The European Court of Justice

Integrating Europe through law

Through a partnership with national courts, the European Court of Justice seeks to ensure that an independent body of law is applied uniformly throughout the European Union.

by Sally J. Kenney

Like the U.S. Supreme Court, the European Court of Justice is grappling with the most important policy matters of our time—separation of powers, the environment, communications, labor policy, affirmative action, sex discrimination, and human rights issues. Since its creation in 1952 under the Treaty of Paris to hear cases for the Coal and Steel Community, the European Court of Justice has transformed itself from an international to a constitutional court, holding European Community law to be supreme and, in many cases, directly effective in member states.* Those in the United States and the rest of the world can learn from the European Union’s experience in promoting free trade (particularly as GATT and NAFTA become judicialized through legal rules and principles) and keeping peace among countries who have been at war. There is also much to be gained from learning how the court does its work.

Many Americans still think of the European Union as the Common Market, since the creation of a free trade area was its foundation. The landmark cases of Community law, unlike decisions of other constitutional courts such as the U.S. Supreme Court, the German Constitutional Court, or the French Constitutional Council, develop lofty principles of law in cases over mundane commodities such as urea-formaldehyde or imported beef. Such cases reflect the four fundamental freedoms of the Treaty of Rome: free movement of goods, free movement of services, free movement of workers, and free movement of capital.

Recently, however, the European Court of Justice has begun to develop a human rights jurisprudence. The European Parliament and Commission have proposed that the European Union itself directly ratify the European Convention on Human Rights. (The Treaty on European Union calls for respect for fundamental human rights as guaranteed by the European Convention as well as those common to the constitutional traditions of member states. Furthermore, the draft Treaty of Amsterdam, in anticipation of the accession of Eastern European countries, permits the council to deny voting rights to members that do not recognize hu-

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* After the Treaty on European Union (the so-called Maastricht Treaty) in 1992, the entity previously known as the European Community became the European Union. The Court of Justice had previously been called the Court of Justice of the European Communities (European Economic Community, Coal and Steel Community, and Atomic Energy Community). Because the Treaty on European Union excluded the Court from certain areas of jurisdiction, the Court was not renamed the Court of Justice of the European Union. Although the correct term for the entity created by the 15 member states is now the European Union, the Court is still called the European Court of Justice and applies Community Law, not Union Law.
human rights.) Yet the European Court of Justice does not often hear cases that raise fundamental human rights cases usually associated with constitutional courts, and certainly the U.S. Supreme Court, such as freedom of speech, freedom of the press, freedom of religion, the death penalty, police powers, and so on.

When human rights issues emerge, they do so in the context of trade. For example, abortion comes before the European Court of Justice, not as a fundamental right to privacy or protection of human life, but as a question of free movement of services. Can one member state (Ireland) declare illegal the advertising of a service (abortion) that is legal in another member state (United Kingdom)? Freedom of religion and freedom of speech arise as member states seek to exclude other EU nationals (scientologists, trade unionists, or student radicals) from entering the country—raising the claim of free movement of persons. Human rights cases raise the most volatile issues of national difference and cultural incompatibility, and this area of law will be one of the most interesting areas to watch develop (although, not surprisingly, disputes over commodities—what is Italian pasta, German beer, or French champagne stir national passions over identity too).

The European Court of Justice's decisions have changed an international treaty into a constitution, transformed the right to free movement of workers to a more general right of free movement of persons, limited member states' ability to exclude "undesirable" EU nationals or goods, expanded equal protection for women in employment and pensions, and required national courts to give effect to European Community law (offering injunctive relief or remedies for discrimination). It is no surprise, then, that "euroskeptics" have called for restricting the court's power. However, the court cannot evade controversy by taking a more "restrained" jurisprudential position, since, for example, the German constitutional court has conditioned its recognition of Community law's supremacy on the incorporation of human rights.

Jurisdiction

More than half of the cases come before the court as requests for preliminary rulings under Article 177 of the Treaty of Rome. With the possible exception of the Court of First Instance, the European Union does not have independent trial courts. Instead, national judges apply European Community law in domestic cases. When a party raises a new question of European Community law in a domestic court or tribunal, that court suspends its proceedings and sends written questions to the European Court of Justice. The court answers the questions (or, occasionally, to the frustration of the referring court, equivocates), and the referring court then applies those answers to the case. Any court or tribunal may apply Community law or refer a case...
to the court, but if there is a new question of European Community law, the treaty requires that the highest appellate court must refer the case. The court has no power, however, to penalize a national court that chooses not to refer.

To those in the United States, reliance on national courts to apply Community law seems to be a weakness—a system more akin to international rather than federal law. Imagine if only state courts were relied on to carry out rulings such as Brown v. Board, for example. In practice, however, this system works. The European Court of Justice carefully cultivates good relations with national judges. It entertains them in Luxembourg and conducts seminars. Its members return “home” for speeches, conferences, and European Community law society meetings. Rather than serving for life (they serve renewable six-year terms), many members of the court come from and return to domestic courts and thus serve as ambassadors of European law or infiltrators of national courts, depending on one’s point of view. Although national courts may be slow to learn of and give effect to Community law (and in some cases they blatantly resist or openly express hostility), once they begin to do so, they are a great resource. Individuals bringing cases in national courts, rather than distant judges in Luxembourg or commissioners in Brussels, then become the enforcers of Community law. In contrast, British judges cannot apply rulings of the European Court of Human Rights unless the British government legislates. (This may change, if pending Labour government proposals are acted on.)

Unlike the U.S. Supreme Court, the European Court of Justice has no mechanism for denying certiorari—it must hear all cases referred to it, however unimportant. It has developed a number of mechanisms for dealing with its crushing workload. First, the court proposed and secured the creation of the Court of First Instance in 1989 to hear staff and competition cases. (Under the Treaty of Rome, the Court of Justice was the “constitutional” court of the European Communities, but also its highest labor tribunal, hearing cases about staff of the European Communities who had labor disputes. In addition, the court heard challenges to commission decisions regarding competition under Articles 173 and 175. Both types of cases require complex finding of fact.) Second, the court (like most non-U.S. courts and lower U.S. federal courts) divides itself into chambers—panels of judges that sit together on a number of cases. The full court decides which cases it will assign to three-judge or five-judge panels, or the full court. Third, in cases where the treaty commands that the full court hear a case, the court sits with its quorum of 11 judges rather than all 15. Finally, the court has begun to refuse to answer questions posed to it by national courts when it concludes the questions are hypothetical and not genuinely at issue in the particular case or are otherwise inappropriate.

Cases also come before the court as enforcement actions of the European Commission. Article 169 of the Treaty of Rome provides for the commission to bring a member state before the court if the commission believes it has failed to implement Community law. Member states also have this power, but for obvious reasons might prefer for the commission to serve as the enforcer. This legal provision is more analogous to an international system of law than the system of preliminary rulings—once the court has declared, in agreement with the commission, that a member state’s laws do not comply with Community requirements, it is then up to the national government to legislate accordingly. (Article 170 of the Treaty on European Union now gives the court the power to fine recalcitrant member states.) Member states have every interest, then, in delaying the conclusion of the commission that they are not in compliance and moving slowly once the court concludes otherwise.

Member states, institutions of the European Union, and, in some cases, interested individuals, may participate in cases to which they are not a party as a sort of amicus curiae. Unfortunately, their written submissions are not public documents, although they may release them, and the report for the hearing and advocate general’s opinion usually summarize the arguments of parties who participate.

Who serves?

Fifteen judges sit on the court, one for each member state. Nine advocates general also serve as members of the court, modeled on the French practice. The advocate general assigned to a case sits with the judges and participates in oral argument; he or she then writes an opinion advising the court how it should rule. Although the court does not always follow the recommendation of the advocate general, its first decision after oral argument will always be whether or not to do so. The advocate general’s opinion is almost always the more interesting reading (for scholars, if not the parties). The court’s single judgment (there are no concurrences or dissents) often includes only a terse pronouncement of the answer to the legal questions—more akin to the declarative judgments characteristic of civil law courts. The advocate general’s opinion, on the other hand, analyzes the larger issues of political philosophy, economics and trade, doctrine and jurisprudence, and public policy the case raises.

Although the treaty calls for members of the court to be appointed “by common accord of the member states,” in practice each member state gets one (and, at times, an extra) judge or advocate general. Members are appointed for renewable six-year terms. National governments alone decide who shall serve. The selection process seems to be a hybrid of appointments to the European Union (such as commissioner), diplomatic appointments, and domestic judicial appointments, and the process may vary across member states. Little parliamentary or public scrutiny occurs in the member state—there is no equivalent of Senate con-
firmation hearings or vetting by the bar association.

There is a high turnover at the court for several reasons. Not all member states choose to reappoint a judge or advocate general when his or her six-year term expires. The additional judge who was rotated between the larger member states and the four advocates general from the smaller member states could never be reappointed because those positions go to a different member state to fill. Furthermore, not all judges and advocates general view membership on the court as the pinnacle of their careers or as a job they will do until retirement. After one or two terms many return to (or take up) judge- ships in their member states, return to the professorate, or return to private practice. The turnover of membership of the Court of Justice is thus higher and the length of service lower than at the U.S. Supreme Court where appointments are for life, but is consistent with the shorter fixed terms served by judges on European constitutional courts in Germany, Italy, and France.

Of the Court’s 76 members since 1952, 54 have served as judges and 28 as advocates general (6 have held both positions). Only France has ever appointed a woman, Madame Rozés, as advocate general; all current members of the court are male. Members of the European Court of Justice are defensive about the absence of women. The well-rehearsed answer they gave in 1994 was that the new Scandinavian members could be counted on to appoint women members. They did not, although they did appoint two women to the Court of First Instance in 1997. The European Parliament has expressed its unhappiness at the absence of women and used this issue as a vehicle for calling for Parliament to assume a greater role in selecting members of the court.

The analogue to the chief justice of the U.S. Supreme Court is the president. Since 1964, the members themselves elect him or her for a renewable three-year term. The court has been led by nine different presidents who have served on average nearly two terms each (5.25 years). Although there is no strict rotation, all of the original six member states have provided a president for the court. In selecting a president, at least some weight is given to the concern that one member state not hold the leadership position of all European Union institutions (Commission, Council, Court, Parliament) at the same time.

The president has the power to defer to himself and his colleagues as report-writing machines, help discuss and negotiate draft judgments between cabinets (the suite of rooms where each judge or advocate general has his or her private office surrounded by the offices of his référendaires and clerical staff—comparable to chambers at the U.S. Supreme Court), and provide continuity as members of the court change. (Unlike law clerks at the U.S. Supreme Court, référendaires do not serve for one year only; they serve at the pleasure of the member. While the average length of service is five years, the longest serving référendaire worked for the court for 34 years.) Référendaires’ length of tenure versus the relatively short tenure of members, the relative career patterns of judges and référendaires, and their language skills makes them much more important players in the work of the Court of Justice than U.S. Supreme Court law clerks.

The court’s working language is French. All written documents are available to members and référendaires in the language of the case (chosen by the referring court), and all are also translated into French. The délégations (conferences of judges sitting on a particular case), draft judgments, and correspondence between cabinets are in French. While all members need French to function at the court, clearly the proficiency of the members varies, and those most skilled in French (or now, possibly German as well) find it easier to interact with their colleagues on a professional as well as a social basis. Members and référendaires who are multilingual are also able to work directly from the pleadings in the language of the case without waiting for translations as well as listen to oral proceedings without relying on interpreters.

Visitors from the United States, where less emphasis is placed on lin-

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guistic accomplishment, are truly astounded by the linguistic versatility of nearly all the staff at the court. Judges ask questions in English but require advocates to answer in German if it is the language of the case. The advocates then comply without missing a beat. At oral argument, or other formal proceedings, simultaneous translations are available for visitors, advocates, and members of the court. A courtroom of people wearing headphones gives the place a United Nations-like feel. In the balcony level of each courtroom are cubicles with duos of interpreters working behind glass. The simultaneous translation amuses observers as national stereotypes are confirmed—Italians gesticulate wildly translating a case about the price of ball bearings while the English translators barely move their lips. No matter how important the case, the courtrooms are mostly empty or filled with undergraduate law student conscripts who entertain themselves by shifting among the headphone channels or tittering at the doorbell that announces the entry of the members of the court.

The president assigns one judge to be juge-rapporteur (reporting judge) of each case. The juge-rapporteur takes instructions from the conference (délubèrè) and writes the judgment. The judgment, then, reflects the views of the formation as a whole, or the majority, rather than the juge-rapporteur’s personal views—and judgments often reflect the need to compromise. After the president assigns a reporting judge, most cabinets wait for the translation of the written proceedings. One of the juge rapporteur’s référendaires then prepares the report for the hearing (rapport d’audience). This document is available to the public at the oral proceedings and is a fairly straightforward statement of the facts of the case, the relevant law, and the arguments of all of the participants (based on their written submissions).

The référendaire working on the case for the juge rapporteur also drafts the preliminary report (rapport préalable). Like the report for the hearing, the preliminary report will summarize the facts, law, and relevant arguments. The preliminary report, however, is an internal document. At the end of the preliminary report, there is a section called observations of the reporting judge in which the judge may inform the other members of the

The Court of Justice and the European Union

Six countries (Belgium, The Netherlands, Luxembourg, Italy, France, and Germany) created the European Court of Justice, which began hearing cases for the Coal and Steel Community in 1952 under the Treaty of Paris. When the six signed the Treaty of Rome, the European Court of Justice became the court for the newly created European Economic Community (often called the Common Market), too, in 1958. Subsequent treaties (the Treaty on European Union, or the Maastricht Treaty, of 1992, and the draft Treaty of Amsterdam of 1997) have enlarged and consolidated the court’s role, and the European Union now includes 15 member states (the six above and United Kingdom, Denmark, Ireland, Portugal, Spain, Greece, Austria, Sweden, and Finland) and will likely soon expand to include some states of Eastern Europe. The Court of Justice is located in Luxembourg, the European Parliament in Strasbourg, and the European Commission in Brussels. The Council meets in Brussels and sometimes Luxembourg.

The European Court of Justice is often confused with the International Court of Justice (also known as the World Court)—the judicial body of the United Nations, located in The Hague, Netherlands, that hears cases such as the dispute over the Lockerbie plane crash. It is also mistaken for the European Court of Human Rights, the court of the Council of Europe located in Strasbourg, France, that hears claims under the European Convention on Human Rights.

Legislative powers in the European Union are shared among the Council, the Commission, and the Parliament. Although member state governments appoint commissioners and in this sense they represent the member state, once they are appointed they are to serve the interests of the Union as a whole; they do not take directions from member state governments. The Council, on the other hand, is an intergovernmental body whose members do directly represent the interests of national governments. The Council can only act on initiatives from the Commission. (The Council, however, may instruct the Commission to begin developing legislation in a particular area.) Although the role of the Parliament has been expanded by the Treaty on European Union, and the Parliament now must be consulted on legislation (and has some power to block, amend, or alter the Council’s voting on legislation), both Parliament’s legislative and oversight powers are extremely weak by U.S. standards. The Commission not only shares legislative powers with the Council (and to a lesser extent, the Parliament), but it is also administers and enforces Community law.

For more information about the European Union (its members, institutions, treaties, etc.) consult http://europa.eu.int/index-en.htm. Information about the Court of Justice is available at europa@dg10.cec.be.

—Sally J. Kenney
formation what he thinks about the case. The members of the court must then determine whether the case will be heard by the full court, or by chambers at its Monday administrative meeting.

Like oral argument at the U.S. Supreme Court, members of the court may question advocates. Although the court does limit the time of oral argument, it is not nearly as restrictive as the half-hour the U.S. Supreme Court allot to each side. Members of the court have discussed whether the time spent in oral argument is well spent, and there may be proposals to limit if not abolish this procedure. (Not all countries’ high courts use oral argument. The Dutch Hoge Raad, for example, has totally written procedures.) Language is a problem and limits the usefulness of oral advocacy.

Once the judges in the formation receive the advocate general’s opinion, the reporting judge circulates a memo indicating whether or not he intends to follow the advocate general’s recommendations. If he does not, he explains why. After a few days, if he has not heard objections from the other judges, the reporting judge drafts a judgment (projet de motif), which he circulates to the other judges. Once there is a draft judgment, the judges meet to discuss it.

If the other judges in the formation disagree with the course of action proposed by the reporting judge, they customarily inform him in writing. Another possibility is that one of the other judges agrees with the general course of action but not the way the reporting judge is arriving at the outcome. In this case, the judge may write a note en délibère spelling out his views. In a complex case, or a case in which the formation is very divided, or not sure which course of action to pursue, the reporting judge may suggest a “roundtable” discussion to see what the points of disagreement and agreement are prior to writing a draft judgment.

Like many European courts, but unlike the modern U.S. Supreme Court, the Court of Justice issues only one judgment; there are no dissenting or concurring opinions. Judges defend the need for secrecy and unanimity because their appointments are only for six-year renewable terms. If they signed separate opinions, member states could check whether their judges were voting for or against the national interest and refuse to reappoint judges who did not vote appropriately, thereby compromising their independence.

The future

In the near future the Court of Justice will likely consider the function of oral argument, whether it needs a system of leave to appeal or certiorari, whether it should permit dissent and concurrences, how it uses law clerks, how its members are selected (should Parliament participate? Should member states appoint more women? Should there be one member from each member state?), how public opinion affects the court, how the court functions in a federal system, and whether the court should be more activist or restrained.

The court faces some of the most pressing public policy questions of our day, and its judgments not only shape that policy, but contribute in important ways to policy debates. The court is also at the heart of questions of European legal, economic, social, and political integration. When the new members from Eastern Europe join, the European Union as a whole will have to address structural and institutional issues that have plagued it for some time yet have been ignored, such as whether the number of official languages can continue to increase.

Just as the admission of Western states in U.S. history precipitated a crisis over slavery and federal/state relations, so, too, the enlargement of the European Union will raise important fundamental issues. And as the reach of the European Union grows, it will also continue to grapple with resistant or noncompliant member states and, like federal bureaucracies, have to confront the question of securing the implementation of law and policies. Although European scholars may draw a sharper line between law and politics than their U.S. counterparts, no understanding of European law, politics, or public policy is complete without an understanding of the European Court of Justice.

For further reading


—Sally J. Kenney
Judicial independence in contemporary China