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Between Precedent and the Present

Re-thinking the precedential impact of preliminary rulings of the Court of Justice on national courts

1. Introduction

The issue of the effect and the authority of preliminary rulings by the Court of Justice - in short, "precedent in EC law"[2] - is an evergreen of EC legal studies. The topic is dealt with by all the textbooks and has also been analysed and debated in a large number of special doctrinal studies.[3]

Akin to many other important issues of EC law, no Article in the EC Treaty prescribes either the effects or the authority of the preliminary ruling of the Court of Justice under Article 234 regarding national courts4 or within the legal orders of the Member States generally. As a consequence, the authority and effects of preliminary rulings are the products of judicial development by way of the case law of the Court of Justice under Article 234. As should be well known, Article 234 establishes a form of judicial dialogue between national courts and the Court of Justice in allowing national courts to ask the Court of Justice which interpretation should be given to relevant Community law pro-

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[2] For the use of this term, see eg Craig - de Búrca, EU Law. Text, Cases, and Materials, Second edition, Oxford 1998, pp. 414-420 and Hartley, T.C: The Foundations of European Community Law, 4th edition, Oxford 1998, pp. 291.

[3] Eg Anderson, D., References.to the European Court, Sweet & Maxwell 1995; Arnull, A., Owning up to Fallibility: Precedent and the Court of Justice, Common Market Law Review, 1993, 247-262; Bebr, G., Preliminary Rulins of the Court of Justice: Their Authority and Temporal Effect. Common Market Law Review, 1981, pp. 475-507; Jacobs, F., The Effect of Preliminary Rulings in the National Legal Order, in Article 177 References to the European Court - Policy and Practice, Andenas, M. (ed.), 1994, pp. 29-29; Joutsamo, K., The Role of Preliminary Rulings in the European Communities, Helsinki 1979; Ojanen, T ., Ennakkoratkaisumenettely. Helsinki 1996, pp. 175-189; Toth, The Authority of the Judgments of the European Court of Justice,: Binding Force and Legal Effects, Yearbook of European Law, 1984, 1-77; Trabucchi, A., L'effet *erga omnes* des decisions préjudicielles rendues par la CJCE, Revue trimestrielle de droit européen, 56, 1974, pp. 56-87.

[4] In this article, the term "national courts" refers to all those courts and tribunals of the Member States which are able to refer questions of Community law for a preliminary ruling by the Court of Justice under Article 234. For which courts and tribunals are covered under Article 234 see eg Anderson, supra note 3, pp. 29-49. ,

visions. In addition, national courts may inquire about the validity of acts of Community institutions, ie. regulations, directives and decisions or international treaties concluded by the Community .[5]

In the following analysis, I shall first approach the topic through a doctrinal prism. However, the intention is not to march along well-trodden paths but to offer a brief recapitulation which may help the reader to glean fully the internal argument of the rest of this article which extends beyond standard doctrinal positions.

In essence, the argument may be encapsulated as follows: national courts cannot entirely mechanically and passively adhere to the case law of the Court of Justice although they must take it into consideration. National courts must also give serious attention to the possibility that this case law may cease to be relevant to the present condition of Community law and European integration generally. The argument is illustrated by cases having an environmental protection element as these cases appear for both legal and extra-legal reasons particularly susceptible to this critical approach of national courts. However , my argument will also be that European courts - that is, the Court of Justice and national courts - cannot get the job done alone.[6] The responsibility for amending out-of-date case law to suit new developments should also be assumed by academic lawyers, the Bar and the intervening Member States and the Commission before the Court of Justice under Article 234.

2. The doctrine

The silence of the Treaty of Rome establishing the European Economic Community (currently the European Community) meant that issues concerning the authority and effect of preliminary rulings on national courts started to emerge incrementally and piecemeal via the case law of the Court of Justice.

In retrospect, the overall pattern of development of these issues also appears quite paused and prolonged as it has often taken many years until a cycle of further development has been engendered by new rulings. However , these characteristics generally label this mode of laying down and elaborating law: while legislation may be seen as a deliberate creation, judicial "law-making" is only vaguely so. In fact, the latter appears more or less haphazard and inarticulate. In addition to the restraints that the judicial role generally provides, judges cannot originate proceedings, but must wait for cases to be

[5] For measures of Community law which may be referred, see in more detail eg Anderson, supra note 3, 50-66.

[6] For national courts as the European Courts of Justice, see especially Slaughter, A-M. & Stone Sweet, A. and Weiler, J.H.H., The European Court and National Courts - Doctrine and Jurisprudence, Oxford 1998, pp. v-xiv.

brought to them. Futhermore, the courts must, by and large, decide the issues brought before them.[7]

The starting-point of the development of "precedent" can be traced as far back as the case of *Da Costa en Schaake,* one of the the very first references decided by the Court of Justice under Article 234.[8] In this case, decided in 1963, the Court let it be understood that the Court of Justice restates the substance of its earlier case law, unless a new reference by the national court does not raise some new factor or argument. According to commentators, the *Da Costa en Shaake* already served to introduce a *de facto* system of precedent into Community law.[9]

From its antecedents in *Da Costa en Schaake,* the doctrine of precedent has evolved towards its more mature phases especially as a result of such cases as *Milchkontor,*[10] *CILFIT,*[11] *International Chemical Corporation*[12] and *Fata-Frast.*[13] Extrapolating from these cases and certain other rulings, as well as their accompanying legal literature, the following parameters can be regarded as criterial for the authority and effects of preliminary rulings.[14]

(I) There is no legal doctrine of *stare decisis* or binding precedent in a strict sense. Thus, the Court of Justice does not consider itself bound to follow its own previous rulings, although it usually follows its previous decisions and also refers to them in many instances.[15]

Keck is one of the most dramatic examples of rulings entailing a departure from the earlier case law of the Court ofJustice.[16] In *Keck,* the Court of Justice reversed its earlier case law under Article 28, which culminates in the following statement: "... contrary to what has previously been decided, the application to product from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly

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7 See also C-22/79 Greenwich Film Production v SACEM [1979] ECR 3275, para 10: " Article 177 [currently 234] of the Treaty does not confer on the Court jurisdiction to rule on questions that have not been referred to it." However, the importance of this limitation must not be overemphasized. The Court of Justice has always been quite efficient in finding ways around this restriction by reframing the references of national courts or by otherwise ruling on points of Community law not raised at all before it by the referring national courts. See Anderson, supra note 3, pp. 288-292.

8 Cases 28-30/62 Da Costa en Schaake NV [1963] ECR 31.

9 Craig-de Búrca, supra note 2, p. 423.

10 C-29/68 Milchkontor v Hauptzollamt Saarbrucken [1969] ECR 165.

11 C-283/81 SrI CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415.

12 C-66/80 International Chemical Corporation v Amministrazione delle Finanze dello Stato [1981]ECRI191.

13 C-314/85 Firma Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199.

14 The transpiring discussion do not exhaust the effects of preliminary rulings. The study could be broadened to consider more generally the effect of preliminary rulings on the national legal systems of the Member States and on the relations between Community law and national law.

15 Eg Anderson, supra note 3, p. 301. See also Hartley, supra note 2, pp. 75 and 76. The Court of Justice may also cite its previous rulings in order to distinguish them. See eg C-127/97 Eco Swiss China Time Ltd v Benetton International NV [1999] I-ECR, para 40.

16 C-267 and 268/91 Keck and Mithouard [1993] ECR 1-6097.

or indirectly, actually or potentially, trade between Member States within the meaning the meaning of Dassonvillejudgment (case 8/74 [1974] ECR 837), so long as they affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States."[17]

(II) A preliminary ruling given by the Court of Justice is binding on the national court which made the reeference. As has been held by the Court of Justice: "The purpose of a preliminary ruling by the Court is to decide a question of law, and that ruling is binding on the national courts as to the interpretation of the Community provisions and acts in question.".[18]

Doubtless, national courts hearing appeals from the case in which a reference has been made are also bound by a preliminary ruling.

No matter what the national rules of precedent may provide, the lower domestic courts are not bound by any decision of a higher court in a given Member State on a question of Community law.[19] And even if a higher national court obtains a preliminary ruling from the Court of Justice on a question of Community law, the lower national courts would be bound by that preliminary ruling only rather than by the higher court"s decision itself.[20] Moreover, even the lowest national court always remains free to make a reference if it wishes, and even if the Court of Justice has already decided the issue.

(III) The case law of the Court of Justice is deficient in explicit and definitive statements regarding the authority and effects of its preliminary rulings on the *interpretation* of Community law on other national courts, ie., courts other than those involved with the case in which the reference was made.

However, several strong arguments coalesce to support the position that, as a matter of Community law ,[21] *all* national courts are bound to the case law of the Court of Justice.[22]

First of all, this position follows from Article 10 EC embodying the so-called loyalty or cooperation principle.[23] This Article is binding upon all the

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17 *Keck,* para 16. For effects of *Keck,* see eg Craig - de Búrca, supra note 2, pp. 618-627, and literature cited therein.

18 C-52/76 *Benedetti* v Munari F.lli s.a.s [1977] ECR 163, paras 24-27. See also *Milchkontor,* supra note 10, paras 2-3.

19 This point was confirmed by the Court of Justice in the context of the *Rheinmühlen* cases. See C-6/71 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstelle fur Getreide und Füttermittel [1971] ECR 823; C-166/73 [1974] ECR 33; and C-146/73 [1974] ECR 139.

20 See eg Hartley, supra note 2, pp. 271 and 272.

21 The case law of the Court of Justice may also be binding on national courts as a matter of *domestic law.* This is the case in the United Kingdom where section 3(1) of the European Communities Act incorporating Community law part of the law of the land provides that questions of EC law, if not referred to the Court of Justice for a ruling, must be decided in accordance with the principles laid down by any relevant decision of the Court of Justice. See eg Shaw, J., Law of the European Union, 2nd edition, 1996, p. 254, and also noting that the Court of Justice is thus inserted at the apex of the system ofbindingjudicial precedent in the United Kingdom.

22 See also Shaw, supra note 21, p. 245 and Craig - de Búrca, pp. 423 and 424.

23 Article 10 EC provides: "Member States shall take appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall faciliate the Community's task. They

authorities of the Member States, including national courts. The Court of Justice has relied upon it as a major *written* legal basis for obligations imposed on national courts.[24]

Furthermore, the precedential impact of the case law of the Court of Justice regarding all national courts is justified by the principles of legal certainty and the domestic uniformity of Community law .[25] These fundamental objectives have structured the overall approach of the Court of Justice from the classic *Van Gend en LOOS*[26] case onwards and, accordingly, permeate the development of nearly all distinctive constitutional attributes of Community law. Here, it suffices to refer to the reasoning of the Court of Justice in the context of such case law which gives rise to the doctrines of primacy, direct effect, indirect effect and State liability of Community law .[27]

According to the established case law of the Court of Justice, the authority of an interpretation provided by the Court of Justice under Article 234 may also revoke the obligation of national courts according to the meaning of the last paragraph of Article 234 to make a reference. This is especially the case when the interpretive question raised is substantially the same as a question which has already been the subject of a preliminary ruling in a similar case.[28]

All remaining doubts regarding the binding nature of preliminary rulings are, I think, removed by the case law of the Court of Justice concerning Member State liability. To start with, one of the three conditions under which the Member State liability may be incurred is that the breach of Community law is "sufficiently serious". The essential point is that this criterion is automatically fulfilled if a breach of Community law has persisted despite, *inter alia,* a preliminary ruling or settled case law of the Court of Justice in which it is clear that the conduct in question constituted an infringement.[29] Furthermore, a failure of a national court to abide by the case law of the Court of Justice can, in principle, be subject to action for infringement of Community law by a Member State under Articles 226 and 227. Thus, there seems to be no way of

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shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty."

24 For the use of Article 10 EC, see especially Temple Lang, J., Community Constitutional Law: Article 5 EEC Treaty. Common Market Law Review, 27, 1990,pp. 645-681. See also Shaw, supra note 21, p. 245, inferring the legally binding nature of the Court of Justice's case law from Article 10 EC.

25 See also Anderson, supra note 3, p. 311.

26 C-26/62 [1963] ECR I.

27 For the development of these doctrines from their incipient steps towards their more mature stages, see Ojanen, T., The European Way. The Structure of National Court Obligation under EC law. Saarijärvi 1998. This was my doctoral thesis for fulfilling the requirements for the degree of Doctor of Law. I defended it in December 1998.

28 See *CILFIT,* supra note II, para 13. For more recent case law, see C-337/95 Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV I-ECR [1997] para 29. For national courts falling within the category of national courts and tribunals within the meaning of Article 234(3), as well as exceptions to the obligation to refer, see eg Anderson, supra note 3, pp. 155-175.

29 See C-46/93 and C-48/93 Brasserie du pêcheur Sa v Germany, and R. v Secretary of State for Transport, ex parte Factortame Ltd, and others [1996] ECR 1-1029, para 57.

escaping the conclusion that all national courts are bound by the case law of the Court of Justice under Article 234.

(IV) As far as rulings on validity are concerned, the well-established starting-point is that, *as a matter of Community law,* the Court of Justice has alone the power to declare an act of an EC institution invalid.[30] As a consequence, a ruling declaring a Community measure to be void is a "sufficient reason for any other national court to regard that act as void," although this judgment is directly addressed only to the referring national court.[31] It also follows from the very nature of such a declaration that a national court may not apply the act declared to be void.[32]

(V) The binding effect of a preliminary ruling is attached to the entire so-called operative part of the ruling. However, the operative part must be understood in the light of the reasoning on which it is based. In English terms of precedent, one might say that the main body of the judgment encapsulates the *ratio decidendi* of a preliminary ruling; ie. as any rule of law explicitly or implicitly treated by the Court of Justice as a necessary step in reaching its conclusion.[33]

(VI) However, certain factors qualify the authority and binding effect of the Court of Justice"s preliminary rulings:

First of all, a preliminary ruling *never* precludes a national court from making a new reference if it considers such a reference to be necessary in order to render a judgment in the main proceedings. It does not matter whether a question referred to the Court of Justice is manifestly identical to a question on which the Court of Justice has already ruled. All national courts nonetheless remain completely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.[34] The Court of Justice may then either give a new ruling on the point reversing more or less its previous case law. Or, alternatively, it renders its decision by reasoned order in which reference is made to its previous judgment.[35]

Furthermore, the competence of the Court of Justice under Article 234 should be remembered: The authority and effects of its preliminary rulings are confined to questions of interpretation of Community law or questions of

30 This was made explicit in *Folo-Frost,* supra note 13. Especially the Constitutional Courts of Germany and Italy have challenged this view - and other closely related views - of the Court of Justice by retaining their competence to state in light of their national constitutions what constitutes the valid law of the land in Germany and Italy. See eg de Witte, B., Sovereignty and European Integration: the Weight of Legal Tradition. In Slaughter, Sweet and Weiler (eds.), The European Courts & National Courts, Oxford 1998, pp. 277-304.

31 *International Chemical Corporation,* supra note 12, para 13.

32 Ibid., para 12. See also C-162/82 *Cousin* [1983] ECR 1101.

33 Anderson, supra note 3, pp. 312-314.

34 Eg *CILFIT,* supra note II, para 15.

35 See also Article 104(3) of the Rules of Procedure. In practice, the Court also informs the national court by letter from the Registrar than an earlier judgment has answered its question, thereby offering an opportunity for the national court to withdraw its request. See Lenaerts, K. & Arts, D., Procedural Law of the European Union, 1999, p. 133.

validity of Community acts. However, the force and significance of this point should not be overemphasized. For one thing, the notion of interpretation has a broad meaning in Community law, as it also encompasses the domestic legal effects of Community law in the national legal systems.[36] That is why, for instance, such an elementary doctrine of EC law as the doctrine of direct effect has managed to evolve under Article 234.[37] Another reason not to overemphasize the importance of the restricted competence of the Court of Justice under Article 234 is that the division of competence between the Court of Justice and the national courts has been blurred over the years. In general, the rulings of the Court of Justice have approximated rulings of application - something which first and foremost relates to the impossibility of distinguishing coherently and consistently between interpretation and application of Community law, rather than implying the "activism" of the Court of Justice.[38]

Finally, there may be temporal limitations upon the effects of preliminary rulings. As a rule, the effects of interpretive rulings have their effect *ex tunc,* ie. from the date that the provision which is being interpreted entered into force.[39] According to the Court of Justice, its preliminary ruling on interpretation "clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the [national] courts even to legal relationships arising and established before the judgment ruling on the request for interpretation."[40]

But quite exceptionally the Court of Justice may, usually in the interests of legal certainty, limit the temporal effects of its rulings so that they do not extend to periods prior to the date of its judgment, though in most cases it makes an exception for those who have already brought legal proceedings or made an equivalent claim.[41] Any such limitation will always be laid down in the ruling itself and, accordingly, by the Court of Justice.[42] As regards rulings on

36 See also Hartley, supra note 2, p. 259.

37 The question of whether or not the direct effect of a certain provision of Community law may be found appropriate has been a standard question posed by national courts in the history of the Article reference procedure.

38 Eg Craig - de Búrca, supra note 2, p. 449.

39 Eg C-61/79 Amministrazione delle Finanze dello Stato v Denkavit Italiana [1980] ECR 1205, para 16. In more detail, see Anderson, supra note 3, pp. 317-323.

40 C-61/79 Amministrazione delle Finanze dello Stato v Denkavit Italiana [1980] ECR 1205, para 16.

41 This was done first in the famous *Defrenne* case recognizing, inter alia, the horizontal direct effect of Article 141 EC guaranteeing equal pay for equal work. See C-34/75 Defrenne v Sabena [1976] ECR 455. More recently, this was practiced in what is also a leading case concerning Article 234: *Barber*. In that case, the Court of Justice ruled that Article 141 also applies to occupational pensions. In addition, it held that the different pension entitlements on redundancy for men and women were in breach of that Article. See C-262/88 Barber v Guardian Royal Exchange Assurance Group [1990] ECR 1-1889.

42 Denkavit Italiana, supra note 38. See also Anderson, supra note 2, p. 319.

invalidity,[43] the Court of Justice may also rule that an act is valid for the past but invalid for the future.[44]

In conclusion, the essence of the authority and effect of preliminary rulings can perhaps be condensed into the following statement: all national courts are bound by the case law of the Court of Justice, but this does not prevent them from making a reference, if they wish, even if the Court of Justice has already ruled on the point.

2. Beyond doctrine: the importance of references petitioning the Court of Justice to reconsider its case law

The prevailing trend in the literature is characterized by its tendency to emphasize heavily the precedential impact of the case law of the Court of Justice on national courts to the extent that the other side of the coin - the ability of the national courts to make a reference, even if the Court of Justice has already ruled on the point - is greatly minimized or even pales into insignificance. To be sure, even when this possibility is mentioned, it is done nonchalantly and without any further elaboration. As a consequence, one might in fact almost go so far as to say that all national courts are bound to decide cases in accordance with the case law of the Court of Justice.[45]

However, if national courts do nothing else but passively and mechanically adhere to the case law of the Court of Justice, this eventually will result in excessive conservatism and also severely inhibit the development of Community law. After all, the Court of Justice cannot revise its case law on its own iniative to make it up-to-date. As with other courts, the Court of Justice cannot originate proceedings. Instead, it must wait for national courts to bring references to it under Article 234.

It is therefore important to underscore that national courts should also be ready to consider seriously the possibility that the case law of the Court of Justice has become more or less obsolete with the passage of time and, therefore, is in need of reconstruction. If the conclusion is affirmative, national courts must make a reference, inquiring whether the old case law of the Court of Justice is still truly most appropriate to the circumstances in question and, accordingly, fully and accurately embodies the meaning which a national court is seeking. In this way, a cycle of complementarity is engendered in which references and case law give rise to one another, thereby guaranteeing the development and dynamism of case law and Community law generally.

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43 If the Court of Justice has ruled in favour of the validity ofa Community act, no question of temporal effect can arise.

44 Eg C-4/79 Providence Agricole de la Champagne v ONIC [1980] ECR 2823. See also Anderson, supra note 3, pp. 321-323.

45 Eg Shaw, supra note 21, p. 245: "... it must follow from Article 5 [currently 10 - TO] EC that all national courts are bound to decide cases in accordance with the case law of the Court of Justice". See also Craig - de Búrca, supra note 2, p. 418: "A decision of the ECJ will, therefore, have a precedential impact on all national courts within the Community, and this serves to enhance the status of the ECJ itself as the supreme court within the Community system."

The case law of the Court of Justice also reminds us of the dynamic nature of Community law. In *CILFIT,* the Court of Justice underscored: "Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and *to its state of evolution at the date on which the provision in question is to be applied.* [italics - TO]"[46]

In essence, the statement illuminates the following general rule of Community law interpretation which is supremely significant: the interpretation of Community law is a matter of contextual, moment-to-moment construction in which the present state of the evolution of the Community is ultimately decisive. Therefore, the interpretation of Community law *is not necessarily determined by prevailing interpretive orthodoxy.* As the context in question changes, an interpretation that was initially relevant may cease to be so.

What light do these observations possibly shed on the role of national courts? On close consideration, the following inferences can be made.

First of all, national courts must be very careful not to fall into the trap of treating the case law of the Court of Justice as a set of basically fixed and absolutely invariant source of knowledge of Community law. In taking this case law into account, national courts must at the same time be ready to give serious attention to the possibility that it may cease to be relevant for the present condition of Community law. There are no absolutely invariant elements in law, and this applies to Community law as well as to the case law of the Court of Justice. It is only that some elements of law endure longer, whereas others decay more rapidly. We might thus say that national judges are in a position that is in essential ways similar to where scientists stand when they begin their inquiries: They should know the old ideas. But they should also be ready to see new distinctions so that much of what has been thought to be basic in the old ideas may be perceived to be more or less appropriate and applicable, but not of primary relevance any longer .

It is also important that this critical, inquiring attitude of national courts is continually interwoven with their readings of the case law of the Court of Justice. Therefore, the approach advocated here cannot be delayed for so long that the whole situation becomes confused and chaotic, eventually requiring the revolutionary destruction of prevailing interpretive orthodoxy to clear it up. It is better to keep the structure of change of law balanced, deliberate and smooth. However, this is not to lead to the denial of the importance of the case law of the Court of Justice. Indeed, it may even be said that adherence to the case law of the Court of Justice may generally be considered to be the primary duty of national courts, while this critical, questioning approach advocated here may be thought to be a secondary one that only takes place when the primary obligation - deciding an issue of Community law in accordance with the case law of the Court of Justice - seems to be really inappropriate as this case law no longer appears to be applied coherently to present circumstances.

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[46] CILFIT, supra note II, para 20.

Furthermore, time appears to be more than ripe for references by national courts examining, to what extent, if any, the old case law of the Court of Justice is still relevant. Today, the Court of Justice"s case law is vast in scope and rich in detail. It consists of thousands, rather than hundreds, of preliminary rulings. However, Community law and European integration generally have been in a constant state of flux from the very outset, although the development has also engendered a number of relatively stable rules, principles, concepts, doctrines, structures, etc. Indeed, dynamism and change are eventually the only constants in EC legal affairs. If we look back on the history of Community law, we cannot escape concluding that *what is* is eventually subject to the process of change, while all rules and principles, concepts, doctrines, etc. are forms that can be abstracted from this process.

To take but one example: the concept of direct effect was established a long time ago, but its meaning has changed significantly over the years. Initially, its cardinal idea was founded on the creation of rights of individuals and, more generally, on the individual-centred perspective. However, this original understanding has gradually undergone erosion. Although its central thrust remains vital even today, the creation of individual rights is currently just *one* facet of the concept of direct effect. Not even the individual-centred perspective can any longer be treated as exclusive or even primary. Currently, the concept of direct effect must be gleaned through an intersection of the perspectives of the individual and the national court, and ultimately the very core of direct effect converges on the idea *ofjusticiability,* with the consequence that insights into direct effect are crucially dependent on an appreciation of the national court perspective.47

Finally, something needs to be said about the next step following a conclusion by a national court that the case law of the Court of Justice no longer appears to be most appropriate to the present state of Community law and European integration generally: if a national court really takes this view and considers a reference necessary, it cannot go on interpreting the relevant Community law provision in a qualitatively new way on its own. In the Community judicial system, " Judge Hercules" is not a national judge. Instead, it is the Court of Justice who must be the final authority as regards questions of interpretation and validity of Community law. In any case, this is the only way of preventing a body of national case law not in harmony with the case law of the Court of Justice from coming into existence in any Member States, thereby jeopardizing the effective application and uniform intepretation of Community law in all the Member States.

Therefore, a national court must ask the Court of Justice to reconsider its case law, and then recede into the background. It is then up to the Court of Justice to decide whether or not changed circumstances really warrant a new intepretation. Yet, it is important to emphasize that the first, and one of the most critical, steps on the road to change of Community law is taken when a national

47 See in details, Ojanen, T ., The Changing Concept of Direct Effect of European Community Law, European Review of Public Law (forthcoming in winter 2001).

court asks the Court of Justice to reconsider its case law. For this is the only way of allowing the Court of Justice to review its earlier interpretations, as the Court of Justice cannot act on its own but must wait for a reference - or a case under other Treaty proceedings - to be submitted for adjudication.

3. Exemplifying the argument: cases having an environmental protection element

Cases having an environmental protection element present, I think, a particularly vivid illustration of instances in which room is open for this type of inquiring approach of national courts. Of course, it would be dogmatic to insist that these cases exhaust all of the possibilities of deriving use from this approach, but there are special reasons for giving the example on cases including an environmental protection element.

To start with, there have been significant changes in the normative status and weight of environmental protection in Community law during recent years. At least equally important, it is high time to take environmental protection and the preservation of flora and fauna seriously in the European union, including its legal order. Our communities, including the European Union and the European Communities, are only as healthy as the air we breathe, the water we drink and the food we eat. However, the situation looks more worrying every day. In fact, it is quite bad already. Every day we hear more and more about the toxins that threaten us, about declining safety of our food, and about the extinction of mammals, birds and plants. And the vast majority of scientists also seems to have concluded unequivocally that if we do not do something about the emission of greenhouse gases, at some point in the future our children and grandchildren will be at risk. Thus from this vantage point, I regarded it as more than appropriate to highlight my argument by providing examples of cases containing environmental protection issues.

First of all, it is significant to note that the normative significance of environmental protection has gradually increased in Community law.48 We may regard the entry into force of the European Single Act in 1987 as signalling a watershed because it was not until that Treaty that the comptence of the Community in the field of environmental policy was definitively confirmed at the level ofEC Treaty Articles, in Title VII to Part Three of the ECC Treaty.

True, this is not to imply that it was not until the late 1980s that the activities of the Community institutions extended to the field of environmental protection. The flow of directives and other Community measures of more or less apparent environmental protection implications already took effect in the early 1970s. However, at the time environmental protection was conceived of as an obstacle of trade and the free movement of goods, rather than as a central and independent goal as such.

48 For a concise overview, see eg Kapteyn, P.J.G. and Verloren van Themaat, P., Introduction to the Law of the European Communities, 3rd ed, 1998, pp. 1086-1103.

Post the European Single Act, the normative weight and significance of environmental protection increased in the late 1980s and early 1990s. Aside from directives and other legally binding measures, attention also deserves to be focused on that host of "soft-law" -measures in the form of environmental Action Programmes and the like adopted by Community institutions.

Yet, it was not until the entry into force of the Amsterdam Treaty on 1 st May 1999 that the promotion of "a high level of protection and improvement of the quality of the environment" definitely become one of the principal objectives of the Community. In addition, Article 6 of the Treaty requires that the protection of the environment be integrated into the definition and implementation of Community policies and activities.[49]

Against this setting, there is now a good case to argue that the demand of environmental protection should today penerate the Community legal order as a whole and, accordingly, organize and shape judicial constructions of individual Community measures. Indeed, it might even be said that, akin to fundamental rights arguments, environmental protection considerations feature as the architectonic or paradigmatic parameters of Community law that penerate and shape that law.

However, the bulk of the Court's case law in such "environment-relevant" fields of Community law as the free movement of goods, competition law, state aid or public procurement go back to the era during which the protection of the environment clearly lacked its present normative status, significance and weight. Thus, this is the reason why national courts should today give careful attention to the possibility that the case law of the Court of Justice may cease to be entirely relevant in these fields of law. And if they, in fact, consider it appropriate, national courts should make references, thereby giving an opportunity for the Court of Justice to reconsider its case law in light of the present circumstances, penerated by the need to take the protection of the environment seriously. In this way, case law and Community law generally hopefully will become rooted more firmly in principles safeguarding the environment and nature. To be sure, the market along with free trade and competition may be a marvelous thing, but we also need a clean environment, safe food and the protection of nature. If we look further ahead, this becomes even clearer, I think.

It is against this background that I also regard a relatively recent reference by the Finnish Supreme Administrative Court in the case of *Stagecoach Finland* as particularly appropriate and important.[50] In this case, the Supreme Administrative Court of Finland has, in essence, asked to what extent, if any, is it possible to take into consideration environmental protection factors in the application of the Public Procurement Directives. The relevant directives are practically silent on the issue.

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[49] For the centrality of environmental protection in the European Community Treaty nowadays, see also Craig and de Búrca, supra note 2, p. 35. See also Kapteyn and Verloren van Themaat, supra note 48, pp. 1086-1 090.

[50] C-513 Stagecoach Finland v Helsingin kaupunki ja HKL -bussiliikenne, pending before the Court of Justice.

As far as I am concerned, this is by far the best reference up to now by the Finnish courts under Article 234 as it offers the opportunity for the Court of Justice to decide an important legal issue which may also further develop Community law generally. Given also the current time-delays and work-load in the Court of Justice, it is important that the Court of Justice focus on hearing and deciding the important cases which potentially may develop Community law and that national courts increasingly decide the less important cases by themselves, without recourse to the Court of Justice under Article 234.

4. Conclusion: to amend out-of-date case law to adjust to new conditions is a common obligation

Extensive and intensive academic work has been done to clarify issues dealing with the authority and effects of rulings of the Court of Justice.

However, the precedential impact of the case law of the Court of Justice has been underscored so heavily that this has come at the expense of the ability of national courts to ask the Court of Justice to reconsider its case law. National courts cannot merely adhere mechanically to the case law of the Court of Justice. They should also remember that the interpretation of Community law is a matter of contextual, moment-to-moment construction - and therefore not necessarily determined by the prevailing interpretive orthodoxy as brought to attention by the case law of the Court of Justice.

In conclusion, national courts no doubt must take into consideration the case law of the Court of Justice, but they are under no obligation to follow any particular precedent because they should also consider whether this case law is truly relevant to present conditions.

And I hasten here to add that the time has now come for national courts to assume a critical attitude: In earlier phases of Community law, it sufficed for national courts to inquire about the existence of a certain principle or a rule in Community law. However, the case law of the Court of Justice abounds today. Although there is still room for references aiming at clarifying the precise scope or function of a certain already established principle or a rule, it is equally important to start asking today to what extent, if any, is the case law of the 1960s, 1970s, 1980s and even 1990s still applicable in the present state of evolution of EC law and European integration in general.

Certainly, it is first and foremost the Court of Justice which must be careful not to be trapped into yesterday's thinking. In the Community judicial system, the Court of Justice is the one who can - indeed, must - break with old ways of thinking and solving legal issues and embark on a new course.

However, the Court of Justice cannot get the job done alone. It is *reactive:* it must wait for a reference by the national courts under Article 234. That is why responsibility must be borne by many other actors and parties as well.

First of all, the role of national courts seems particularly important. Even the humblest national judge has to decide for her/himselfwhether the case cited to him/her embodies the most appropriate norm applicable to the particu-

lar circumstances. If not, and the legal question at issue can be regarded as important, a reference should be made. In addition, it matters how the reference, including questions, is framed by a national court: a national court should make it clear that it is making its reference to determine the applicability of old case law to the present, as well as attempt to reason why it entertains doubts in the first place. In this way, the Court of Justice would be placed on a fruitful footing to start considering whether or not it is necessary to continue to give a more or less new or original construction.

Of course, being aware of case law and adhering to it, and at the same time realizing its transient quality, is very challenging. It is not easy to differentiate between case law which still applies to present conditions and case law which does not. Clearly, therefore, the strategy advocated above requires a great deal of judicial acumen and background knowledge. National courts must be very careful not to ask the Court of Justice to reconsider its case law unless and until they think that this case law may be outdated or wrong. Similarly, there must be no ""intercourt competition", neither vertically between courts within the same Member State nor horizontally between the courts of different Member States, as to who can influence the development of Community law by making new references.

Therefore, these remarks also pave the way for recognizing that judicial education and academic analysis are vital components in such a strategy as I have outlined above. Especially academic lawyers can play an important role in pinpointing exactly what fields of Community law might be in need ofreconstruction at the brink of this new century. For what *European courts* should do and how they should do it are important legal themes as we deal today with dramatic changes in work, life and environment, and nature.

Finally, the role of individuals, their advocates, as well as the intervening Member States and Community institutions before the Court of Justice should not be forgotten. After all, by filing suits, by claiming their Community law rights and by insisting on their peaceful enjoyment before national courts, individuals with their advocates provide the very first impulse for the development of case law and Community law generally. And when it comes to the Member States and the Community institutions, they have one special obligation to try to ascertain that the historical is not privileged over the contemporary in Community law. After all, case law cannot be the primary mode of developing Community law. The Community legislative and the ""Masters of the Treaty", the Member States, assume the primary responsibility in this regard. In short, rethinking and reinventing Community law must be prioritized today, and this is one national and European obligation for which we are all responsible.