Interview with Pierre Pescatore: the introduction of new Judges at the Court of Justice (Luxembourg, 12 November 2003)

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[Susana Muñoz] The Court of Justice consists of one Judge for each Member State. You experienced the arrival of new Judges when the United Kingdom, Ireland, Denmark and Greece acceded. Could you describe the particular problems caused by the fact that these were Judges with different languages and different legal traditions?

[Pierre Pescatore] I'll begin with a general answer to your question and then try to explain how the accession of the United Kingdom, Ireland and Denmark marked a turning point in both our methods and our style. Of course, every Judge brings the whole of his legal background with him. In the beginning, we were all Judges in what I might describe as the Latin mould. We came from legal systems that all derived from Roman law, including even the German Judges; they are trained on the basis of the German Civil Code which, as you know, is very directly derived from Roman law — far more so than the French Civil Code. I would, therefore, say that, legally speaking, the Germans are far more Latin than the rest. The result was that, despite all the variety that you might expect in a College comprising a French, a German, an Italian and three Benelux Judges — one from the Netherlands, one from Belgium and one from Luxembourg — we had a common background in codified, Roman law.

Nevertheless, right at the start, the seven included two Judges from countries whose constitutions had evolved significantly beyond the constitutional developments that had taken place in France and the Benelux countries: namely Germany and Italy. Both those countries had introduced new constitutions after the Second World War, and they were certainly more modern than the earlier constitutions of the other Member States. In particular, they had established constitutional courts. That was, from the very beginning, a new element for the other Judges — it introduced a new aspect of jurisdiction and an awareness that they had the authority to take decisions at a constitutional level.

Then came the first enlargement with the accession of the United Kingdom, Ireland and Denmark. I have to tell you that we were somewhat apprehensive about this, wondering what they intended to do. 'Do they intend changing everything, turning things upside down, calling everything into question?' Fortunately not! We were agreeably surprised to discover that they came in a spirit of absolute cooperation. It was a matter of personal choice.

The United Kingdom sent Lord Mackenzie Stuart, a Scot — not an Englishman — in other words from a country that nevertheless had a distant background in Roman law.

Ireland sent us the country's most senior Judge, Judge O'Dalaigh. He had been a highly respected Chief Justice in Ireland and was very keen on European integration. He came to us in a clear spirit of goodwill, speaking French, although his background was in English and then Gaelic. He was, it seems, one of the few Judges in Ireland who could speak Gaelic. So, he had already distanced himself from the language usually spoken in Ireland: with us, he spoke French.

Denmark sent us Judge Sørensen. He was highly respected in international circles, and he, too, spoke French well.

They joined us in a positive spirit and were willing to cooperate in the College. Initially, it seemed to me that they were observing what was going on until the day when, in the context of some deliberation, Judge Sørensen somehow interrupted the discussion and said: 'But what are you talking about, and what language are you using?' At the time, the Court was in the habit of speaking in what was then described as *imperatoria brevitas*. We were modelling ourselves on the French *Conseil d'État* and Court of Cassation. The Court of Cassation may be elliptical in its decisions, but that is nothing compared to the *Conseil d'État*, whose decisions include barely any grounds. The aim is to encapsulate the whole concisely and generally. And so it was the newcomers who made us realise that the public did not understand that style and that, if we wanted to make ourselves understood, we had to provide more extensive explanations and be more discursive in the grounds for our decisions. The message was — although, personally, I am not keen on this rather didactic

expression — that, to some extent, we needed to educate the public. We are not, in fact, there to educate the public, but we are there to explain things, and so, from then on, the Court abandoned the formula 'Whereas … whereas … and so on'. I am sure you know that the ideal judgment in French simply reads: 'Whereas … on those grounds … off with his head or send him to prison.' That is how justice operated. We abandoned the famous 'whereas' clauses. I was rather sorry about that because when, faced with a blank page, once I'd written 'whereas', the rest followed almost automatically. I lost that word, and so I had to begin by setting out the case.

That is how the new Judges became integrated with us. Our style certainly improved from then on, but there is a more serious question that was raised by the English lawyers, in particular, when they subsequently visited the Court: I heard them ask it on more than one occasion. They asked the United Kingdom Judges: 'What have you been able to do in order to have common law incorporated into the system of Community law?' I can still recall my poor colleague's predicament, because we were finding that, basically, aside from the external forms and methods, the legal systems were very similar, sharing the same historical and ethical roots. Consequently, our poor British colleagues — because there was also an Advocate General who was actually English — had difficulty explaining and usually said: 'Since our arrival, there has been greater reference to the Court's case-law than previously.' I think that that was a mistake, because the Court never adopted the rule of precedent which still holds sway in the system of common law. The real change came later, with the advent of the computer, because, once a database had been set up for the Court of Justice, it was possible to call up all case-law back to the very beginning. […] But that came long after the arrival of those Judges, which happened before the days of the computer. The computer did not arrive until late in my own career, so I came into contact with it only in its very early days. But, once we had computers, whole lists of earlier decisions began to appear in judgments.

Since I have the pleasure of talking with a lawyer, let me explain to you the method by which case-law was selected, which I then took with me to the Administrative Tribunal of the International Labour Organisation in Geneva. When the database provides an excessively large number of precedents, you have to make a choice. The first option would be to take the earliest precedent, but that is possible only if it is sufficiently clear. If you are fortunate enough to find that the earliest precedent is sufficiently clear, you should cite it to show that this is long-standing and well-established case-law. The second option is to take the most recent decision, relying on the fact that it will refer back to other precedents, and the reader will, therefore, be able to follow them back to the earliest decisions. Under the third option, if the series of decisions includes what I would call a codifying judgment, that is to say a judgment in which the case-law has been summarised and the essential elements given due prominence, you choose that precedent.

You follow the logic. But I think that the first change was from the cant, the *imperatoria brevitas*, to a clearer, more explanatory style, and that is the style the Court still uses.

Greece acceded at a later date, and a Greek Judge joined us. There too, we were fortunate with the selection of the first Greek Judge, Judge Chloros. Unusually, he came from the Greek Diaspora and, in fact, lived in the United Kingdom; he was as much English as he was Greek. That made it very easy to integrate Greece into the system. Sadly, he died one weekend. I remember that he was in good health when we parted on Friday, but on Monday, we learnt that he had died on an aeroplane that was transferring him from Luxembourg to a London hospital. Thereafter, the Greek Judges came directly from Athens.