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FEDERAL ISSUES IN AND ABOUT THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JERRY L. MASHAW*

INTRODUCTION

Professor Walter Hallstein, President of the Commission of the European Economic Community, has said that the Court of Justice of the European Communities finds perhaps its nearest parallel in the Supreme Court of the United States.\(^1\) Certainly, there are similarities between them. Both are in some sense arbiters of the balance of power in a two-tier governmental structure. Both are guardians of constituent documents and exercise some type of constitutional jurisdiction. Both are courts of law whose decisions often have strong political overtones.

However, to point to the United States Supreme Court as the nearest parallel of the Court of Justice of the European Communities is not necessarily to say that the “nearest” is very near. Moreover, it is not the purpose of this paper to investigate fully the extent to which this comparison is, or was meant to be, a useful analytical tool. What is intended is a discussion of that jurisdiction of the European Court which seems to have the greatest significance to its development as a court exercising federal constitutional control. In this inquiry the Supreme Court of the United States may be used as a point of reference, but its use is suggested at least as much by its familiarity as by its comparability. Indeed, one must begin by attempting to justify looking at the Court of Justice of the European Communities as in any respect similar to a federal, constitutional court.

In a federal-state system of government, of which the United States is the archetype, there are five basic areas of constitutional control: (1) the relationship of the branches of the central government (the separation of powers problem); (2) central government-regional government relationships (the division of powers problem); (3) the relationship of regional units; (4) central government-citizen relationships; and (5) regional government-citizen relationships. All of these areas, of course, are not peculiar to federal systems. Uniquely federal constitutional problems ap-

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\(^1\) Hallstein, Economic Integration and Political Unity in Europe, 2 Community Topics 3 (1961).
pear only within categories two and five, and in the latter only to the extent that this relationship is controlled or qualified by provisions of federal law. The issues peculiar to litigation before a federal, constitutional court will, therefore, be those which affect the definition of the respective competences of the two levels of government and which concern the effectiveness of central governmental norms within the territory of the component parts. With respect to the position of the court itself, the relevant issues are those which concern the court's jurisdiction to define central government-regional government spheres of competence and its jurisdiction to insure the effectiveness of "federal" law. It is within this dual framework of federal issues that we shall be examining the jurisdiction of the Court of Justice of the European Communities.

THE POLITICAL CONTEXT

Before discussing the particular categories of jurisdiction by means of which the judicial power of the European Court is defined, it may be well to take a brief look at the political context within which the court works. By political context is meant the political organization of the communities; one might as readily say the constitutional or the juridical context. No attempt is made here to deal with the political history of European integration, nor to sketch the institutional framework at the community level. Both of these subjects are important in an assessment of the Court of Justice, but for the purposes of this article a look at two basic problems will suffice to set the tone.

The first concerns the considerable difficulty in categorizing the European Communities juridically. Assuming that all three communities may be treated together, should they be called "in-

2Although the word "supranational" is applied to the High Authority of the European Coal and Steel Community and fails to appear in the Rome Treaties, it is suggested that this terminological difference results primarily from a difference in the political climate at the time of the negotiation of the treaties. Although there are clearly distinctions of substance to be made between the treaties, it may be suggested that they are distinctions that have not made a great deal of difference when the actual operation of the communities is compared. See Starke, An Introduction to International Law 469 (5th ed. 1963); Statement by M. Spaak, 3 Council of Europe, Consultative Assembly, Official Report of Debates 617 (1955). Contra, Zurcher, The European Community—An Approach to Federal Integration, in Systems of Integrating the International Community 77 (Plischke ed. 1964).
international,”3 “transnational,”4 “supranational,”5 “confederal,”6 or “federal”?7 A choice among these, or rejection of all of them in favor of some other term, is, of course, not critical to the day-to-day operation of the communities.8 They are all highly ambiguous, and none of them are peculiarly descriptive of the European situation, a situation which has been classified as unclassifiable, or “sui generis.”9 On the other hand, this inability to fit the communities firmly within an established category reveals something of the “functional” approach in their formation. It also affects their development. For example, the court is thus

3The communities are clearly international organizations, but of an advanced type. They have become the favorite example of international lawyers to demonstrate the forefront of international legal development. See, e.g., Friedmann, The Changing Structure of International Law 113-14 (1964); Jenks, The Common Law of Mankind 218-20 (1958); Starke, op. cit. supra note 2, at 61, 119.

4This is an attempt at an all-inclusive, apolitical classification and, again, is too broad for our purposes. See Jessup, Transnational Law (1956).

5This is the most common label affixed to the communities, although all the people who use it obviously do not mean the same things by it; nor do they seize upon the same element of the structure as the acid test of supranationality. See, e.g., Robertson, Legal Problems of European Integration, 91 Recueil des Cours 105, 143-48 (1957); Rosentiel, Reflections on the Notions of “Supranationality”, 2 J. Common Market Studies 127 (1963); Schwarzenberger, Federalism and Supranationalism in the European Communities, 16 Current Legal Problems 17 (1968). The suppression of the term “supranational” in the drafting of the Rome Treaties, however, severely limits its usefulness.

6This nomenclature is favored in Cardis, Fédéralisme et Intégration Européenne 240-41 (1964).

7It has been suggested that “federalism” is a concept of the same magnitude as “liberalism” in the eighteenth century and “Marxism” in the nineteenth. Id. at 33. It is at least as variously employed. From the confusion two basic approaches emerge. Some see federalism as a status with definable attributes. See, e.g., Wheare, Federal Government (1953). In this aspect federalism is concerned with nation-states. For others federalism is a process of group formation whereby units combine for common purposes, while remaining autonomous for all others. This view of federalism would apply the term equally to the United Nations and the United States. See Friedrich, International Federalism in Theory and Practice, in Systems of Integrating the International Community 120 (Plischke ed. 1964). The static concept is obviously inapplicable to the communities except as a goal or by analogy to particular aspects of a federal system. Federalism as a process exhausts the universe, although its emphasis on the dynamic elements of federal structures is well placed.

8What appears to be critical is the existence of an institutional order providing possibility for development. Introduction to the Fourth General Report of the Commission of the EEC, 1 Community Topics 7 (1961).

9Lecture by Professor Walter Hallstein, Fletcher School of Law and Diplomacy, Tufts University, April 16-18, 1962, in CCH Common Mkt. L. Rep. ¶ 9001, at 7512. Contra, Zurcher, op. cit. supra note 2, at 71 (citing the Zollverein and Swiss cantonal confederations as forerunners).
deprived of a useful interpretive tool: an agreed, basic label, preferably with a variable content, which may be used as an unexamined major premise.\textsuperscript{10} It remains to be seen whether the court has been, or will be, able to develop a fundamental interpretive concept for itself.

There is a further dispute over whether the communities are merely technical economic—or as some like to say “technocratic”\textsuperscript{11}—organizations, or political ones. The obvious answer is that they are both,\textsuperscript{11} but that does not end the controversy. Broadly speaking, the difference of opinion is between those who see the communities as instituted to solve particular economic problems and as containing only that political content sufficient to do the job,\textsuperscript{12} and those who see the communities as the “foot-in-the-door” leading to a United States of Europe.\textsuperscript{13} The former can easily find support in the technicality of many of the provisions of the treaties themselves, and the latter, in the history of the European movement from the Council of Europe to the Treaties of Rome.\textsuperscript{14} To add to the confusion, each may also draw comfort and support from the other’s sources.

If the communities are difficult to categorize, what of the treaties which establish them? They are, of course, treaties duly signed and ratified by the High Contracting Parties. They also function as constitutions, allocating powers of decision to the various organs at the community level. This combination of

\textsuperscript{10}On the function of categories in terminating judicial consideration of a logical chain of consequences, see, \textit{e.g.}, MacKinnon, \textit{Comparative Federalism} 177-78 (1965).

\textsuperscript{11}The Commission has said, “[T]hey are already part and parcel of, and not simply a preparatory stage for ‘political union.’” \textit{1964 Initiative: Communication by the Commission to the Council and Member Governments.}

Cardis, \textit{op. cit. supra} note 6, at 126-53, draws on the Swiss experience to show the necessity of coordinate economic and political integration in order that either may be effective. See also Allais, \textit{Rapport du Premier Congres de l’U.E.F.} 54-55 (1947).

Any contention that economic decisions are not an exercise of political power or that politics is defined by the subject matter of decisions taken seems theoretically untenable. Meyneaud, \textit{L’Action Syndicale et la C.E.E.} 38 (1962).

\textsuperscript{12}Some of the more politically integrating aspects of the treaties, \textit{e.g.}, harmonization of social policy, were insisted upon by the opponents of a political characterization, but clearly for economic reasons. See Camps, \textit{Britain and the European Community: 1955-1963}, 71-72 (1964).

\textsuperscript{13}See, \textit{e.g.}, Joint Declaration, Action Committee for the United States of Europe, 11th Session, Bonn, June 1, 1964.

\textsuperscript{14}See generally Robertson, \textit{European Institutions} 1-30 (1959); Zurcher, \textit{op. cit. supra} note 2.

There is also earlier European experience, particularly in Germany and Italy, which demonstrates the impetus of economic integration toward political union. Fisher, \textit{3 History of Europe} 930, 968 (1935).
functions is common among international organizations, but there are some uncommon elements here. For example, the authoritative determination of what sections of the treaties are self-executing, that is, which provisions create rights and duties directly for individuals within the member states, may be made, not by national courts as is customary, but by the community court. Further, the treaties suggest that community law, whether in the treaties or in the regulations promulgated under them, is to be enforced by national courts as community law, rather than as norms which are effective as adopted and applied within the national legal systems. From the point of view of community law the treaties function as constitutions creating, not only an internal constitutional order for the institutions established by them, but also a separate, constitutional, legal order for those subject to the control of those institutions.

However, through municipal-law glasses the treaties may take on a rather different hue. Thus, while the direct applicability of the treaties may be governed by community law, their status, that is, their rank in the hierarchy of municipal norms, is a function of how the municipal law views treaties generally. The

15Starke, op. cit supra note 2, at 79-86.
16Treaty establishing the European Economic Community, art. 177 [hereinafter cited as EEC Treaty]; Treaty establishing the European Atomic Energy Community, art. 150 [hereinafter cited as Euratom Treaty]. There is no corresponding provision in the Treaty establishing the European Coal and Steel Community [hereinafter cited as ECSC Treaty], although such determinations might be made in exercise of the jurisdiction conferred by ECSC Treaty, article 89.
17Municipal courts are competent according to their own procedural rules to hear disputes concerning community law, but their interpretation and enforcement of it is brought under community supervision by the reservation of authentic interpretation of the Rome Treaties to the community court, EEC Treaty, art. 177; Euratom Treaty, art. 150, and the exclusive competence of the community court to determine the validity of all community acts, ibid.; ECSC Treaty, art. 41. In exercising this jurisdiction the national courts act as community courts. Bebr, The Relation of European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis, 58 Colum. L. Rev. 767, 770 (1958). Contra, Morelli, La Cour des Communautés Européennes en tant que ugue interne, 19 Zeitschrift für Auslandches Öffentliches Recht und Völkerrecht 269 (1958).
18The latter position is descriptive of the manner in which treaties are generally given effect in municipal systems. Starke, op. cit. supra note 2, at 79-86.
19See ECSC Treaty, arts. 14, 15, 22, 23, 40, 44, 66, 92; EEC Treaty, arts. 173, 187, 189, 192, 215 para. 2; Euratom Treaty, arts. 151, 159, 161, 164, 188 para. 2; Bebr, Judicial Control of the European Communities 178 (1962); Lagrange, Les Problèmes Juridiques et Économiques du Marché Commun 43 (1960); Bebr, supra note 17, at 788.
20For the constitutional positions of the members of the European communities on the internal status of treaties, see Stein & Hay, Law and Institutions of the Atlantic Area 14-28 (1968); Bebr, op. cit. supra note 19, at 216-24.
European Economic Community Treaty may have constitutional status in the Netherlands but be considered only legislation in Italy. In Germany it could even be considered unconstitutional. Needless to say, the position of regulations, directives, recommendations, and decisions of community institutions is even more unclear under municipal laws, although the direct effect within the member states of such regulations and decisions is explicitly provided for in the treaties. This is the sort of situation that Chief Justice Marshall suggested would make the United States Constitution a "solemn mockery."

The picture of community political organization which emerges from this cursory treatment of two of its basic problems is a confusing one at best. However, at the level of every-day operation these theoretical difficulties often disappear in the light of the practical progress being made toward the achievement of the immediate goals of the communities. These achievements are also a part of the political context and their ultimate impact on the problems we have been discussing should prove to be substantial.

Even so, we can, perhaps, construct some tentative hypotheses from what has been said. Given the ambiguous nature of the community structure and the curious relationship of community and national law, we should expect the federal, constitutional jurisdiction given the court to reflect the same sort of compromise position. To be made aware of how much the definition of judicial power to hear "federal questions" is part and parcel of the whole problem of allocating political power between two levels of government, one need only refer to the acrimonious debates concerning the jurisdiction given federal courts to hear all suits "arising under the Constitution," which took place in the state conventions called to ratify the United States Constitution. A majority of Congress

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21See Netherlands Const. arts. 68, 66-67 (1956).
24See Stein & Hay, op. cit. supra note 20; Bebr, op. cit. supra note 19, at 224-25.
On why this jurisdiction was omitted from the Judiciary Act of
could not be mustered to confer the full measure of that jurisdiction on the courts until after the Civil War.\textsuperscript{28}

We should also expect that this background will affect the court's interpretation of its own competence. The most important, or at least the most notorious, jurisdictional decision in the modern history of the United States Supreme Court, \textit{Erie R.R. v. Tomkins},\textsuperscript{29} rests on little more than its appropriateness under a federal system.\textsuperscript{30} Judicial decision-making is purposive, and in constitutional interpretation the purposes envisaged are political purposes.\textsuperscript{31} To the extent that those purposes are unclear or undecided, the court may find itself with difficulties, or, perhaps, with opportunities.

\section*{FEDERAL CONSTITUTIONAL ASPECTS OF THE COURT'S JURISDICTION}

\subsection*{A. Direct Judicial Control}

\subsubsection*{Community Acts}

The direct judicial control over acts of community organs provided in the three treaties is reasonably straightforward. In general terms it consists of (1) an appeal for annulment,\textsuperscript{32} (2) an appeal against inaction,\textsuperscript{33} and (3) an exception of illegality.\textsuperscript{34} The availability of these remedies establishes the Court of Justice as a court exercising a powerful constitutional and administrative jurisdiction. In an appeal for annulment on grounds of incompetence, this constitutional jurisdiction takes on unmistakable aspects of federal control. Adjudication of a suit based on this ground necessarily implies a delimitation of jurisdiction between

\begin{thebibliography}{99}
\bibitem{28} On the political impetus for and the intent of this conferral, see \textit{Bergman, Reappraisal of Federal Question Jurisdiction}, 46 Mich. L. Rev. 17 (1947); \textit{Chadbourn & Levin, Original Jurisdiction of Federal Questions}, 90 U. Pa. L. Rev. 639 (1942); \textit{Forrester, Federal Question Jurisdiction and Section 5}, 18 Tul. L. Rev. 263 (1943).
\bibitem{29} The jurisdiction had been conferred earlier, Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, 92, but was repealed almost immediately by Act of March 8, 1802, 2 Stat. 132.
\bibitem{30} See \textit{id. at 78}.
\bibitem{31} See \textit{MacKinnon, op. cit. supra note 10, at 172}.
\bibitem{32} ECSC Treaty, art. 33; EEC Treaty, art. 173; Euratom Treaty, art. 146.
\bibitem{33} ECSC Treaty, art. 35; EEC Treaty, art. 175; Euratom Treaty, art. 148.
\bibitem{34} ECSC Treaty, art. 36; EEC Treaty, art. 184; Euratom Treaty, art. 156.
\end{thebibliography}
the communities and the member states, \textsuperscript{35} although “division of
competence” does not have the same significance in the
community legal order that it has in a federal state system.

The distinctions drawn between the availability of the above-
mentioned remedies to states and their availability to individuals,
enterprises, or associations may also raise federal problems. These
distinctions, as well as the general distinctions between the scope
of the remedies as provided under the different treaties, have
been ably and extensively discussed elsewhere. \textsuperscript{36} Suffice it to
say that to the extent that the treaty provisions give member
states a privileged position in invoking these remedies, particularly
the appeal for annulment, \textsuperscript{37} they emphasize the “intergovern­
mental” aspects of the communities, as opposed to their direct
affect on individuals. The same observation applies to the deci­
sions of the Court of Justice concerning the right of appeal of
private parties. \textsuperscript{38}

However, this access problem seems to be more a general
problem of availability of legal redress than a problem of the
court’s federal, judicial control, \textsuperscript{39} for its jurisdiction to determine
the validity of community acts is almost exclusive. \textsuperscript{40} The only
exceptions to this exclusive competence are found in article 177
of the European Economic Community Treaty and article 150
of the Euratom Treaty; under both provisions referral by lower
national courts of issues concerning the validity of community acts
is discretionary rather than mandatory. In this context problems
of federal judicial control clearly arise; these will be treated more
fully below. Reference to referral jurisdiction is inserted here by
way of introduction to a case which attempted to solve problems
of limited access under the annulment jurisdiction and of national
court discretion under the referral jurisdiction by use of the
“exception of illegality.”

\textsuperscript{35}Bebr, \textit{op. cit. supra} note 19, at 81.
\textsuperscript{36}\textit{Id.} at 33-148.
\textsuperscript{37}\textit{Compare ECSC Treaty, art. 33, paras. 1-2, with EEC Treaty, art.
173, paras. 1-2, and Euratom Treaty, art. 146, paras. 1-2.}
\textsuperscript{38}\textit{Sec., e.g., Plaumann & Co. v. EEC Comm’n, Case No. 25/62, 9
Recueil de la Jurisprudence de la Cour [hereinafter cited as Rec.] 197,
July 15, 1963.}
\textsuperscript{39}The court has generally given a liberal interpretation to the treaty
provisions allowing suits at the instance of enterprises. See, \textit{e.g.,}
Groupement des Industries Sidérurgiques Luxembourgeoises \textit{v. High
Authority, Cases Nos. 7/54 and 9/54, 2 Rec. 53, April 23, 1956.}
\textsuperscript{40}Hay, \textit{Federal Jurisdiction of the Common Market Court}, 12 Am.
Pursuant to a request of the German Government under article 46 of the EEC Treaty, the Commission issued a decision allowing the German Government to impose a countervailing tax on imports of powdered whole milk. Germany implemented this authorization by administrative order and assessed the tax against the appellant importers. The latter appealed the assessment in the German courts. They also appealed to the Court of Justice, alleging that the Commission's decision, upon which the national order and assessment were based was invalid. Jurisdiction for this suit could not be based on the "appeal for annulment" under article 173 because the decision was not addressed to the appellants, nor was it of "direct and specific" concern to them although addressed to another. Nor could the national administrative action, through the medium of which the Commission's decision did become of such concern, be made the basis of a suit before the community court under article 173.

Instead, appellants invoked article 184, which provides:

"Where a regulation of the Council or of the Commission is the subject of a dispute in legal proceedings, any of the parties concerned may, notwithstanding the expiry of the period laid down in Article 173, third paragraph, invoke the grounds set out in Article 173, first paragraph, in order to allege before the Court of Justice that the regulation concerned is inapplicable."

The "dispute in legal proceedings" relied upon was the importer's suit in the German courts. The basic issue presented by this claim was whether article 184 should be interpreted only as extending the scope of review possible in an action properly before the court under article 173, or whether it should be read as granting an additional, compulsory, supervisory jurisdiction over national courts.

The court acceded to the former view and dismissed the appeal. The decision was based, inter alia, on the respective competences of the national courts and the community court as established in article 177 of the EEC Treaty and article 20 of the Protocol on the Statute of the Court of Justice. The court recognized that to allow the parties in a case pending before national courts to address themselves directly to the Court of Justice under article 184 would circumvent the discretionary power of referral given lower national courts under article 177 and would nullify the national courts’

control over suspension of their own proceedings in article 177 cases, as envisaged by article 20 of the Protocol.

This decision illustrates a basic aspect of the relationship between the community court and national courts. The former is not a court of appeal sitting above the latter, nor has it concurrent jurisdiction with national courts to decide cases involving community law. In many instances only the issues of community law present in national litigation, not the parties, may find their way into the community court.

**Member-State Action**

Perhaps the most striking aspect of judicial control in a federation is the ability of the highest federal court to enforce the federal constitution by declaring state laws or practices unconstitutional. Mr. Justice Holmes has said,

"I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."^42

A somewhat similar form of federal judicial control is found in the provisions of the community treaties which give the European Court jurisdiction to find a member state in defaut of its treaty obligations.^43 However, it is not a control exercisable at the instance of private parties. For this reason it has been referred to as involving essentially a suit at international law to establish the violation of an international obligation, rather than a suit to establish a violation of the "internal constitutional law" of the communities.^44 This is a questionable characterization.

While conceding for the moment that suits by member states *inter se* to establish treaty violations are suits invoking a classical, international, judicial jurisdiction,^45 one need not agree that this same observation applies to situations where a community organ

^43ECSC Treaty, arts. 88, 89; EEC Treaty, arts. 169, 170; Euratom Treaty, arts. 141, 142.
Under ECSC Treaty, article 88 the court merely reviews the finding of failure to fulfill obligations already made by the High Authority.
^45See ECSC Treaty, art. 89; EEC Treaty, art. 170; Euratom Treaty, art 142. Further "international" jurisdiction appears in EEC Treaty, arts. 93, para. 2, 225, para. 2, and Euratom Treaty, art. 38, para. 3.
is a principal party to the litigation. Admittedly, the judgment in either case will be that a member state has or has not fulfilled its treaty obligations, but the interest of the party aggrieved will not be the same. Italy's legal interest in Belgium's compliance with its treaty obligations may be based upon Italy's status as creditor with respect to those obligations. The Commission of the EEC, to take one of the community organs concerned, can hardly be similarly interested. As EEC Comm'n v. Italy illustrates, the Commission's interest goes beyond fulfillment of the member state's obligation. In litigation under article 169 of the EEC Treaty, the Commission's interest is based upon its obligation, as community executive, to insure the effective application of community law. It enforces the treaty provisions, not in the contractual sense of "international obligation," but as guardian of the "internal constitutional order" of the communities.

Any doubt about the nature of the legal order involved in article 169 litigation should be put to rest by the court's disposal of a defense based on the law of international obligations, which was put forward in EEC Comm'n v. Luxembourg. The court said,

"This connection between the obligations of the parties cannot, however, be recognized under community law, since the Treaty does not merely create mutual obligations between the various persons to which it applies; rather it establishes a new legal order governing the powers, rights and obligations of such persons, as well as the necessary procedures for determining and punishing all possible violations.

"Consequently, in addition to the cases expressly covered by the Treaty, its concept involves the prohibition on the part of Member States from taking justice into their own hands."

46 ECSC Treaty, art. 88; EEC Treaty, art. 169; Euratom Treaty, art. 141.
Under ECSC Treaty, article 88, the High Authority would be cast as the defendant because it has powers to make a binding decision determining a violation. That decision would then be appealable at the instance of the state affected. The EEC and Euratom Commissions, however, would have to take such cases before the Court of Justice in order to obtain a binding determination.
47 EEC Treaty, art. 171.
49 EEC Treaty, art. 155.
51 Cases Nos. 90/63, 91/63, 10 Rec. 1217, Nov. 13, 1964.
52 Id. at 1232. (Emphasis added.)
Indeed, this language casts considerable doubt upon the necessity of conceding that even suits between member states are forms of classical international litigation.

The same sort of "federal issues" may be raised in a suit under article 169\(^53\) as are raised in a suit by the United States government against a state government, challenging the latter's capacity to act with respect to a particular subject matter.\(^54\) We would not say that such a suit failed to call into question the "internal constitutional order" of the United States.\(^55\) General access of individuals to federal forums having jurisdiction to determine the constitutionality of state action is the most effective form of federal, constitutional control,\(^56\) but it is not the only form. Its absence in the European communities' treaties should not be allowed to conceal that measure of federal, constitutional control which is found in the jurisdiction of the Court of Justice to declare nonfulfillment of treaty obligations.

From this brief discussion of the federal, constitutional elements in the direct, judicial control\(^57\) exercised by the Court of Justice, we turn to a more extensive investigation of that segment of the court's jurisdiction which has the greatest significance with respect to the division of competences between the community court and national courts and with respect to the relationship between community and national legal systems—le renvoi pré-judiciel.

**B. Indirect Judicial Control**

In order to harmonize the application of community law by

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\(^{54}\)See United States v. California, 332 U.S. 19 (1947).

\(^{55}\)The only limit on the ability of the states and the federal government to litigate their constitutional conflicts before federal courts in this manner is the requirement that a "case or controversy" be presented. Compare United States v. West Virginia, 295 U.S. 463 (1935), with Missouri v. Holland, 252 U.S. 416 (1920).

\(^{56}\)It should be noted, however, that the availability of individual remedies operates through the interest requirements inherent in the "case or controversy" criterion to restrict the scope of federal-state confrontations in litigation. See Massachusetts v. Mellon, 262 U.S. 447 (1923).

\(^{57}\)A further direct, federal, judicial control is found in articles 103 and 104 of the Euratom Treaty, which give the court jurisdiction to determine whether proposed agreements or conventions, between the member states or their nationals and any third party, are compatible with the Euratom Treaty.
national courts the community treaties give the Court of Justice jurisdiction to make a “preliminary ruling” on the “interpretation” of the treaties and the “validity and interpretation” of acts of the community institutions. This supervisory jurisdiction may be termed “indirect” because it is not a jurisdiction to decide cases; it is a jurisdiction only to decide issues, as and when submitted by national courts. The application of these decisions to the settlement of particular controversies remains within the general jurisdiction of the courts of the member states.

**The ECSC Problem**

The jurisdiction to hear preliminary questions is much more restricted under the European Coal and Steel Community Treaty than under the Rome Treaties. Article 41 of the former provides only for a compulsory referral by national courts of issues involving a question of the validity of acts of the executive organs of the ECSC. There is no provision for preliminary referral of the interpretation of these acts or of the treaty.

This omission could seriously affect the court’s ability to oversee the development of Coal and Steel Community law. Several methods for remedying this defect, without attempting a treaty revision, have been proposed. It has been suggested, for example, that any interpretation of an executive act by a national court which concerns the extent of that act’s application raises a potential question of its validity. Thus, a compulsory referral on the question of “validity” would be required whenever there was a question of “interpretation.” Apart from other weaknesses, this solves only half the problem. Jurisdiction to interpret the ECSC Treaty is yet lacking. This difficulty is overcome by a second solution, which would imply from the treaty’s statement of the court’s general function a preliminary jurisdiction to interpret. The pertinent statement is found in article 31: “to ensure the rule of law in the interpretation and application of the present Treaty and of the regulations for its execution.” However, this suggestion is made suspect by the inclusion of almost identical language in the Rome Treaties, along with the

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59 EEC Treaty, art. 177; ECSC Treaty, art. 41; Euratom Treaty, art. 150.
60 Bebr, op. cit. supra note 19, at 182.
61 Valentine, The Court of Justice of the European Communities 15 n.8 (1965). Although Mr. Valentine suggests this solution, he does not support it. Id. at 112.
62 EEC Treaty, art. 164; Euratom Treaty, art. 136.
specific grants of jurisdiction to make preliminary rulings. If these general statements of function are additional grants of jurisdiction, the purpose of the carefully defined specific grants of jurisdiction becomes obscure.

The member states could, of course, confer a referral jurisdiction on the court by passing appropriate laws at the national level, but the question, given the present status of the law, is what the court should do if asked by a national tribunal to interpret the ECSC Treaty. In one set of circumstances the court has decided that it may do so. The facts of the case are of some interest. The plaintiffs brought suit in a district court of Luxembourg during the few hours of one day of the year in which the defendants were not covered by the immunity from suit accorded Luxembourgeois parliamentarians while Parliament is in session. However, the defendants were also members of the European Parliament and claimed that the gap in their national parliamentary immunity was filled by the immunity guaranteed them under article 9 of the Protocols on Privileges and Immunities of the respective communities. This claim required a determination of whether the European Parliament was in session on the particular date involved and resulted in a referral to the Court of Justice under article 177 of the EEC Treaty and article 150 of the Euratom Treaty for an interpretation of the concept of "in session" in the treaties. Because the Parliament is an institution common to the three communities, this question involved an interpretation of the ECSC Treaty and the Protocol on Privileges and Immunities of the European Coal and Steel Community.

In his submissions Advocate General Lagrange openly favored reading article 31 of the ECSC Treaty as containing a general competence to interpret the treaty, but concluded that a decision on that "delicate" question was not required because the ECSC provision was perfectly clear and did not require interpretation. From the reasons (motifs) given by the court for its judgment, it would appear that neither of these opinions was accepted. The court seemed to solve the jurisdictional problem on the eminently practical basis that, because the sections of the protocols to be interpreted were identical under all three treaties and because they and the treaty provisions in question applied to a common institution, the treaties and protocols should all be interpreted

63ECSC Treaty, art. 43.
64Wagner v. Fohrmann, Case No. 101/63, 10 Rec. 381, May 12, 1964.
65ECSC Treaty, art. 22; EEC Treaty, art. 139; Euratom Treaty, art. 109.
6610 Rec. at 404.
together. This result was reached even though it was necessary to give separate treatment to article 22 of the ECSC Treaty. However, among the considerations listed in the formal judgment is article 31 of the ECSC Treaty. Did the court accept M. Lagrange’s argument? It is difficult to say, but even if no theoretical ground was broken, the impending merger of the executives of the three communities might allow the development of the restricted sort of ancillary jurisdiction here employed.

**Validity**

As previously mentioned, the community court has exclusive jurisdiction to determine the validity of community acts, save where their validity is called into question before lower national courts whose referral of such matters is made discretionary under the Rome Treaties. This jurisdiction raises at least two questions having “federal” implications: (1) Does this ultimate competence over questions of validity exclude national court determinations of invalidity on solely national law grounds? (2) What is the scope of review in a preliminary ruling on validity?

It has been suggested that a national court may not rule on the constitutionality of an act of a community organ because the appraisal of validity is reserved to the community court and because unilateral refusal to apply community law on any ground would constitute a treaty violation. Good reasons though these are, they may not solve the national court’s problem. Suppose the national judge is confronted with an attack on a community act which seeks to have that act declared unconstitutional as an exercise of powers which exist only at the national level, or as a use of delegated powers for purposes not envisaged by the delegation. A referral to the Court of Justice for a preliminary ruling on the validity of the act under community law may be determinative for the national court, because the community law and national law questions are reverse sides of the same coin. However, if the question changes slightly to one of the constitutional propriety of delegating the powers exercised, the community law ruling on validity will not solve the national law problem. The community court has no jurisdiction to interpret national constitutions. That the national judge’s refusal to apply the community

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67 Id. at 394-95.
68 Id. at 396, 398.
69 Id. at 397.
70 See text accompanying note 40 supra.
71 Ebr, supra note 17, at 225-26.
law constitutes a violation of the community legal order does not solve the dilemma; it creates it. If the constitutional attack is well-founded, the national court must offend one legal order or the other.

The federal constitutional significance of the scope of review in a preliminary ruling on validity of community acts is directly related to the problem of individual access under the annulment jurisdiction. The one decision of the court on a preliminary question of validity illustrates this connection. The referral concerned the validity of certain decisions of the EEC Commission which formed the basis for assessments of export duties made by the Dutch Ministry of Agriculture and Fisheries. It was clear that the nature of the attack on the Commission's decisions went beyond questions of "formal validity" and raised questions of their substantive "legality." Exercising its rights under article 20 of the Protocol on the Statute of the Court of Justice, the German Federal Republic made a submission questioning the court's competence to rule on the "legality" of decisions addressed to a member state in a referral proceeding under article 177 of the EEC Treaty. The submission pointed out the impossibility of private appeal against such decisions through the annulment procedure of article 173 or the exception of illegality of article 184. It also noted the difference in wording between the latter articles, which clearly envisage a review of legality, and the use of "validity" in article 177.

Although the court made no mention of the problem raised by the German submission, it clearly investigated the "legality" of the decisions. Indeed, the court reviewed whether they were open to attack for any reason. However, the question of competence received extensive treatment in the Conclusions of Advocate General Roemer. One of his reasons for upholding the court's competence is particularly interesting. Far from agreeing that the inadmissibility of private appeals against decisions addressed to member states under direct-control procedure dictates their complete inadmissibility, he suggests that this is a good argument for allowing such challenges under the indirect referral procedure of article 177. A narrower interpretation of that article would prevent it from remedying the unfortunately narrow scope.

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\(^{73}\)ECSC Treaty, art. 86; EEC Treaty, art. 5; Euratom Treaty, art. 192.

\(^{74}\)See text accompanying notes 36-38 supra.

\(^{75}\)N.V. Internationale Crediet-en Handelsvereniging "Rotterdam" v. Minister of Agriculture & Fisheries, Cases Nos. 73/63, 74/63, 10 Rec. 1, Feb. 18, 1964.

\(^{76}\)Id. at 27-28.
of the legal protection of individuals under the direct-control jurisdiction and would emphasize the international law aspects of the community to the detriment of the "idea of a binding Community constitution in the sense of a federal organization." One would suspect that the court agreed, for in an earlier 177 case it said,

"[T]he vigilance of individuals concerned with safeguarding their rights entails an efficient supervision added to that which articles 169 and 170 entrust to the care of the Commission and the Member States."

Interpretation

1. Relationship of Community and National Courts
   a. The View from the Court of Justice. The delicacy of the federal issues inherent in the exercise of the jurisdiction of the Court of Justice to interpret community law led Advocate General Lagrange to begin his Conclusions in the first case arising under that jurisdiction by saying,

   "[T]he provisions of article 177, if they are to be applied with relevance—we might even be tempted to say with loyalty—must permit the establishment of a genuine and fruitful collaboration between domestic courts and the Court of Justice of the Communities, with a mutual respect for their respective jurisdictions."

One aspect of this collaborative effort immediately comes to mind. The community court interprets under 177, but national courts apply that interpretation. This interpretation-application distinction is, obviously, of cardinal importance. Abstractly, it is a simple distinction, but in concrete situations it is extraordinarily difficult, for the two concepts blend imperceptibly together. Clearly application involves interpretation, and interpretation of the law is of little use unless it indicates to what situations the law applies. The division of competence developing under the article 177 jurisdiction may be better appreciated by putting the question in different terms.

(1.) Relevance. We might first ask whether the Court of

77Id. at 45.
Justice may consider the application of its interpretation by the national court in determining whether it should give an interpretation at all. May the court, in other words, confine its jurisdiction to interpret to situations where those interpretations are relevant to the case before the referring court? The development of this concept of relevance is peculiarly instructive.

The early and important case of *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration* sets forth the basic rule: the relevance of the interpretation sought to the decision of the case at the national level is a question for the national judge. It will not be examined by the community court. The latter's jurisdiction rests solely on the presence of a question of interpretation. This was a firm ruling, coming as it did in a case in which a decision that the basic question referred was irrelevant might have been supported on three separate grounds. Indeed, in the next case in which an issue of relevance was raised the court did not even discuss the problem, and the Advocate General merely referred to the “precedent” established that the court had no jurisdiction to review the considerations impelling the national court's referral.

*Wagner v. Fohrmann* exposed the question of relevance in a slightly different light. Relevance to the national court's decision was there used as an aid in determining precisely what texts the national court wanted interpreted. The Advocate General sets forth clearly the problem that this raises with respect to the division of competence between the community and national courts. The community court must not become a substitute for the national court either in resolving the litigation or as judge of the pertinence of the interpretive questions referred. Both M. Lagrange and the court found that allowing the community court to judge relevance in this case was justified, however, because the national court's decision asked for an interpretation, not only of the texts specified, but also of all others which would permit it to resolve the litigation. Thus, what ap-

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81(1) That there was a solution on independent state-law grounds; (2) That an answer to the second question referred might make the first, and most significant, question unnecessary; (3) That the national court would yet be faced with a question of primacy between EEC and Benelux law after the interpretation was given. Query whether any but the first of these arguments would have held up if scrutinized.
83Id. at 372.
84Case No. 101/63, 10 Rec. 381, May 12, 1964.
85Id. at 402-03.
86Id. at 395, 404.
Peared to be a rule of absolute incompetence in *van Gend & Loos* has been refined to disclose a relative incapacity, which may be waived by the national court's referral decision.

Finally, in *Costa v. E.N.E.L.*\(^7\) there is language which raises doubts about the consistent application of this "relative" lack of jurisdiction. Among other grounds of incompetence, the Italian Government asserted that the referral in that case to the Court of Justice was "absolutely inadmissible" because there was no question of community law before the national judge. This assertion raised serious questions, to which we shall return, about the relationship of community and national law. For our present purposes this claim of "absolute inadmissibility" seems to raise again the question of relevance. Advocate General Lagrange treats it as such,\(^8\) but this time he is not content to repeat the *van Gend & Loos* formula. Instead, he questions whether the court is bound to give completely abstract interpretations which have no relation to the solution of a problem, particularly where such interpretations might bear upon matters of importance or create serious conflicts with national jurisdictions.\(^9\) The Advocate General then goes on to discuss why the interpretation of community law may be relevant to the national court's decision.

It is difficult to determine whether the court agrees fully with M. Lagrange's approach. The judgment seems to treat "absolute inadmissibility" and "relevance" as distinct problems.\(^9\) In dealing with the latter, the court reiterates the basic rule grounded on a clear division of function between national courts and the community court. It then proceeds to a separate consideration of absolute inadmissibility. This may be a justifiable position. Questions of relevance in prior cases have involved whether the interpretation sought was necessary to the national court's decision. In *Costa* the Italian Government was claiming, not only that the national court need not apply the court's interpretation, but that it could not apply it.

One may, of course, question whether this distinction should affect the community court's competence to investigate the applicability of the interpretations requested of it to the case before the national court. If it does not, the difference in *Costa* between the court's approach and that of the Advocate General is without substance. Both cast doubt on the viability of the *van Gend & Loos* rule. At any rate, it takes no extensive exercise in

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\(^7\)Case No. 6/64, 10 Rec. 1141, July 15, 1964.

\(^8\)Id. at 1173.

\(^9\)Id. at 1173-74.

\(^9\)Id. at 1158.
realist jurisprudence to discern that the development of the concept of relevance has been constantly expansive of the jurisdiction of the Court of Justice and has, at least in the van Gend & Loos and Costa cases, allowed the court to discuss issues of crucial importance to the operation of the communities.

(2.) Use of fact. The division of function based on the interpretation-application distinction involves, not only who decides whether an interpretation is applicable to a case before the national court, but also who decides how and to what extent it is applicable. How abstract must an interpretation be in order not to impinge upon the national court's jurisdiction to apply it? This question has two aspects: (1) To what extent may the community court use facts developed before the national court, including national law, in formulating the interpretive issues? (2) To what extent may the interpretations given be directed to these facts?

The first problem arises from the form of the questions submitted by the national court. For example, the referral decision in the Bosch case asked whether a particular contract was null by virtue of article 85, paragraph 2 of the EEC Treaty. Again, in van Gend & Loos the court was asked to rule on whether the tariff involved constituted a "reasonable modification" of the Netherlands tariff structure and, thus, did not offend the prohibition of article 12 of the EEC Treaty. These questions require the application of the treaty to specific facts, and the court might have rejected them as not asking for an interpretation. However, considering that no form had been specified for article 177 referrals and that "interpretation" was itself subject to interpretation, the court ruled that, although it was competent only to render interpretations, the national courts might choose to make their submissions in a simple and direct, that is, fact-based, form from which the community court could extract questions falling within its interpretive jurisdiction.

Does this imply that the national court may make a completely general referral which asks the community court to discuss any questions of validity or interpretation it finds in the facts of the case and the national court's decision? In the "Rotterdam" case Advocate General Roemer denies this implication, but both he and the court admit of an "extensive interpretation" of the

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91Case No. 13/61, 8 Rec. 89, 99, April 6, 1962.
93Société Kledingverkoopbedrijf de Geus Uitdenbogernd v. Société de Droit Allemand Robert Bosch, G.m.b.H., Case No. 18/61, 8 Rec. 89, 102, April 6, 1962.
94Cases Nos. 73/63, 74/63, 10 Rec. 1, 51, Feb. 18, 1964.
referral decision, using its reasons and its facts, which may lead to questions not specifically proposed by the national court.\textsuperscript{95}

The facts are not only important in cases where the national court's submission is inartfully drafted. M. Lagrange underlines this point in \textit{Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten}\textsuperscript{96} when he says,

"Gentlemen, in this case as in all cases brought under article 177, the Court of Justice is bound to give an abstract interpretation of the texts submitted to it. . . . One must not, however, forget that the article 177 procedure always takes place within the framework of a suit and that the substantive aspects of the suit frequently shed light on the matter involving an abstract interpretation, as does an example in support of a theory. Of course, in court, the example is not chosen by the theoretician, but is thrust upon the judge as reality."\textsuperscript{97}

The use of fact envisaged in "Rotterdam" and \textit{Unger} is closely related to the problem of relevance posed by \textit{Wagner v. Fohrmann}.\textsuperscript{98} In neither situation does the interpretation-application distinction prevent the Court of Justice from helping the national court to ask the right questions, both from the standpoint of the community court's jurisdiction and of usefulness in settling the substantive controversy.

The court's use of stated facts in interpreting the texts submitted by the national court strikes more directly at the latter's jurisdiction to apply community law. The position of the Court of Justice on this question is far from clear. Advocate General Lagrange, particularly, is wont to speak of the jurisdiction under article 177 as one involving only "abstract" interpretations.\textsuperscript{99} However, the court seems hesitant to use this term in its decisions, and it indicated in \textit{Bosch} that it refrained from giving a direct answer to the question posed only because it had not been supplied with sufficient facts for making a proper determination.\textsuperscript{100} This position contrasts somewhat with Herr Roemer's abstract distinction in \textit{van Gend & Loos} between interpretation, by which is

\textsuperscript{95}Id. at 52.
\textsuperscript{96}Case No. 75/63, 10·Rec. 347, March 19, 1964.
\textsuperscript{97}Id. at 372-73.
\textsuperscript{98}See text accompanying notes 84-86 supra.
\textsuperscript{100}8 Rec. at 106.
meant the general import of a provision, and application of a rule to a specific case, which requires examining whether certain facts involve the application of a legal rule.

This is not to say that the court in any way rejects the interpretation-application distinction, but that it recognizes the limitations of the distinction and the necessity of flexibility in its application. In so doing the practice of the court seems to fall somewhere between abstract exegesis and rendition of answers to particular fact-based questions. Although the application of the interpretation to the facts of a case may be obvious, the court attempts to make its interpretation sufficiently general so as not to be decisive on the merits. In Unger,\textsuperscript{101} for example, the Dutch court asked whether denial of benefits to persons in the plaintiff's position would be incompatible with article 19, paragraph 1 of Council Regulation No. 3 on social security of migrant workers. The court, instead, gave a general description of the class of persons covered by the regulation and pointed out that it was for the national court to determine whether the plaintiff fell within that class.\textsuperscript{102} The characteristics of the class were the characteristics of the plaintiff writ large.

It is, of course, unreasonable to expect perfect consistency in the court's approach to the use of facts in its interpretations. The variations in the manner in which national courts frame their questions is enough to make consistency impossible. If M. Lagrange is correct that the success of the article 177 jurisdiction depends upon a fruitful collaboration between community and national jurisdictions,\textsuperscript{103} any attempt at a rigid and consistent distinction between interpretation and application may frustrate that goal. From the standpoint of effective collaboration the decisions of the Court of Justice reveal a consistent attempt to exercise jurisdiction in such a way that the court's interpretations may harmonize community law in general and at the same time remain relevant to the particular problems of the national court which requested the preliminary ruling. Moreover, respect for the national court's jurisdiction has not been lacking. The community court has shown far more concern for that jurisdiction in its answers than have the national courts in their questions.

The division of competences envisaged by the jurisdiction to give preliminary rulings on interpretation is, perhaps, better characterized by the distinction, suggested earlier, between juris-

\textsuperscript{101} Id. at 353.
\textsuperscript{102} Id. at 364.
\textsuperscript{103} See text accompanying note 79 supra.
diction to decide issues and jurisdiction to decide cases, than by a
distinction between jurisdiction to interpret and jurisdiction to
apply. The former distinction finds support in the court's will­
ingness to answer directly a question, such as, whether a com­
munity ruling applies to a particular national law,\textsuperscript{104} while insisting
that it has no jurisdiction to apply community law to specific
cases.\textsuperscript{105}

\textbf{(3.) The possibility of inter-state conflict.} The relationship
between the problems of relevance, use of facts in formulating ques­
tions, use of facts in rendering interpretations, and the broader
question of respect for national jurisdictions is well illustrated
by one of the most recent cases referred to the court under
article 177, \textit{S.A.R.L. Albatros v. SOPECO}\.\textsuperscript{106} The suit was brought
in the Italian courts by an Italian firm claiming against a French
firm. The complaint alleged a breach of the latter's contractual
obligation to deliver a quantity of petroleum products. The
respondent's defense was based, \textit{inter alia}, upon \textit{force majeure}:
the denial of an import license to it by the French authorities under
the French law and regulations on the wholesale import of petro­
leum products. SOPECO claimed that this denial was in violation
of certain provisions of the EEC Treaty and that it could not
reasonably be held to have foreseen the French Government's non­
compliance with its treaty obligations.

At the parties' request the Civil Court of Rome referred four
questions to the Court of Justice concerning the effect of articles
30 through 37 of the EEC Treaty on the French import rules.
The French Government intervened and argued that the questions
were inadmissible under article 177 because they required a deter­
mination of the validity of the French laws and also because all
the questions were irrelevant to the Italian court's final disposi­
tion of the case. Both these objections had been heard in previous
177 cases, but there was a new twist here: the referral was by
the courts of one member state concerning the validity of the laws
of another.

The Court of Justice restated its now familiar positions: (1) it
will not consider relevance, (2) it will sift out the interpretive
questions implicit in the national court's submission, and (3) it
will then interpret the treaty in the light of the legal data sub­
mitted by the national court. However, in conforming with rules
two and three the court found it impossible to honor rule one.

\textsuperscript{104}Kalsbeek-Van Der Veen v. Bestuur Des Sociale Verzekeringsbank,
Case No. 100/63, 10 Rec. 1105, 1121-22, July 15, 1964.
\textsuperscript{105}Costa v. E.N.E.L., Case No. 6/64, 10 Rec. 1141, 1158, July 15, 1964.
\textsuperscript{106}Case No. 20/64, XI-3 Rec. 1, Feb. 4, 1965.
Clearly, if the court based its interpretation on the facts and issues presented by the national court, it must have been interpreting in the light of what was relevant to those facts and issues. The court went even further than this process required; it combined all four questions, excluded parts of them that were unnecessary, and interpreted the chapter of the treaty as a whole, although the articles had been mentioned in separate questions.

Did the Court of Justice infringe upon the proper jurisdiction of the Italian court? Probably not. It bent its own self-imposed rules, but it gave the Italian judge the sort of answer he must have been seeking. The court's approach also seems to take account of the novel element in this particular litigation—the possibility of disrespect for French judicial jurisdiction. By confining its interpretation to what was strictly relevant to the Italian court's problem, the community court avoided a definitive discussion of the French import system, which Advocate General Gand's more abstract and detailed interpretation required. Other language in the opinion leaves the impression that the court would prefer to deal extensively with the complex provisions of chapter 2 of the treaty and their relationship to a member state's action only in the context of litigation contesting such action in that member state's own courts.

b. The Problem in National Courts. Decisions defining the division of competences do not all originate in the community court. Most of them do not. The Court of Justice has no opportunity to exercise its jurisdiction until a national court decides that it is faced with a problem which requires or allows a referral. The issues raised for national courts in making such determinations are many and varied. We shall discuss but a few of them.

The national court may well ask itself whether it is a court which may submit preliminary questions or which must do so.\textsuperscript{107} It must do so if it is a court from whose judgments there is no appeal under national law. What does this mean? No appeal at all? No appeal of right? No appeal save by extraordinary remedies? No appeal in the case at the bar? The answers to these questions may be of substantial importance. If, for example, the last mentioned option is taken, and there has been an indication by the Court of Justice that it should be,\textsuperscript{108} the necessity of a referral may depend upon the irrelevant criterion of whether the

\textsuperscript{107}Compare EEC Treaty, art. 177, para. 2 and Euratom Treaty, art. 150, para. 2, \textit{with} EEC Treaty, art. 177, para. 3 and Euratom Treaty, art. 150, para. 3.

\textsuperscript{108}Costa v. E.N.E.L., Case No. 6/64, 10 Rec. 1141, 1158, 1182, July 15, 1964.
amount in controversy is large enough to merit an appeal under national procedural rules. If no appeal means no appeal at all, then a court of the significance and general finality of the Belgian Conseil d'Etat will not be bound to refer questions of interpretation because in a limited class of cases its decisions are reviewable by un pourvoi en cassation.\textsuperscript{109} If the existence of only extraordinary remedies is made the criterion of mandatory referral, we are faced with a comparison of member-state appeal procedures to determine how extraordinary is extraordinary. The problems abound.

Must the national court, assuming it is one that is bound to refer questions of interpretation, request a preliminary ruling on a question that has been previously decided by the community court? This question arose in 

\textit{Da Costa en Schaake v. Netherlands Fiscal Administration},\textsuperscript{110} which referred precisely the same questions that had been decided in \textit{van Gend & Loos}. The court held that it was properly seized of the question and had to answer it, but noted that a prior interpretation on the same point might deprive the national court's obligation of its object and thus empty it of its purpose.\textsuperscript{111} The Commission sought clarification of this position in the next case that was referred under article 177\textsuperscript{112} by seizing upon a tangential point involving article 12 of the EEC Treaty and asking whether an interpretation of that article was necessary.\textsuperscript{113} It was article 12 that had been interpreted in \textit{van Gend & Loos} and in \textit{Da Costa}. The court agreed that the Dutch court's approach in the present case presumed a particular interpretation of article 12, but denied that the national court was interpreting it; the latter had merely \textit{applied} the interpretation given by the Court of Justice in the two previous cases.\textsuperscript{114}

\begin{footnotes}
\textsuperscript{110}Case No. 28/62, 9 Rec. 59, March 27, 1963.
\textsuperscript{111}Id. at 75.
\textsuperscript{112}N.V. Internationale Crediet-en Handelsvereniging “Rotterdam” v. Minister of Agriculture & Fisheries, Cases Nos. 73/63, 74/63, 10 Rec. 1, Feb. 18, 1964.
\textsuperscript{113}The opinions in \textit{Da Costa} and “Rotterdam” give the impression that the Commission's position on the necessity of referring previously answered questions is inconsistent. However, it appears that the Commission favors a position which would narrow the \textit{Da Costa} rational to encompass only those cases where both the same issue had been previously referred and the same national court had been the referent. The Commission, then, seems prepared to draw a stronger conclusion in such cases than the court did in \textit{Da Costa}, that is, that the referral may be dismissed.
\textsuperscript{114}10 Rec. at 25.
\end{footnotes}
This mitigation of the duty to refer preliminary questions where there is an outstanding, definitive interpretation leads inexorably to a theory broached by M. Lagrange in his *Conclusions* in *Da Costa*\textsuperscript{115}—l*acte claire*. Surely, it is reasonable to suppose that texts may be clear, not only because they have been interpreted, but also because they are simply clear. In these cases too, there should be no duty to refer because there is no question of interpretation involved. The dangers of this theory in relation to the attainment of a uniform interpretation of community law may be easily demonstrated.

In *Re Société des Petroles Shell-Berre*,\textsuperscript{116} the plaintiffs requested that the French Conseil d'Etat submit several questions of interpretation to the European Court. The theory of the *acte claire* was invoked to find that no referral was necessary. The submissions of the Commissaire du Gouvernement are illuminating.\textsuperscript{117} She suggests that a practical solution is to be found in the form of proceedings before the national court. The national judge is always concerned with particular facts. If, when he views these facts in relation to the allegedly applicable text, a solution appears, he can no longer formulate an abstract question for the community court. Thus a possible difficulty is dismissed because in the context of the facts of the case the text is clear.

The *Shell-Berre* theory is, of course, open to criticism for its presumptions: (1) that the Court of Justice deals only with completely abstract questions, and (2) that the interpretation which "appears" to the national judge in a specific instance is a correct one in the context of the general purposes of community law. It may also be questioned whether the text was clear with respect to the issues in the *Shell-Berre* litigation. One month prior to the Conseil d'Etat's decision, an Italian court, faced with almost exactly the same issues concerning the relationship between community law and the French law and regulations attacked in *Shell-Berre*, had referred the *SOPECO* case to the Court of Justice for a preliminary ruling.

The application of seemingly clear technical provisions on the division of competence between national courts and community organs under article 85 of the EEC Treaty has resulted in a startling variety of opinions.\textsuperscript{118} There has also been disagreement

\textsuperscript{115} 9 Rec. at 88-89.
\textsuperscript{116} Conseil d'Etat, June 19, 1964, 3 C.M.L.R. 462 (1964).
\textsuperscript{117} C.M.L.R. at 472-74.
at the national court level concerning whether the obligation to refer under article 177 applied to summary proceedings. Although the Court of Justice has not decided in what sense article 177 interpretive decisions are binding on courts other than the one referring the question, a German case has held that the community court's interpretations in cases under article 177 are "binding" on German courts. Obviously someone is neglecting that article 177 is also a part of the treaty and is subject to a referral for interpretation.

A French case has stated categorically that the community court has no jurisdiction under article 177 to decide conflicts between community and national law. If the conflict involves the supremacy of one law over the other where they are contradictory, this statement may be accurate. On the other hand, a traditional conflicts decision of whether community law or national law is applicable to a particular case seems to involve nothing more than an interpretation of the treaty. The French decision went on to hold that the question involved could not raise issues of community law because only French companies were parties to the litigation and because the case concerned French contracts which were not of a nature capable of affecting trade among the member states. Shades of Wickard v. Filburn, the problem is not necessarily that simple. The relationship of community and national law in article 177 cases bears closer scrutiny.


120The court may have an opportunity to rule on this question in a case presently before it styled Schwarze v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel, Case No. 16/65, Journal Officiel des Communautés, 845/65, April 8, 1965.


123Etat Français v. Nicholas, supra note 122, at 558, 2 C.M.L.R. at 244.

124317 U.S. 111 (1942).
2. Relationship of Community and National Law

Some general remarks concerning this topic were made in the discussion of the political context of the communities. We turn now to some specific problems that have arisen concerning the exercise of the article 177 jurisdiction.

In the first case referred to the court under that article, de Geus v. Bosch, a question of the effect of national procedural rules on the community court's jurisdiction was raised. The lower court decision referring questions to the Court of Justice had been appealed in cassation to the Dutch Supreme Court, and it appeared that under national law this appeal suspended the effects of the judgment below. The issue presented to the Court of Justice was whether this suspension deprived it of jurisdiction to answer the interpretive questions posed by the lower court's decision.

Advocate General Lagrange's ingenuity in dealing with this question was boundless. He first suggested that article 20 of the Protocol on the Statute of the Court of Justice might be interpreted to reveal that a referral under article 177 stayed all further proceedings in national courts. Thus, the appeal at the national level would have been in excess of jurisdiction. However, the protocol would not lend itself to that interpretation; only a stay of proceedings in the referring court is there envisaged. M. Lagrange then looked for a common rule on suspension in the laws of the member states which have, at the national level, a referral jurisdiction similar to that contained in article 177. No general rule could be found. He then turned to the provision on suspension in the Dutch Code of Civil Procedure which had raised the issue and found that the suspension involved was of the execution of the judgment. It did not seem likely that a referral for a preliminary decision by the Court of Justice should be considered a measure of execution, for the status of the parties was unaffected. Moreover, if there were any doubt about this question, the doubt itself would constitute an additional reason for not applying the Dutch suspension rule because the Court of Justice may only apply national law that is clear and incontrovertible.

Compared with M. Lagrange's Conclusions the court's opinion was the soul of simplicity. The court relied exclusively on the

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125Case No. 13/61, 8 Rec. 89, April 6, 1962.
126Id. at 118-24.
127Query in what sense the community court may ever "apply" national law.
general proposition that national law and community law form distinct legal systems. The jurisdiction of the community court depends no more on national procedural rules than does the jurisdiction of the national court depend on the EEC Treaty.128 The problem in Bosch was thus solved, but we may well wonder how long this strict dichotomy of legal systems can hold up. For example, in the next case which appeared in exercise of the 177 jurisdiction, van Gend & Loos, the court developed this concept of community law as an independent legal order to show that it creates obligations for individuals and "also gives rise to rights which become part of their legal heritage."129 From this reasoning we may infer that a national law which deprived individuals of their opportunity to enforce these rights, by withdrawing jurisdiction over them from national courts, would violate article 5 of the EEC Treaty.130

As was suggested by M. Lagrange's Conclusions in the Bosch case, the Court of Justice may refer to national law as a means of interpreting community law. When it does so by reference to general principles gleaned from a comparative survey of member-state laws, it develops a community concept distinct from any of the national rules consulted. However, it may also be asked whether certain community norms should have this distinct community significance or should incorporate the particular national-law concepts of the country in which they are being applied. Precisely this question was submitted for interpretation in Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten131 with respect to the concept of "wage-earner or comparable worker" in article 4 of Council Regulation No. 3 on the social security of migrant workers.

The court ruled that these words must be held to have a unified, community content because the purpose of the regulation is coordination of social security schemes in order to secure free movement of workers. However, the interpretation that was given relied on the substantive treatment of classes of persons under the particular national law involved.132 Hence, it was the

128 Rec. at 101.
129 Rec. at 23.
130 "Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims. "They shall abstain from any measures likely to jeopardize the attainment of the objectives of this Treaty." EEC Treaty, art. 5.
131 Case No. 75/63, 10 Rec. 347, March 19, 1964.
132 Id. at 364, 366.
substance of national law that formed the content of the community concept, although that concept would have had a different significance in the national legal system. Community law may also determine which law, among those of several states, shall apply to a situation envisaged by the community law.\footnote{Nonnenmacher v. Bestuur der Sociale Verzekeringsbank, Case No. 92/63, 10 Rec. 557, June 9, 1964.}

The Bosch-type affirmation of separateness solves some problems, but increasingly the issue seems to involve the development of techniques consonant with a necessary integration of legal orders. This relationship underlines the importance of an authentic interpretation of community law by the community court.

The relationship of community and national law also inevitably entails a question of which of them prevails in case of a conflict. In a backhanded fashion that conflict materialized in Costa v. E.N.E.L.\footnote{Case No. 6/64, 10 Rec. 1141, July 15, 1964.} The plaintiff sought to escape payment of his three dollar electricity bill by alleging that the Italian law nationalizing the electricity industry and creating the defendant company was null because it violated certain provisions of the EEC Treaty. The lower Italian court rendered a decision submitting to the Court of Justice the question of whether the disputed law violated EEC Treaty articles 87, 53, 93 and 102.

The submission raised issues cognizable under articles 169 or 170, rather than 177, but clearly it was within the court’s competence, consistent with prior practice, to extract questions of interpretation in connection with the question posed.\footnote{Id. at 1157-58.} However, the Italian Government maintained that even questions of interpretation were “absolutely inadmissible” because the national judge in this case was bound to apply national law. The argument was that any conflict of laws was between two Italian acts, the law ratifying the treaty and the nationalization decree. The resolution of this conflict depended upon Italian constitutional law. The Italian Constitutional Court, on almost precisely the same facts as the instant case, had ruled that under the constitution the latest in time, here the nationalization law, prevailed.\footnote{Judgment of March 7, 1964, Corte Costituzionale, [1964] 87 (I) Foro Italiano 465, 3 C.M.L.R. 425 (1964).}

Even this assertion would not necessarily raise the question of primacy. Aside from the possibility of invoking the relevance doctrine, the court might have been content to reaffirm the “distinct legal order” rationale of \textit{van Gend & Loos} to show, as did...
Advocate General Lagrange,\textsuperscript{137} that the conflict before the national court called into question the separate, community legal system, a showing which allows the national judge who must apply the community law an opportunity to obtain an authentic interpretation whenever he deems it necessary. However, from the language of the court the decision seems to have gone further:

"[T]he transfer, by member-states, from their national order in favor of the Community order, of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail . . . ."\textsuperscript{138}

From this, the court continued, it would follow that article 177 may be applied whenever there is a question of treaty interpretation, national laws notwithstanding.

The court's language leaves little doubt that it was addressing itself to the question of the pre-eminence of community law, but in what sense was it asserting that pre-eminence? Has the court gone so far beyond van Gend & Loos as to decide, not only that subsequent national law does not pre-empt the community law, but also that national courts must apply community law as supreme law? Probably not.\textsuperscript{139}

When the court said, "[S]ubsequent unilateral law, incompatible with the Treaty, cannot prevail," or when it said that regulations, because of their specific original nature as directly effective community norms, "cannot be judicially contradicted by an internal law, whatever it might be, without losing their Community character and without undermining the legal basis of the Community," it was not answering the question of what a national judge should do when faced with such a unilateral and contradictory law. That question was not asked.

As the articles cited in the opinion suggest, the court was demonstrating that community law is supreme in the sense that

\begin{footnotes}
\item[137] 10 Rec. at 1173-82.
\item[138] 10 Rec. at 1160.
\item[139] Contra, Stein, Towards Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case, 63 Mich. L. Rev. 491 (1965). With all due respect to Professor Stein, if the community court gave the Milan judge a ruling that "treaty rights must be given precedence over any conflicting national law," id at 502, and declared the supremacy of community law "not only in the Community legal order but also in the national legal orders and that the supremacy rule is directly applicable by national courts, any contrary national provisions regarding ordinary treaties notwithstanding," id. at 513, it must have done so in a document extraneous to the reported decision.
\end{footnotes}
member-state lawmaking power comes under community supervision and member-state laws can be held to violate the community treaties. Hence, the latter must establish a separate legal order which is supreme within its own system, that is, which is unaffected by changes in national law. This is not to say that the national law has no effect in the national legal system or that the national judge must give preference to community law. The Italian Government did not claim that national law prevailed over the treaty; it claimed that the treaty was national law. The court's argument shows that it is not and that the national, having an independent obligation to uphold it, may always avail himself of the provisions of article 177.

That the foregoing analysis of *Costa* may leave the national judge in a dilemma is not denied. Such are the vagaries of a division of powers without a supremacy clause. The member states affected by this problem can resolve it by amending their constitutions. Indeed, they may be forced to do so or to renounce the community treaties. The only alternative procedure would seem to be a referral by a national court requesting that the Court of Justice interpret the community treaties as a whole to determine whether they envisage such a limitation of the sovereignty of the member states that community law must be given preference in conflicts with national law before national courts.

This procedure would not, however, solve problems concerning national constitutions, such as the one presently germinating in Italy. Several cases have been brought in Italian courts attacking judgments rendered by the Court of Justice in coal and steel matters. The plaintiffs' general approach has been to argue that the exclusive judicial jurisdiction to control the actions of the High Authority given the community court by the European Coal and Steel Community Treaty and the limited grounds of appeal afforded private enterprises thereunder combine to deprive Italian citizens of the guarantees relating to judicial redress against the executive which are contained in the Italian Constitution. The complainants then conclude that the Italian law ratify-

\[140\] See 10 Rec. at 1180 (*Conclusions* of Advocate General Lagrange).
\[141\] A similar question has already been mentioned with respect to the German Constitution. See note 23 *supra* and accompanying text.
ing the treaty is invalid. Article 11 of the Italian Constitution allows reciprocal delegations of sovereignty, but not, it is argued, when such delegations affect other constitutional provisions. The latter result would require constitutional amendment. Two Italian courts have found such claims to be manifestly unfounded, but a third has declined to do so and has referred the question to the Italian Constitutional Court for a decision.

CONCLUSION

It is clear from the foregoing discussion that the community court, in the exercise of both its direct and indirect judicial control, deals with federal issues as they were earlier defined. The court also performs the basic functions of a federal judiciary: it insures the supremacy of the constitution; it promotes uniformity of law; it settles controversies between particular classes of parties. However, the jurisdictional framework for the exercise of these functions is different in all the recognized state federations. In the community, which is far from being a federal state, the jurisdictional framework is in many ways unique.

With respect to the maintenance of the supremacy of the constitution, the powers afforded the community court are oriented more toward review of the acts of the community organs than toward control of member-state interposition. Uniformity of law is promoted only by abstract or quasi-abstract interpretations, and it is dependent upon a recognition by the state judiciary of the need for authentic interpretation. These peculiarities, and others previously mentioned, are a result of a basic fact which permeates the whole of the organization and operation of the communities: the "sovereignty" of France is a very different animal from the "sovereignty" of New Hampshire.

Thus, when one speaks of the federal, constitutional control of the Court of Justice, of federal issues in the court's jurisdiction


and of the performance of federal functions, some liberty is taken with the accepted significance of these concepts as they apply to state constitutional systems. The community court faces problems which are familiar to federal constitutional lawyers, but this familiarity may be seriously misleading. The balance between control and cooperation in the community legal system is very different from that found within a federal state legal system. The essentially cooperative nature of the community enterprise gives these familiar issues a uniquely community meaning and they must be resolved in a similarly novel fashion. The effectiveness of the federal-style, judicial jurisdiction described by the community treaties and of the court's operation in the exercise of that jurisdiction cannot be evaluated fairly in terms of a pre-existing federal model.

From this viewpoint one may recognize the limitations imposed on the court's federal constitutional control and yet say that within the context of the community political structure the jurisdictional provisions of the treaties have provided a workable framework for the exercise of judicial control. However, these limitations may affect the ability of the court to operate effectively in the new structural conditions created by imminent developments. There is, for example, the already agreed merger of executives. The political situation in the community makes it unlikely that a merger of the treaties, as well, can be accomplished in the near future. The problem that the court faced in the Luxembourg Parliamentarians Case144 will certainly be magnified by the duty to oversee and to give a coherent interpretation to the actions of a single executive operating under three treaties.

Another prospective difficulty arises from the manner in which the community may be expected to develop over the next several years. Progress toward full economic union, as envisaged by the Treaty of Rome, must proceed juridically in a different manner than has much of the creation of the customs union. Direct community action must be supplemented by parallel, uniform action on the part of the member states in accordance with community recommendations. The "harmonized" norms thus created will be substantively of a community character, but formally they

144See note 64 supra and accompanying text.
will be national laws or regulations. The community court pres­
ently has no jurisdiction to interpret such norms: Query how long
they can be expected to remain “harmonized” when subject to
interpretation by six, separate, national judiciaries?

The voting procedure in the Council of Ministers is also about
to be changed. From 1966 forward, broad policy decisions, which
could formerly be taken only unanimously, may be adopted by a
weighted majority vote. Although it is doubtful that the council
will suddenly abandon decision-making based on a general con­
sensus among its members, the possibility of important decisions
being taken in the face of serious member-state opposition should
logically be accompanied by an increase in the judicial control
over member-state action.

With respect to the operation of the court itself, two develop­
ments seem especially significant. The first is the court’s use of
the concept of the “separate legal order” of the communities. This
concept has proved itself to be extremely valuable in the context
of the peculiarities of the community organization. “Separate
legal order” is as vague in content as it is pregnant with inter­
pretive possibilities. For present purposes it seems a better basic
category than any of the politically explosive, juridical labels
enumerated earlier. This separate legal order can be defended,
and with it the independence and the possibilities for organic
growth of the communities, without involving the judges in
abstruse, doctrinal quarrels.\textsuperscript{145} It does not always provide the
court with theoretically satisfying answers to specific problems,
but the communities are not tidy juridical structures.

Second, although the Court of Justice has been firm in its defense
of the community legal order and its effectiveness within the mem­
ber states, it has been flexible in its attempt to integrate national
judiciaries into that order. In the face of multifarious and often
perplexing submissions by national judges, the court has refused
to make any rules concerning the form or content of article 177
referrals. It has encouraged the submission of interpretive ques­

\textsuperscript{145}Some idea of the extent of the doctrinal arguments concerning the
“supremacy” question may be obtained from Ipsen, The Relationship
Between the Law of the European Communities and National Law, 2
tions by not requiring either that they be relevant to the national judge's decision, or novel in the jurisprudence of the community court. The court has taken a practical approach to its own jurisdictional limitations, when concern for theoretical niceties might have made its decision meaningless to the national court. The increasing number of referrals by national courts over the period of the court's operation indicates, not only that community activities are generating more litigation, but also that M. Lagrange's "fruitful collaboration" is being established. Perhaps the promotion of this collaboration is the ultimate standard by which the effectiveness of the Court of Justice's manipulation of the cooperative and the control elements in its federal, judicial jurisdiction should be judged.