiture of the deposit of 17.026,47 DM was then served. Handelsgesellschaft maintained before the Verwaltungsgericht that such a forfeiture was unconstitutional. From 1966 onwards the Verwaltungsgericht Frankfurt am Main had declared certain similar regulations invalid without calling for a preliminary ruling. This time, however, the Court referred two questions to the ECJ:

"1) Are the obligations to export, laid down in .... Regulation No.120/67 EEC....., the lodging of a deposit, upon which such obligation is made conditional, and forfeiture of the deposit, where exportation is not effected during the period of validity of the export licence, legal?

2) In the event of the Courts confirming the legal validity of the said provision, is Article 9 of Regulation No.473/67 EEC....., legal in that it excludes forfeiture of the deposit only in cases of force majeure?"[27]

The Court observed, after much analysis, that it was a matter of ordinary economic discipline aiming to regulate the Communities external trade with a minimum of restriction and therefore no basic perrogative was at issue. "It follows from all these considerations that the fact that the system of licences involving an undertaking, by those who apply for them, to import or export, guaranteed by a deposit, does not violate any right of a fundamental nature. The machinery of deposits constitutes an appropriate method, for the purposes of Article 40(3) of the Treaty, for carrying out the common organisation of the

agricultural markets and also conforms to the requirements of Article 43."[28]

Once again the actual decision stated no fundamental rights were at issue. However, the chance had been taken to clarify both the meaning and weight of fundamental rights. "Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."

"However an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature respect for which must be ensured within the Community system"[29]

There are several features of the argument of the Court worth noting. First and foremost, it firmly squashes any threat to the

primacy of Community law. The Court strongly emphasises the autonomy of the legal system and rejects the introduction into Community law of all concepts drawn from national constitutional law.[30]

Secondly, it clarified its previous reference to basic personal rights in the general principles of Community law by speaking of "general principles of law" as such. Thus the ambit of fundamental rights is considerably broadened. This brings in the constitutional traditions of the Member States as part of the Community law. However, the Court makes it clear that national constitutional traditions only "inspire" FR not give them validity in EC law, such rights deriving their validity solely from the Treaty. At the same time, it gives an assessment of the relative weight of such rights. They "must be ensured within the framework of the structure and the objectives of the Community." A further important point brought about is that it will be the ECJ itself that sets the boundaries of fundamental rights. As Pescatore stated, "it being understood that it is for the Court of Justice to define their actual content."[31]

The next case of importance regarding fundamental rights was Firma J. Nold K.G. v Commission. The basic question arose from European Court procedure Locus Standi. On the related topics of Human Rights, Community law and GP, the Court said, "As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding their rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of these States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."[32] On the more specific Human Rights of property and commerce, the Court stated, "If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered perogatives, must be viewed in the light of the social function of the property and activities protected thereunder.

For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with public interest.

Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is

left untouched."[33]

The Court dismissed an application for annulment of a decision of the Commission authorising new terms of trading of the Ruhr Coal Sales agency whereby the applicant would lose its status as a first stage wholesaler.

This case led Scheuner to remark that a tradition of judge made law has been established which introduces into Community law general principles, requiring the respect of these fundamental liberties which belong to the common constitutional tradition of the Member States.[34]

The Nold case has attracted both praise and criticism. Hilf noted approvingly that the Court bound the Community to these rights protected by "the" constitutions of the Member States.[35] The previous case judgment has spoken of traditions common to "all" constitutions of the Member States.

This new statement by the Court adds more precision to the definition of fundamental rights. Thus the Court will not employ a minimum standard, that is a common denominator of all constitutions will not be used. Instead it will observe a maximum standard, that is it will invalidate any rule of Community law which is in conflict with any of the rights guaranteed by any of the Member States constitutions.

Hartley summed up the case thus, "Nold took two further steps beyond Handelsgesellschaft. First it made it clear that a Community measure in conflict with FR as expressed in the constitutions of the MS will be annulled; second a new source of "inspiration" for these rights was revealed : international treaties."[36]

"This tenet has three effects. It binds the Community in relation to the Member States as noted above. Second, it binds the Member States among themselves. That is, no Member State should use its respective power without taking into account the repercussions this may have on the legal order of the other MS. Third, it binds the Community not to legislate in any possible way which would be contrary to the essential rules of Member States constitutions."[37]

The critical comments fall into two categories. Again they concern the definition of Fundamental Rights. It is argued that acknowledging a vast variety of rights, ownership, profession, work and other activities is not only an act of judicial legislation but a gross misuse of the power of such judicial legislation. This is so as it is claimed that the decision binds the EC to a liberal economy, the right to take such a definite step being reserved for the political institutions.[38]

A further criticism is, paradoxically, that the limitations imposed on FR such as social function, public interest and

overall objectives pursued by the Community were too restrictive.[39]

Both criticisms, it is suggested, show lack of awareness of the true intentions of the Court. On the one hand public and political pressure demands fundamental rights which the Court has thus acknowledged. By such action the other institutions have not been excluded from legislation. This point is argued further on in this chapter. On the other hand the argument against the "open-endedness" of the limitations is attacked by the ECJ critics. However, it is precisely by keeping such restrictions indistinct that the Court can reserve for itself the sole rights of further defining their meaning in any particular case.[40]

Further steps in FR classification and clarification are as follows. In the case of Roland Rutili v Minister of Interior (preliminary ruling requested by the Tribunal administracht Paris), the following Court statement is relevant : "Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of Protocol no.4 of the same convention, signed in Strasbourg on 16 September 1963 which provide in identical terms that no restrictions shall be placed

on the rights secured by the above quoted articles other than such as are necessary for the protection of those interests "in a democratic society"."[41]

In Rutili the process of integrating fundamental rights is carried further by reference to the Convention of Human Rights. Louis points out that it is not the Convention as such but the GP it expresses that is invoked here.[42] The Bulletin of the European Communities 1979, however, seemed to cite Rutili as an example of a reference to the Convention itself.[43] It is contended that this latter interpretation is correct.

A further important case was Hauer v Land Rheinland Pfalz. It was alleged that certain Community legislation, forbidding the planting of new vineyards for a limited period, infringed the right of property guaranteed under the German Constitution. It was said that rights of property were guaranteed in the Community system according to the concepts common to the constitutions of the Member States, reflected also in the First Protocol to the European Convention of Human Rights. In determining the scope of this right of property, the Court expressly referred to, inter alia, provisions of the German, Italian and Irish Constitutions. It determined that the measure in question did not entail any undue restriction on the exercise of rights.

The considerations of the Court are of interest; "As the Court declared in its judgment of the 17th December 1970,

Internationale Handelsgesellschaft (1970) ECR 1125, the question of a possible infringement of fundamental rights can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the Common Market and the jeopardising of the cohesion of the Community."[44]

It was noted by the Court, in a retrospective look at its previous judgments, that the Court had emphasised in the Internationale Handelsgesellschaft case and "later in the judgment of 14 May 1974, Nold (1974) ECR 491, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures;" that "in safeguarding those rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States so that measures which are incompatible with the fundamental rights recognised by the constitution of these States are unacceptable in the Community; and that, similarly, international treaty for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception was later recognised by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which after recalling the case law of the courts, refers on the one hand to the European Convention for

the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Official Journal C103 1977 p.1)."[45]

In Hauer's case the guarantees examined were the (1) European Convention of HR; (2) the German Constitution; (3) Italian Constitution; (4) Irish Constitution.

The right to property is guaranteed in the Community legal order in accordance with the idea common to the constitutions of the Member States, which are also reflected in the First Protocol to the European Convention for the protection of HR.

Article 1 is then discussed, so is the German Grundgesetz Article 14(2), Italian Constitution Article 42(2), Irish Constitutional Article 43,2,112 no.20. The Court then stated, "Therefore in order to be able to answer that question, it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz Article 14(2), first sentence), to its social function (Italian Constitution Article 42(2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14(2) second sentence) and, the Irish Constitution, Article 43,2,2) or of social Justice (Irish

Constitution, Article 43,2,1). Thus in all the Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes applicable, on the use of real property."[46]

The Hauer case is particularly interesting. Here the Court goes over its previous judgments and analyses, thus giving an insight into the motivation of the Court. These statements of the Court clearly bear out previous statements that the main objective of ECJ policy is protection of the EC (the good of the city being the chief goal).

Also Hauer for the first time specifically examines the constitutions of the Member States. As always this action should be seen in the light of overall ECJ objectives. In particular, with regard to the doctrinal discussions and cases in Italy and Germany, it can be seen as the culmination of the Court's efforts in that direction. As Usher stated, "in the light of this it may be hoped that the problem envisaged by the German Constitutional Court will not arise in practice."[47]

4. Conclusions

The conclusions that flow from the complex problem of FR in the EC are varied and numerous. for the sake of clarity of exposition they are dealt with as a series of separate points. It should be noted that most points are interrelated and thus some amount of overlap between points is unavoidable.

Point one is to note that the question of FR posed a new problem for the ECJ. Hartley in his review of HR in the EC stated this fact and also emphasised its significance. He wrote, "It is important to note that the Courts approach regarding FR is probably a little different from that in other GP of law."[48]

Point two explains and analyses the problems. The potential for such a problem to arise in EC law was noted by Section 12 Chapter VI. There it was stated that individuals, institutions, and MS need not arrive at the same conclusions as to whether a case is a macro or a micro case. Such a situation arose with regard to FR. The ECJ regarded the early FR cases as micro cases while some MS regarded them as macro cases. Though it is not suggested all parties saw the issues in precisely those terms, it is put forward that the ECJ did not attach any particular importance to these cases while the Federal Republic of West Germany and Italy viewed the implications of ECJ action with misgivings.

To take this basic explanation further it is relevant to take account of the consequences of the judges not seeing the cases as

macro. Not being forewarned of the importance of these cases their judgments lacked the strategic depth and longterm considerations that the judgment of e.g. Costa v ENEL contained. There, as Pescatore noted the "potentially explosive" nature of the question before the Court was known to them at the time.[49] In the first HR cases the judgment as in all micro cases simply attempted to decide the point of law at issue. Further it is suggested the ECJ compounded their original error by nevertheless adopting a macro case - type attitude without using any of their usual appeasement methods. That is, in all these cases the Court saw the GP of primacy (a GP which forms part of the basis of integration) as possessing greater weight that any rights guaranteed in municipal law.

In defence of the ECJ it would, taking a rational view of the matter, have been difficult for the Court to have arrived at any other decision, national law being irrelevant to measure the legality of an EC act. Yet, as stated previously, integration and primacy are GP not rules. Thus they are not to be automatically applied in every fact situation in order to protect the EC from various "threats". In a new legal order survival of the Community as a whole must be the primary consideration, yet in carrying out these aims the Court can easily fall into the error of equating (as Plato did) the good of the individual with the good of the whole, (in this case the EC). The error of, and dangers inherent in, such a policy were clearly illustrated by Bertrand Russell. "Our political and social thinking is prone to

what may be called the "administrative fallacy"...the habit of looking upon society as a systematic whole...it is in the individuals, not in the whole, that ultimate value is to be sought. A good society is the means to a good life for the individuals who compose it."[50] Overall therefore it is suggested that the Court was at fault in the first FR cases.

Point three outlines the action the ECJ took. Having been made aware that FR cases were in fact macro cases the ECJ then attempted to find a solution to the problem. Another way to state this is to say the ECJ evolved a specific schema to deal with a specific problem. Hartley noted that, "The solution was to proclaim a Community concept of HR and to lay down the doctrine that the ECJ itself would annul any provision of Community law contrary to HR."[51] This course of action was followed by the Court in subsequent FR cases beginning with Stauder v Ulm.

Point four deals with the attitude of the Court to the problem of FR. This, of course, is a matter of subjective opinion rather than fact. It is suggested that the ECJ saw FR only as a problem requiring a short term solution. The GP of FR posed a threat to the GP's of primacy and integration. The Court reacted by elevating the GP of FR to the status of a fundamental GP of EC law. Further such a reassessment of the GP of FR by the ECJ is only of a temporary nature, that is, the GP of FR is a fundamental GP of EC law only as long as FR present a threat to

the GP's of integration and primacy. In short the ECJ never at any time changed its long term attitude towards the GP's of FR, primacy and (above all) integration.

Point five answers various potential charges of government by judges. One such charge is by Dowrick who cited the Nold case as evidence for his statement, "it is undeniable that, by occasional dynamic judgments the Court has legislated."[52] It is believed that Dowrick is mistaken on several counts. First as to the charge that the Court legislates it is true that the GP of FR was given concrete expression in EC law through the statements of the Court. However, as Chapter V and Section 12 of Chapter VI showed, the concept of FR was already inherent in EC law. Further as has been stated previously some degree of judicial legislation is unavoidable. Taken together these two statements show the so-called judicial legislation on FR is well within the acceptable bounds of "judicial legislation", whereas Dowrick's statement seems to imply ECJ action in this instance was an especially noteworthy example of judicial legislation. Second, if by dynamic judgment Dowrick implied that the ECJ judgments on FR amounted to political integration it is suggested that the analysis contained in Chapter VII shows clearly that the HR judgments from Stauder v Ulm on were examples of defensive integration. In all these cases the primacy objective of the Court was to protect the established GP of primacy and integration. Equally study of the earlier FR cases showed that the introduction of FR into EC law was regarded by the ECJ as a

dubious innovation. It should also be noted that Dowrick was mistaken, as Chapter VI section 2 showed, in implying that political integration is outwith the ambit of the Court.

A further charge of government by judges, to be answered by point five, related to the general charge as such, as opposed to the above specific instance, of government by judges.

The FR question showed that where, as in the earlier FR cases, it could be said that the Court attempted to lead the EC, and the MS, in a direction they did not wish to go, such attempts were a total failure. The subsequent national constitutional Court outcries in the Federal Republic of West Germany and Italy (and subsequent ECJ remedial action) makes it clear that the charge of government by judges is a fallacy.

Point six covers the development of the GP of FR by the ECJ through the cases. It notes this development then analyses whether such development was commensurate with the needs of the EC. The GP of FR was first recognised by the ECJ in Stauder v Ulm. Internationale Handelsgesellschaft went one stage further by noting that FR was inspired by the constitutional traditions of the MS. Nold revealed a second source of inspiration - international treaties. Hauer took the further step of actually referring to national constitutions. In all these cases it was made clear by the Court that the GP of FR was always to be weighed against GP representing overall Community objectives.

The development of FR in EC law was steady though never spectacular. Such development fits in well with the previously stated theory (Chapter VI) that the Court is inherently conservative. Nevertheless as e.g. the Nold case showed the ECJ was criticised both for giving too much scope to the GP of FR and for not developing it adequately to meet the needs of the EC citizens. It is suggested that the critics are incorrect for these reasons. The Court, while playing a political role in the EC is neither the sole, nor the major legislative origin. The EC however, as the constitutional debates within the MS showed, had an urgent need for the GP of FR to be explicitly recognised in EC law. By its actions the Court has, on the one hand, satisfied the immediate need for overt recognition by the EC of FR but has, on the other hand, not given it such wide scope and precise definition so as to usurp the role of the legislator. In point of fact there has been a lively debate within the EC on FR in the past few years culminating in the publication by the Commission of a Memorandum, Bulletin supplement 2/79. This approves of the idea of a Community Bill of Rights.

Thus in conclusion the following can be said. With regard to the question of FR in the EC the Court had, at all times, the good of the EC as a whole as its main priority. As for example Usher noted, by its action in the series of FR cases the Court has been successful in its main aim of preventing the emergence of a serious threat to the unity and harmony of EC law. Further it should be noted that the Court has, with equal success,

accomplished its subsidiary aim of meeting the expectations of its audience. Individual EC citizens now have a wide variety of FR under EC law. Also the number and scope of such rights is continually being expanded. MS do not feel that their constitutionally protected FR are any longer under threat from EC law. EC institutions have been left sufficient scope with regard to FR to decide how best to shape the concept with regard to the present and future needs of the EC.

The whole question of FR in the EC is, overall, a fascinating area of study representing as it does a microcosm of the dynamic (and complex) problems that can arise in a new legal order.

Notes Chapter VII

1. For example the following are merely a sample of the many articles on this topic.

Edelson and Woolridge, "European Community law and Fundamental Human Rights", 1976/1 LIEI p. 1.

Zuleeg, "Fundamental Rights and the law of the European Community", (1971) 3 CMLR Rev p. 446.

U. Scheumer, "Fundamental Rights in the EEC and National Constitutions", (1975) CMLR Rev p. 71.

P. Pescatore, "Human Rights in the European Communities", (1972) CMLR Rev pp. 73-79.

P. Pescatore, "Fundamental Rights and Freedoms in the European Communities", 1970 AJCL Vol 18, pp. 343-351.

M. Hilf, "The Protection of Fundamental Rights in the Community", in F.G. Jacobs (Editor) "European Law and the Individual".

H.G. Schermers, "The Communities under the European Convention on Human Rights", LIEI 1978/9 p. 2.

F.E. Dowrick, "Overlapping European Laws", ICLQ Vol 27 (1978) pp. 629-660.

Wilson Finnie "The Location of Fundamental Rights in the Community Treaty Structure", LIEI 1982/1 pp. 89-99.

John Bridge, "Fundamental Rights in the EC", pp. 291-305 in John Bridge (Editor) "Fundamental Rights", (1973).

2. M. Hilf, "The Protection of Fundamental Rights in the Community", pp. 145-160 at p. 147 in F.G. Jacobs, "European Law and the Individual", (1976). Hereinafter cited as Hilf.

3. Hilf (fn. 2), p. 145, "The expression Fundamental Rights is difficult to define."

4. For an up-to-date examination of this rapidly evolving concept, FR, see Paul Sieghart, "The International Law of Human Rights", (1983); See also A.H. Robertson, "Human Rights in the World", (2nd edition, 1982).

5. Hilf (fn. 2), p. 145. For other classifications of FR see Peter Stein and John Shand, "Legal values in Western Society" (1974), pp. 150-162. Pierre Pescatore, "Fundamental Rights and Freedoms in the European Communities" AJCL Vol.18 (1970) pp. 343-351 at p. 344; Paul Sieghart (fn. 4). Sieghart at p. xi gives an interesting classification of FR as various rights involving (1) Physical Integrity, (2) Standard of Living, (3) Health, (4) Family, (5) Work, (6) Social Security, (7) Education and Training, (8) Property, (9) Legal Integrity, (10) Mental and Moral Integrity, (11) Joint Activities, (12) Politics and Democracy, (13) Collective Rights.

6. Stein and Shand (fn. 5), p. 157. Some theorists say this view as represented by Stein and Shand is too narrow and Western-law oriented. For an alternative, see Alice Ehr Soon Tay, "Marxism, Socialism and Human Rights", pp. 104-113; Edward Arnold, "Human Rights - for whom and for what", pp. 59-74 in "Ideas and Ideologies of Human Rights", (Editor) Eugene Kamenka (1978); See also R. Milliband, "The State in Capitalist Society", (1969); and "Capitalist Democracy in Britain", (1982); Moses Moscovitz "International Concern with Human Rights", (1974), and "Human Rights and World Order", (1958); Tom Nairn, "The Left Against Europe" (1973), "The Break-up of Britain", (1977).

7. There are various social rights in the ECJ Treaties e.g. redundancy pay, re-training. As to the EEC Treaty an exhaustive analysis by Hans Von der Groeben (one of the negotiators of the Rome Treaties) has shown the EEC Treaty contains certain substantive norms that come very close to dealing with the question of FR and freedoms; see "Uber das Problem der Grundrecht in der Europaischen Gemeinschaft" in Problems des Europaischen Rechts (Festschrift fur Walter Hallstein) (1966), pp. 226 et sequestra. See also J. Bridge, "Fundamental Rights in the EEC", pp. 291-300 in J. Bridge (Editor) "Fundamental Rights", (1973).

8. 1/58 Stork v High Authority (1959) ECR 17; 36-38 and 40/59; Second Ruhrverkohlen Case ECR (1960) 423; 10/64 Sgarlata v Commission (1956) ECR 215.

9. P. Pescatore (fn. 5), p. 345. Also see a further article by P. Pescatore, "Human Rights in the European Communities", CMLRev 1972, pp. 73-79 at pp. 73-74.

10. John Usher, "The Influence of National Concepts on Decisions of the European Court", (1976), ECR pp. 359-374 at p. 371. See also Jean Victor Louis, "The Community Legal Order", (1980), p. 70. Louis' view on these early cases is less critical than other theorists. He wrote, "The door was left partly open for a solution based on general legal principles ensuring the observance of fundamental rights." Also Toth, Volumes I and II "Legal Protection of Individuals in the European Community", should be consulted generally on FR and the EC.

11. Pescatore (fn. 5), p. 344.

12. Pescatore (fn. 5), p. 346.

13. Pescatore (fn. 9), p. 75.

14. Pescatore (fn. 9), p. 75.

15. Pescatore (fn. 9), p. 74.

16. Pescatore (fn. 9), p. 75.

17. Stein, p. 782, "Lawyers, Judges and the Making of a Constitution", in Herbert Bernstein, Ulrich Drobnig, Hein Kotz (Editors), "Festschrift fur Konrad Zweigert", (1981).

18. It is suggested that FR are universal concepts. Thus they cannot be confined to one legal system. If so then the Court erred in treating FR as purely national laws.

19. Hilf (fn. 2), p. 148, "These decisions appear to us today like the sins of youth."

20. Frontini Case (1974), 2 CMLR 372.

21. Internationale Handelsgesellschaft B Verf GE 37, 271. The majority was 5:3.

22. P. Pescatore (fn. 9), p. 75.

23. P. Pescatore (fn. 9), p. 75.

24. T.C. Hartley, "The Foundations of European Community Law", (1981), p. 123.

25. 29/69 Stauder v City of Ulm (1969) ECR 309;
    11/70 Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide (1970) ECR 1125;
    4/73 Nold v Commission (1974) ECR 491;
    36/75 Rutili v Minister of the Interior (1975) ECR 1219;
    44/79 Hauer v Land Rheinland-Pfalz (1979) ECR 3727.

26. Stauder Case (fn. 250) p. 419.

27. Handelsgesellschaft Case (fn. 25) p. 1127.

28. Handelsgesellschaft Case (fn. 25) p. 1137 consideration 20.

29. Handelsgesellschaft Case (fn. 25) p. 1134 considerations 3, 4.

30. See Pescatore's analysis of this case (fn. 9), pp. 77-8.

31. Pescatore (fn. 9), p. 78.

32. Nold Case (fn. 25) p. 507 consideration 13.

33. Nold Case (fn. 25) p. 508 consideration 14.

34. Scheuner 1975 CMLRev "Fundamental Rights in the EEC law and National Constitutions", p. 71.

35. Hilf (fn. 2), p. 149.

36. Hartley (fn. 24), p. 126.

37. Hilf (fn. 2), p. 150.
It is also an example of "creeping harmonisation" of the national laws of Member States.

38. Hilf (fn. 2), p. 150.

39. See G. Meier, 27 N.J.W. (1974), 1704; and H.H. Rupp, "Zur Bundesverfassungsgerichtlichen Kontrolle des Gemeinschaftsrechts am Masstab der Grundsrechte" 27 NJW (1974), 2153.

40. I am reminded of Lord MacKenzie Stuart's dictum that when a decision is attacked from both sides, then it must be more or less correct.
See also Louis' (fn. 10) opinion on the Nold case (fn. 25) p. 71. He states two lessons can be learned from the judgment. See further 149/77 Defrenne v SABENA (1978) ECR at p. 1378.

41. Rutili Case (fn. 25) p. 1232 consideration 32.

42. Louis (fn. 10) p. 72.

43. Commission Bulletin supplement 2/79.

44. Hauer case (fn. 25) p. 3744 consideration 14.

45. Hauer case (fn. 25) p. 3744 consideration 15.

46. Hauer case (fn. 25) p. 3747 consideration 20.

47. John Usher, "European Community Law and National Law. The Irreversible Transfer?", (1981), p. 38.

48. Hartley (fn. 24), p. 126.

49. P. Pescatore, "The Laws of Integration", (1974) p. 85.

50. Bertrand Russell, "Authority and the Individual", (The Reith Lectures for 1948-1949, 1949) p. 116.

51. Hartley (fn. 24), p. 123.

52. F.E. Dowrick, "Overlapping European Laws" ICLQ Vol 27 1978 pp. 629-660 at p. 630.

CHAPTER VIII : C O N C L U S I O N S

Chapter VIII : Conclusions

The subject of this dissertation, being of wide scope and complexity, lent itself to the detailed analysis which has preceded. It would add nothing to the understanding of this topic if Chapter VIII merely acted as an orderly precis of Chapters I-VII. Instead Chapter VIII attempts to gain a clear understanding of the salient points of this dissertation by posing the major question, "What has the Court, through use of GP, done?" By doing so, further, more specific questions immediately arise. In answering the questions thus posed, Chapter VIII acts as the complement to the exposition of facts and analysis in Chapters I-VII.

What has the Court, through use of GP done? Chapter VI noted and agreed with the concensus of opinion that the Court has promoted integration. Chapter VI Section 2 showed that many legal theorists, ECJ judges, and individuals involved with the actual formation of the Community, among them AG Lagrange, all believed the ECJ had acted as a factor of integration in EC law. Further Chapter VI showed that the GP of integration could be broadly interpreted to include political, economic and defensive integration.

Why has the ECJ promoted integration? There are several reasons. The most important is that it was the duty of the Court to do so. Chapters V and VI showed that it was the duty of the Court to actively seek the spirit of the law. In practical terms it was suggested this became a search for the fundamental GP or values on which the ECJ was founded. It was a major theoretical statement of

this thesis that the ECJ analysed the Treaties and their preambles and came to hold the view that union was the major fundamental GP or value of EC law. The method of translating this intellectual conclusion of the ECJ into action was to promote the GP that was most closely associated with this GP or value. Integration therefore was chosen as the GP that could attempt to realise union.

It should be noted that this sequence of events was predictable, that is, chapters V and VI showed that the Treaties were strongly integrationist in nature. As such it may be supposed that integrationist treaties produce an integrationist Court. Equally relevant is the point that such a sequence of events was not inevitable. That is, the Court is composed of individuals with individual personalities and ideas. Thus the ECJ, seen as an assemblage of human beings with free will, chose to follow this path. A related point is that, as individual human beings whatever broad policy is decided by the Court as such, the implementation of that policy is subject to many individual nuances of interpretation and implementation. Though the collegiate nature of the Court masks this fact to a large extent, it should nevertheless be kept in mind when analysing Court decisions. The statement by Lord MacKenzie Stuart is quite explicit on this point "Too often in contemporary writing and in discussion with those interested I find implicit the view that because the Court is collegiate, it is also unipersonal. It would be more realistic to accept that the Court consists of a group of individuals, each no doubt the epitome of reasonableness but each having a mind of his own. The judgments of the Court are not

infrequently an attempt to synthesise a number of voices agreed on the end result but reaching the same destination by different roads".[1]

Having established why the Court decided to promote integration, the obstacles that prevented the smooth transition from thought to action are now restated. There were, at base, two major obstacles to integration; the complexity of the task; the resistance of Member States to integration.

Chapter VI Section 3 stated the reasons why the apparently explicable phrase "promotion of integration" in reality functioned as a concept phrase for a most complex undertaking. It remains only to state here that whatever the difficulties of, and problems caused by, promotion of integration, they were all within the acceptable ambit of the problems that might be faced by a new legal order. Further there was a positive aspect to these problems in that they helped to check the tendency of the Court to overestimate its role.

The second problem, the resistance of Member States to integration, was one of wider ambit. It arose from International law. Chapter IV showed that the high regard states had for the GP of sovereignty had a directly detrimental effect on the development of International law by GP. Further this principle had equally detrimental consequences for the ICJ in the eyes of its clients. As Chapters IV and VI showed, both these disruptive factors, hindrance of the progress of the law, curtailment of judicial effectiveness, albeit in less overt fashion, were also operative in the case of the EC, the EC being at

base an agreement between states. This second problem was to a greater extent relevant in the ECJ macro cases. That is, in the majority of macro cases all interested parties, including MS were aware of the potential problems that a particular judgment might spark. An excellent example of the tension that such cases generated among observers was the Costa v ENEL case where Pescatore made use of the adjective "explosive" to describe the preliminary question the ECJ was called upon to deal with.[2]

It was contended that the ECJ was aware of, and took counter measures to combat, both the above mentioned problems. There is little point in outlining separate solutions for each problem as both problems arose simultaneously in macro and micro cases. Further it may be that a solution intended to combat one problem simultaneously has an effect on the other. In individual cases and also in the overall series of GP cases, counter measures arise in a haphazard fashion, that is with regard to integration each case throws up a problem or problems, which, though related to the general problem has unique features which demand a suitable counter measure or counter measures as part of its solution. It is up to individual commentators to analyse the case or cases and collate the measures in accordance with his or her particular project or line of enquiry.

The ECJ solutions or counters to the above problems which were noted and analysed from Chapter VI section 6 onwards are now listed below, in no particular order of importance. They are as follows:

1) The Court deliberately limited the scope of the concept of integration in three ways. It limited the number of fundamental GP or values that, more or less, permanently comprise integration to as few as possible e.g. primacy and direct effect. It restricted the number of other GP which occasionally metamorphosed into GP of integration. It restricted the use of such GP to as few cases as possible.

2) The Court preferred the use of fundamental GP to rules in macro cases.

3) The Court made use of values as well as fundamental GP in macro cases.

4) The Court was deliberately vague in its handling of GP, that is the choice, origin, transfer to EC law from place or places of origin and use of particular GP in cases were not explained at length by the Court.

5) The Court limited the number of macro cases, that is it deliberately did not look at the wider constitutional implications of every case.

6) In macro cases the Court did not always state the full implications of its decision.

7) In some macro cases the Court avoided or fudged the actual immediate problem before it.[3a]

8) In macro cases the majority of its decisions and statements were examples of defensive integration.

9) In the majority of economic integration cases, the micro cases, the Court behaved with curcumspection, that is, there were few direct political overtones to its judgments.

10) The Court attacked the GP of sovereignty directly in the macro cases and indirectly by the overall effect of its micro cases.

11) The Court attempted, to the best of its ability, to answer the questions before it in the micro cases.[3b]

What were the effects of these actions by the Court? It is contended that there are four major results of its action over the past twenty five years, which, collectively speaking, promote integration. These results can be stated as the consolidation of the power of the Court; the enhancement of the power of the Court; the consolidation of the EC; the enhancement or advancement of the EC and its institutions.

As to the first claim, it is contended that the Court has consolidated its role and power in the early macro cases such as Van Gend[3c] much as did the Supreme Court in the early Marshall cases. Further the EC court, by its solid work in the micro cases has

enhanced its power by becoming possibly the most respected of the Community institutions.[4] The works of legal theorists as well as the writings of the judges tend to confirm this opinion. Further as Kutscher and Bredimas noted the respect the ECJ has is manifested in a practical form - the lack of dissention from EC citizens as to its judgments.[5]

As to the EC, it is suggested that it has, thanks in part to the ECJ, successfully consolidated its position as an International institution. By stating that it is a new legal order, its right to exist as an independent Institution was affirmed. Further, it is believed that, despite any present problems the EC faces, there is no real possibility of MS resigning or the EC disbanding. Perhaps this fact, that the EC is (still) here is, to borrow again the ingenious concept of Donner, the most important thing of all and thus the greatest achievement of the ECJ.[6]

As to enhancement of the EC, despite the present gloom it is contended that the EC has achieved some major successes. As Gaston Thorn noted in "Europe 82", "the people of Europe have seen the absurdity and futility of fratricidal strife. Secondly a number of milestones have been passed on the road to economic and political unity... Thirdly Europe is now the main source of aid to the third world"[7] These successes are in part the result of the work of the ECJ. By acting as guardian of the EC the Court gives the EC the chance to develop and thus to allow the powerful GP or ideals of peace, prosperity, helping the third world and union to take root in

Europe.

Such statements are surprising in view of the talk of gloom and doom that tends to dominate discussions among Europeans about the EC. The Report by the Committee of Three on European Institutions is aware that EC subjects tend towards this view. They note, "The standing of the EC is often rated far higher by its external partners than by its own members."[8]

In fact as regards advancement of the EC, observing its development over the past twenty five years, it is suggested that the EC has achieved commendable results. A period of twenty five years is, in reality, an extremely short time for any real development of what is, after all, the most advanced International institution of its type ever created. This was also the view of the Committee of Three "In fact the achievements of the Community are impressive both for their richness and for the unique manner in which they have been obtained. For the Community is a quite unprecedented creation."[9]

However, as regards the consolidation and development of the institutions, it cannot be said that the Court has achieved great success. Despite the support of the Court for the Commission in cases such as ERTA the report by the Committee of Three showed that there is an imbalance between the Commission and Council.[10] The Commission is in decline while the Council gains in strength. The results of this imbalance inhibits the smooth development of the EC to some extent. In fact it is in large part due to this reason that

so much attention is paid to the pronouncements of the Court. As the Committee of Three note, such weaknesses in the Commission were caused both by external and internal factors.[11] Such factors are beyond the scope of the Court to affect or counter. In point of fact this is another argument against the view of some legal theorists of an all powerful Court with wide political influence. As the table by Stein shows, the Court agreed with the Commission in a high number of macro cases.[12] Yet despite this boost by the Court for the views of the Commission that body has declined in power. This was clear by the use of phrases such as "Elements in the Commission's decline" and "weakended Commission performance" by the Committee of Three.[13]

Why was the Court successful in its aims? There are, it is suggested, several reasons over and above the eleven counter measures listed previously.

The first and most important reason is that the EC has, for more than a quarter-century, upheld rights and enforced duties in micro cases by intelligent and sympathetic use of GP; and also by sheer hard work and unremitting effort there has been created what could be termed a common law of the Community. The wider implications of such action were analysed at length in Chapter VI Section 12. However, it can also be noted here that the EC, by its recognition of the many GP outlined in Chapter VI Section 12, had effectively introduced FR into the EC, even before their explicit recognition of such rights in Stauder v Ulm.[14] By such action the ECJ could be said to be keeping the law close to the people, that is the Court, by its use of GP has

acted as a bridge between law and the peoples of Europe. The major result of ECJ action in Micro cases is, it is contended, to successfully introduce a kind of Municipal Law Court at the supranational level. Thus the apparent "ordinariness" of the majority of micro cases, their very lack of noteworthy or exceptional features is the highest tribute that can be paid to the ECJ.

Second it is contended that the Court has made correct decisions on the major matters at issue in the macro cases. As Chapter VI noted, Hamson wrote Van Gend gave a fillip to the Community.[15] More important was the observation of Stein who stressed that the correctness of the decision by the ECJ in Van Gend has been borne out in practice.[16] This, it is suggested, is one of the most important reasons why the Court has succeeded in its task. Third the opposition to the EC and ECJ was never and is never united. The insistence on the individual right to action is both the attraction and the weakness of the GP sovereignty. The analogous situation of the United States and the US Supreme Court is relevant. As to that situation McCloskey wrote, "The Court's progress was also aided by a basic disability of the localist movement - its very lack of unity. The States were so individualistic they defeated themselves."[17]

Fourth, in direct contrast to the above is the consistency of the ECJ as to their belief in, and handling of, fundamental GP. Chapter VI section 7 showed that the major statements of principle made in Van Gend were consistently followed in later cases. Further, Chapter VII showed that, even where the Court appeared to shift its ground in the

FR cases, in reality it consistently adhered to its fundamental GP of primacy and the overall good of Communities.

Fifth is the fact that the ECJ was forewarned of potential trouble over the GP of sovereignty by the examples of International law and the United States constitutional law of the 1820's. The basic tasks of the ECJ were analogous to those McCloskey noted for the Supreme Court. He wrote, "it was necessary both to confirm and to extend the Courts claim to authority."[18] Thus Supreme Court actions provided possible solutions the ECJ could adopt. Of Gibbons v Ogden, McCloskey wrote, "The opinion is a deft blend of boldness and restraint", and also "Marshall managed to achieve ... results while sidestepping the area of greatest controversy."[19]

Sixth is the part played by the individuals of the ECJ. It was made clear by several commentators on the Supreme Court that the influence of Justice John Marshall had a great effect in shaping the US law. As Felix Frankfurter succinctly summed up, "John Marshall is an example of Cleopatra's nose."[20] It is therefore contended that the success or otherwise of the ECJ should be attributed directly to the individuals that comprise the ECJ. Though it could be argued that a collegiate Court, like a company "has no body to be kicked and no soul to be damned", it is still suggested that, as a recognition of the scope given to judicial/human discretion in EC law, judges Pescatore, Kutscher, Donner, Lord MacKenzie Stuart et al each be recognised as having contributed, in greater or lesser part, to the development of EC law.[21]

Having discussed how the Court has successfully dealt with the major problems it faced, the question of the validity of the fear of government by judges is now dealt with.

The question of government by judges is, it is contended, much misunderstood. The issue can be analysed by noting that the fear of government by judges in fact exists at several levels and analysing each level separately in order to try to find whether such fear is justified at any or all levels.

The first level is the general fear by all EC citizens of misuse of judicial power. Such fear is both acceptable and understandable but it is believed that the restrictions on the ECJ outlined in Chapter VI Section 5 are effective checks on the ECJ. Thus though the possibility of government by judges should not be forgotten it ought not to be a constant source of worry for EC citizens.

On the next level MS fear government by judges due mainly, it is believed, to their own resistance to EC integration. As Chapter VI Section 6 mentioned, such fears, whatever their cause must nevertheless be investigated as to whether or not they have a real basis in fact. Chapter VI part 6 noted that while the charge by states of government by judges was a subjective one and thus could not be fully answered, it was believed, equally subjectively, to be an insubstantial charge. Further Kutscher was of the opinion that irrespective of the merits or demerits of such charges, they were relatively unimportant due to the nature of the new legal order.[22]

He noted for example the fact the laws of the Communities have not been adopted by an elected Parliament.

At a further level is the idea that the ECJ is a part of the political structure. Thus it could be argued that, irrespective of whether MS have other reasons, real or imagined, valid or invalid for fearing government by judges, on this level the view that the ECJ is a part of the political structure gives the MS genuine cause for concern. These two points, the correctness of the view and if so whether such a situation constitutes a genuine cause for concern as regards government by judges are now examined.

The idea of Murphy and Pritchett that "political scientists have sought ... to give the activities of the Courts new meanings by placing them within the mainstream of political relationships" is, it is contended, also relevant for the EC.[23a] That is, it can be seen that the ECJ is a part of the overall political structure of the EC and does interact politically with the other institutions. While this statement may shift the accepted idea of the function of a Court it is submitted that it fits in with the activities of the Court vis a vis the other institutions and the MS.

However, the actual actions of the ECJ which justify such an assertion must be clearly stated. It is believed the ECJ should be regarded as part of the political structure on two grounds; the deliberately selective way it chooses certain cases in which to make certain statements; the clarity and force of its exposition of these

statements in such cases.[23b]

The former statement is justified as follows: Analysis of the body of EC cases involving GP showed only a small percentage were termed macro cases. Further it was shown that the ECJ deliberately did not seek to make all cases with apparently clear examples of contentious issues macro cases, e.g. The Dyestuffs cases.[24] Equally relevant is the following statement by Hamson. Taken in conjunction with the above statements it is contended that in Van Gend the Court, by an act of will, carefully selected or chose to see the case as a macro case. Hamson wrote "a hesitant or timorous Court could I think have legitimately declined jurisdiction on the ground of any of the preliminary objections proposed to it."[25]

As to the latter statement it is contended that, once the ECJ has decided it has something to say, in the interests of Community law it will, by making full use of GP and fundamental values, and the scope for judicial interpretation such devices allow, state it unequivocally and with little regard for any legal technicalities. As Pescatore noted in Van Gend "The reasoning of the Court clearly showed that the judges had "une certaine idee de l'Europe" of their own, and that it is this idea which has been decisive and not arguments behind the legal technicalities of the matter."[26] This statement, that it is the ideas and not the rules "the legal technicalities" that are important clearly came out in the Van Gend case. It is hard to see how the profound statements made in this

case could have been uttered without the Court having a deep political understanding of the EC and a willingness to let that knowledge be put to use (and a willingness to "fight" the MS in order to use it).

Having made the statement that the ECJ should be seen as a part of the ECJ political structure and also after having given the reasons behind such a statement a most important rider must be added. It is that the actual content of what the ECJ says does not form part of the reasons for seeing the Court in the light. It has been a theme of this thesis that the statements in Van Gend and other macro cases, though showing a profound understanding of EC law, do not go beyond the clear implications of the Treaties. As stated in Chapter VI anyone with the knowledge and awareness of law could read the treaties and come to this conclusion.

Pescatore wrote that the statements of the Court on the new legal order was "the consequence of a democratic ideal."[27] It could reasonably be asked why everyone did not see the idea or its consequences at that time. One answer is to slightly qualify the statement that anyone could, upon reading the Treaties, see their consequences. As with many profound yet simple ideas they are easily seen by almost everyone but only after the idea has first been discovered by someone of imaginative insight. Here that person or more accurately that body was the Court. An alternative answer is that the idea could be easily seen but many, in particular the MS, did not wish to look.[28] Yet a third answer could be that the idea

could be easily seen and its consequences recognised but those who disliked the idea simply ignored its implications. Equally those who saw the consequences and were in favour of them kept their silence in the knowledge that continued Community integration would eventually force overt recognition of the idea and its consequences by all EC citizens and MS.[29]

In conclusion, at this level of fear of government by judges it is contended that the view that the ECJ is an active part of the political structure of the EC is correct but that it does not follow that this fact constitutes a real danger of government by judges.

It is believed that at all levels the fear of government by judges is unrealised in both theory and practice.

Having now covered most of the ground of the topic of this dissertation, a further area still remains to be discussed. Bearing in mind that a major part of this dissertation concerned the use of GP for achievement of the ends mentioned, such usage is now collated, re-examined in greater detail and commented upon. The use by the ECJ of GP can be broken down into various categories. The first category is procedural, that is where the Court took GP from originally, how such GP were then assimilated into EC law and how these GP were referred to during the course of a case. In such action it was noted that there was a certain vagueness of procedure. The major question thus is, "Should the Court be more elaborate in explaining or implying a procedure or argumentative logic?" The Court up to now,

has not done this. However valuable the contribution of the Court to the progressive emergence of the common law of the EC, the Court has thus far not tied itself to an argumentative or procedural logic as regards such procedural matters. This could be qualified as a weakness in the practice of the Court and in its approach to the function of GP in EC law. On the other hand did the ECJ have the possibility to develop such a uniform logic of GP applicable to EC law? The answer must be no. This is so as regards two major considerations, the first traditional, the second pragmatic/ functional. Traditional consideration refers to the shortness of the judgment in the practice of Continental courts. Continental judicial practice has historically influenced the methods and practice of the ECJ in that the roots of EC law and the composition of the Court are undeniably fixed firmly in the continental legal tradition. The pragmatic functional reason for the Courts abstention from reference to a procedural and argumentation logic is that EC law is too comprehensive, too ambitious as to its objectives which range from short term goals such as the Four Freedmons to implicit political integration for the ECJ to pin itself down to argumentative logic in the form of intricate explanations and thus have its hands tied.

The second category relates to the new use made by the Court of GP. It could be argued, especially in the macro cases, that the Court, by speaking of the spirit of the law, has used GP and values in an original manner for an original purpose. By doing so they have translated the abstraction "spirit of the law" into the more ascertainable but still only partially concrete form of GP.

The third category was the use by the Court of new GP. In the micro cases several authorities had noted that the so-called GP of European Community law were emerging. Though it was argued that this terminology is incorrect, it is agreed that new GP of law capable of use by any or all legal orders have emerged and will continue to arise in micro cases.[30] In the macro cases it could also be argued that new GP have emerged. The most important example is, of course, integration. No Member State has such a GP as an active source of law. Equally, International law is far from having integration as such a source of law. A counter-argument is that such principles as integration are not new but, after a long period of inaction, have become relevant; that is, at one time the Municipal legal orders of nations must have had integration as a basic need. The EC, if seen as the product of developed municipal systems, has thus inherited rather than invented the GP of integration.

The final category of use of GP is the conventional use by the ECJ of accepted GP of law in order to fill gaps in EC law. As Chapter VI showed such a usage occupied the majority of time of the Court and in the long term is the most important of all its uses of GP.

The above tends to reinforce another theme of this thesis - the unique flexibility and adaptability of GP and their possible, theoretically profound effects on the particular legal order in which they appear. In EC law GP were used for three distinctly different purposes. To make statements of great depth on EC law which affected the very foundations of that law; to help with the enforcement of

rights and duties, that is, to aid the finding of an answer to any questions raised in the Court; to solve the sudden and urgent problems set for EC law and for the ECJ by the issue of FR. In all these problems use of GP allowed the ECJ maximum freedom of action.

In fact, though its answer transcends the bounds of this dissertation, the question could be asked whether GP in any other legal system, past or present, in such large numbers has fulfilled so many functions. Despite the lack of an answer to this question being given in this thesis it is believed that the functions they fulfill may be taken both as an indication as to the comprehensiveness and ambition of the law of the new legal order, and as an indication of the unique flexibility and adaptability of GP.

Will the use by the Court of GP increase or decrease in the future? The logical answer seems to be that fewer GP will be seen in judicial practice as the flow of Community legislation increases to fill the gaps in EC law. However, it could also be argued that, given a relatively stable Community development, legislation covering new areas of law will create new problems requiring use by the ECJ of GP. Further any legislation whether enacted to clarify existing areas of EC law or to encompass new EC developments is, as Chapter VI noted, an imperfect process that consequentially requires clarification by the Court. Thus for this general question, no specific answer can be found. However, it may be that the use by the Court of GP will decrease but at a relatively slow rate.

The above quesiton, dealing as it did with all GP, referred in the main to micro case GP. A further query is to inquire whether use of macro case GP will increase or decrease. Again, speaking logically, as the EC develops the need for macro cases should lessen. For example, in developed municipal systems macro cases occur only rarely. A counter-argument to this is to note that the periodic crises within the EC, the Luxembourg Accords, the energy crisis, for example, show no signs of abating. Further the world economy is in recession.

In "Europe 2000", Peter Hall writes that a forecast of Europe's economic and social evolution shows that European society of the 1980's and 1990's is likely to face severe problems.[31] If this is correct, then the present instability will be a continuing fact of life for the foreseeable future. This should result in a continuation of macro cases.

Are there limitations on the use of GP? Having stated throughout the text of this dissertation, the positive aspects of the GP by the ECJ, the negative side of principles, should also be restated. Where the Court consistently attempts to use on or more GP as a rule, and thus as inviolable, then the dangers inherent in Plato's dictum of the good of the city being the ultimate good are realised.[32] As Chapter VII showed, the first Fundamental Rights cases were examples of the Court paying too little attention to alternatives to the GP of primacy of Community law. Bertrand Russell noted, in the end there is no society only a collection of individuals and the individual

good cannot automatically be suppressed for a spurious greater good.[33]

In conclusion, therefore, it could be said that due to various factors an undue burden had fallen on the ECJ as regards its role in the development of the law. Furthermore, these factors combined to make use of GP by the ECJ to accomplish its tasks the most suitable method. An overall evaluation of the stage of development of EC law in the 1980's shows that, in greater part, the Court has succeeded in its aims.

NOTES - CHAPTER VIII

1. Lord MacKenzie Stuart, "The European Communities and the Rule of Law", (1977), p.72.

2. Pierre Pescatore, "The Law of Integration", (1974), p.85. 6/64 Costa v ENEL (1964) ECR 585.

3a. A. Bredimas, "Methods of Interpretation and Community Law", (1978), pp 145-6 notes some examples of such action. "In Costa v ENEL the Court proclaimed the primacy of Community law but did not come to grips with the substance of the case, vis nationalisation of the Italian electric industry". "In ERTA following the statement of general principle that the Community has the power to negotiate international transport agreements it was held on the facts that the Council should continue undertaking negotiations because the Commission had not taken the appropriate steps in time". She also added that the Defrenne v SABENA Case was "another clear indication" of such policy on the part of the Court. These examples are given, not only to justify point 7 but are to clarify what is meant by the words "the immediate problem".

3b As Chapter VI generally and section 4 in particular noted, the ECJ did so by use of GP and, in the main, the teleological method of interpretation. Further this method as H. Schermers "Judicial Protection in the European Community", (1976), p.14 stated is "interpretation based on the purposes of the Community Treaties". In addition he wrote p15 "the Court interprets that legal order (the EC) as it has evolved and in such a way that it may fulfill its function most efficiently. The spirit and the purpose of the constitution form the core of this interpretation".

3c 26/62 Van Gend en Loos (1963) ECR 1

4. Also the Court has become an important institution of the Community. Barend Biesheuvel, Edmund Dell, Robert Marjolin, "Report on the European Institutions by the Committee of Three to the European Council", (1980) p.63 wrote "The ECJ is one of the Community's most basic and indispensable institutions". Hereinafter cited as Biesheuvel.

5. H. Kutscher, "Methods of Interpretation as seen by a Judge at the Court of Justice", pp. 1-51 at p. 47, in "Reports Presented at the Judicial and Academic Conference 1976". A. Bredimas (fn. 3a) p. 145.

6. A.M. Donner, "The Role of the Lawyer in the European Community", (1968), p.59.

7. Gaston Thorn, "Europe 82" (Jubilee Review) p. 10.

8. Biesheuvel (fn. 4), p.48.

9. Biesheuvel (fn. 4), p.8. They went on to list the achievements of the EC pp 8-9. These included the facts that, "The greater part of the Treaties have now been implemented ...The EC is now one of the most important single trade blocs in the world... The MS have managed to cooperate in many ways not prescribed in detail in the Treaties.... The EC survived a major economic crisis, (both internal and external). It managed to survive with all its central policies and its political solidarity intact".

10. ERTA Case - 22/70 Commission v Council (1971) ECR 263. Biesheuvel (fn. 4), pp. 49-53.

11. Biesheuvel (fn. 4), pp. 50-51.

12. E. Stein, "Lawyers and Judges and the Making of a Constitution",

in H. Bernstein, U. Drobnig, H. Kotz "Festschrift fur Konrad Zweigert" (1981). His table is included in the appendix to this thesis.

13. Biesheuvel (fn. 4), pp. 50-51.

14. 29/69 Stauder v Ulm (1970) ECR 424.

15. C.J. Hamson, "Methods of Interpretation - A Critical Assessment of the Results" pp. 1-26 at p.25 in "Reports presented at the Judicial and Academic Conference 1976".

16. Stein (fn. 12), p.776. "Had the Court followed the government, community law would have remained an abstract skeleton".

17. Robert G. McCloskey, "The American Supreme Court", (1960), p. 59.

18. McCloskey (fn. 17), p.69.

19. McCloskey (fn. 17), p.71.

20. Philip B. Kurland (Editor), "Felix Frankfurter on the Supreme Court" (1970) p.538.

21. Edward, First Baron Thurlow. The quote in the text is the usual way the saying is given. The actual quote however is, "Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like". Poynader, Literary Extracts (1844) Vol 1. Taken from "The Oxford Dictionary of Quotations (3rd edition 1979)", p.550 line no.32.

22. Kutscher (fn. 5), p.11 "The question however loses some of its importance where the laws have not been adopted by a directly and democratically elected Parliament ... The Constitutional Structure of the Communities diminishes the importance of the question". It is suggested this statment of Kutscher be

examined with care.

23a Walter Murphy and C. Herman Pritchett, "Courts, Judges and Politics", (1961), p. vii.

23b There is also a third reason, the structure of the ECJ and its powers under the EC. On the basis of the facts regarding the ECJ given in Chapter V it is contended that the ECJ is part of the political structure of the EC. This reason is not discussed in the text of Chapter VIII as it is a static rather than a dynamic reason and the particular point at issue relates to how the ECJ chooses, as a deliberate act of will, to become part of the living political structure of the EC. Further as was noted by Murphy and Pritchett (fn. 23a) it is the "activities" of the Court they seek to give meaning to.

24. Dyestuffs Cases - 48/69 ICI Case (1972) ECR 656; 54/69 Francolor Case (1972) ECR 875; 55/69 Carsella Case (1972) ECR 915; 56/69 Hoechst Case (1972) ECR 930; 57/69 ANCA Case (1972) ECR 950.

25. Hamson (fn. 15), p.8.

26. Pierre Pescatore, "The Doctrine of "Direct Effect" : An Infant Disease of Community Law" (1983) ELR Vol, 8 No 3 pp 155-177 at p.157.

27. Pescatore (fn. 26), p.158.

28. In view of the implications for states noted in Chapter VI Section 6, the weakening of the GP of sovereignty, this lack of insight among MS would hardly be surprising.

29. It is believed people like Monnet, Lagrange, Hallstein, etc., were well aware of the consequences of the foundation of the EC. However for pragmatic reasons it was best not to be too explicit

about these consequences. A related idea was, it is suggested, behind the somewhat obscure wording of the preambles to the Treaties.

30. L.N. Brown and F.G. Jacobs, "The Court of Justice of the European Communities", (1977), p. 224 wrote, "the expression GP of Community Law... must be taken as shorthand for the GP of Law recognised in the community legal order. The term GP of Law is to be preferred".

31. Peter Hall, "Europe 2000" (1977), p.24, 2. Also of interest is the article by Etienne Davignon "The End of the Road for Europe, or a new beginning?", pp. 119-138, in R. Dahrendorf (Editor), "Europe's Economy in Crisis", (1982), in which he sets out the new challenges for the EC. He notes p.120 that such challenges "call for an original response from Europe in particular. At the level of the EC, preparations are being made to take up the challenge". Such preparations, and their implementation may well result in new macro cases arising.

32. Plato, "The Republic of Plato", (1942) (translated by Francis MacDonald Crawford) p.107 "Our aim in founding the Commonwealth was not to make any one class specially happy, but to secure the greatest possible happiness for the community as a whole". As e.g. Trevor J. Saunders (Editor), "Plato - The Laws", (1970) has pointed out p. 1345, Plato's method of setting up, and putting into effect an ideal society "will usually call for an unpalatable degree of coercion". There are many analyses of Plato and his views on this, and other topics e.g. See Robert W. Hall "Plato" (1981).

33. Bertrand Russell "Authority and the Individual" "The Reith Lectures for 1948-1949; 1949) p.116.

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APPENDIX

Position of principal actors on major constitutional issues

Issue and Case	Government	Commission	Advocate General	Court
direct effect: van Gend	no: Belg. Lux., Germany	yes	no (Roemer)	yes
supremacy: Costa v. Enel	no: Italy	yes	yes (Lagrange)	yes
Simmenthal	no: Italy	yes	yes (Reischl)	yes
Internationale Handelsges.	unnecessary to decide: Germany, Neth.	yes	yes (Dutheillet de Lamothe)	yes
expanding direct effect: Lütticke	no: Belg. Neth. Germany	yes	yes (Gand)	yes
Reyners	no: Belg. Lux., Ire.,UK yes: Germany, Neth.	yes	yes (Mayras)	yes
Walrave	no position UK	no	yes (Warner)	yes
Defrenne	no: UK, Ire	yes on public empl., no on private	yes (Trabucchi)	yes
Franz Grad	no: Germany	yes	yes (Roemer)	yes
van Duyn	no: UK	yes	yes (Mayras)	yes