

Interview with Pierre Pescatore: the influence of individual Judges on the College (Luxembourg, 12 November 2003)

Source: L'apport de la PESC à l'action extérieure de l'Union européenne (discours pour l'Université du Luxembourg)/Université du Luxembourg, cycle de conférences, semestre d'hiver 2006-2007 / JIM CLOOS, directeur des questions de politique générale au Secrétariat général du Conseil de l'Union européenne, prise de vue : François Fabert.- Luxembourg: CVCE [Prod.], 30.11.2006. CVCE, Sanem. - VIDEO (00:45:40, Couleur, Son original).

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Last updated: 09/08/2016

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[Susana Muñoz] Do some members of the Court play a key role in bringing about, or guiding their colleagues towards, a change in relation to existing case-law? The Court's President, perhaps, an Advocate General or the Judge-Rapporteur?

[Pierre Pescatore] That is a very tricky question because it comes close to touching on the confidentiality of the Court's deliberations, but there are some things that I can tell you without breaking my duty of discretion. Within a College, there will always be people of different temperament. The differences that I most clearly perceived were differences in legal outlook and psychological differences. I will leave it to you to assign the individual Judges to those categories.

The first difference that struck me was the difference between what, in the universities, we term the public and the private law enthusiasts. By that I mean jurists with more of a private law bent, interested in the legal issues with which national courts deal, namely civil and criminal law; and the other jurists whose preference is public law and international law. I would say that the latter category has dominated and continues to dominate within the Court of Justice. If you read the *curricula vitae* of the members of the Court, you will see that most come from the private law stable — they tend to be former lawyers, legal practitioners who have been heavily involved with national law — and a minority has a background in international law. I do not think that there is a single international lawyer left at the Court of Justice ... maybe one: the French Judge who comes from the *Conseil d'État* — so from the public law sector — and was a legal adviser at the French Foreign Ministry. He is a well-known international lawyer. Personally, I have always felt a kinship with the international and public law field, and that has always been apparent in what I have written. But that does mean that there is, to some degree, a different way of thinking and a rather different perspective. Public law specialists are rather more inclined to stress public policy issues and questions of general interest. They are interested in the Community's external relations. The others have a far more internal focus.

Moving on to the psychological differences, I thought that I could identify two kinds of temperament among the Judges, and I think that the same applies today. Some are, if I may say so, more dynamic and decisive, they are decision-takers who perceive themselves as Judges. Of course, they are there to listen and familiarise themselves with the matters referred to them, but when problems arise, such problems have to be tackled. They have to be resolved, even if the issues are difficult and controversial. There has to be clarity. The other kind of temperament is that of the more hesitant, more indecisive Judges. They are — and forgive me for employing the term, because I detest it — the compromisers, the ones who see both sides. They are looking for balanced solutions, and, when a new problem suddenly arises, they prefer to begin by avoiding it, by applying a lateral solution and using inadmissibility as a way out. Above all, they like to settle it using the formula that Giscard d'Estaing used to advocate: the 'Yes, but ...' I have always hated both the 'Yes, but ...' and the 'No, but ...' The 'No, but ...' perhaps even more than the 'Yes, but ...' — in any event, I absolutely loathe that approach. I believe that, if a problem arises, if it arises for the first time, one has to face up to it and resolve it clearly so as to provide legal certainty.

That gives me the opportunity to return to the question of U-turns in case-law and adjustments to case-law. An initial decision must always be, and remain, an open decision. We resolve a problem on the basis of our initial appraisal, but that does not mean that we cannot, at a later date, come back to that first solution, which may perhaps have been too general, too apodictic, and introduce refinements, adjustments, changes in direction. I am a believer in what is called cybernetics and feedback, changes in trajectory. That is what happens in the field of space flight: you launch the rocket and then adjust the trajectory according to the information that you receive. I think that that is a better way of developing case-law than the one employed by the perpetual *cunctators*, the ones who hesitate.

I have noticed that in any College — whether it has seven, nine, eleven and now even more members — you are bound to find those two different temperaments. You would probably have no hesitation in pigeonholing me, and it is, above all, on that basis that I shall answer your question. There is no doubt that those who are more decisive can more easily influence a College than those inclined to start by listening and hesitating,

opting for one approach and then changing their mind and opting for the other. They are not the ones who make case-law, nor are they going to dominate in a College of Judges. When I enter a College, my approach has always been to observe my colleagues closely — far more closely than they would have liked — to observe them closely, observe their reactions and try to classify them as decisive or hesitant and then, as far as the hesitators go, see what I can do to win them over to my view. That is not always easy with people of that kind. The approach of one's decisive colleague is, however, quite clear. One must count on them. One is content to have them on board in a difficult case. That is how things pan out within a College of that nature.