Hjalte Rasmussen

ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE

Martinus Nijhoff Publishers

ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE

A Comparative Study in Judicial Policymaking

by

HJALTE RASMUSSEN

1986 **MARTINUS NIJHOFF PUBLISHERS**
a member of the KLUWER ACADEMIC PUBLISHERS GROUP
DORDRECHT / BOSTON / LANCASTER

Distributors

for the United States and Canada: Kluwer Academic Publishers, 190 Old Derby Street, Hingham, MA 02043, USA
for the UK and Ireland: Kluwer Academic Publishers, MTP Press Limited, Falcon House, Queen Square, Lancaster LA1 1RN, UK
for all other countries: Kluwer Academic Publishers Group, Distribution Center, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

Library of Congress Cataloging in Publication Data

Rasmussen, Hjalte.
On law and policy in the European Court of Justice.

Includes indexes.
1. Court of Justice of the European Communities.
2. Judicial process--European Economic Community countries. I. Title.
KJE5461.R37 1986 347.4'01 85-18740
ISBN 90-247-3217-4 344.071

ISBN 90-247-3217-4 (this volume)

PRINTED IN THE NETHERLANDS

ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE

To My Wife, Kirsten, and
Louise, Susanne and Anne-Sophie, Our three Daughters

Acknowledgements

Most of the ideas advanced in this book have been stirring my mind at least since I spent the Academic Year 1978/79 as a research scholar at the University of Michigan Law School at Ann Arbor. It was only following my readings there about the political functions of high federal courts, and especially about the role of the US Supreme Court in American society, that the foundations were laid for my subsequent grappling with the European Court of Justice as a policymaking institution of the European community. I sincerely thank the Law School for inviting me to work and reside there.

It is one thing to devise a concept in general terms and quite another thing to develop it into precise expressions. That process has taken much time in my case. It has involved discussions with numerous university academics, and practitioners in and out of government, judicial personnel of the European Court and their legal secretaries, librarians, etc. Many have patiently listened when I tried out my ideas on them and have given me their distinguished advice, recommendations and guidance. I hope that they will accept my expression of profound gratitude without being mentioned by name.

I have developed a habit of writing by reading. Much of what I have written is made up of reactions to what others have written. The names and titles in the Index, however, reveal only one part, though important, of my sources of inspiration. Many authors whose importance for the forming of my ideas became clear only at later stages of writing are not mentioned. I acknowledge here my endeptedness to every one of them.

My greatest thanks go in four directions. First, to the single person to whom I owe most, Mr. Karsten Hagel-Sørensen, Head of division (European Law) of the Danish Ministry of Justice and Chairman of the Special Committee on EC-Juridical Matters which, in essence, controls Danish compliance with European Law. He has carefully gone through the draft

manuscript and has given valuable advice on several issues. I thank him for support and inspiration.

Next, a special mention must be made of Professor Joseph Weiler who is both friend and intellectual companion. He urged the European University Institute (at Florence) to invite me in the Spring of 1981 to give seminars there on the adjudicative importance of 'socio-economic fact', now the subject-matter of an entire Chapter of this book. This provided me with an invaluable, early opportunity to try out my ideas on a distinguished audience of resident scholars and post-graduate students. I thank him (and the EUI) indeed.

Thirdly, I want to thank Professor Claus Gulmann of the Law Faculty of the University of Copenhagen. At a late drafting stage of the present book, he spent much time reading the manuscript and in subsequent fruitful discussions of selected issues. As a result of these, I think that the quality of presentation of the work has been enhanced.

I alone am responsible for errors of fact and weaknesses of opinion.

My distinguished thanks finally must go to my two faithful administrative secretaries at the Institute of European Market Law, Agnete Kitai and Bodil Knudsen. They agonized with me over draft after draft of this book. Invariably, shortly after they had finished typing one version, I would commence refurbishing it. Their professional ability, their qualified corrections of my ever-so-sloppy usage of the English language and their endless patience with me formed an integral part of the production of what is now a publishable study.

I also want to address warm thanks to Professor Ole Lando, Director for many years of the Institute for European Common Market law of the Copenhagen School of Commerce and Business Administration. He became the *conditio sine qua non* to my academic work by appointing me to my present position in the first place and, secondly, by granting me ideal material working conditions.

Finally, my thanks go to the European Commission for granting me one of its very valuable research awards in 1981; and to Axel H. Petersens Fund which generously enabled me to travel to the United States; and to the European Court of Justice which offered me working space and hospitality during my numerous visits to its premises. Moreover, the Danish Social Science Research Council and Gangstedfonden graciously funded the presentation of the book for the award of a doctorate in law to its author by the Faculty of Law of the University of Copenhagen.

Judicial agencies have a peculiar power to enlist obedience and impose control, essentially, I suggest, because they meet a deeply felt and constant need for trustworthy neutrals. One way to achieve neutrality that has often been tried has been to depersonalize the process by subordinating judges to rules that control them strictly. But neutrality and trust were not necessarily forfeited when judges made up the rules as they went along; as in medieval England when a great new system of social controls, in aid of the monarchy's purposes, was manufactured through judicial action. But there are limits to the allegiance that judges can inspire, as the experience of France reveals. The judges of pre-revolutionary France became partisans in political strife for a reason that seemed to them persuasive – that other political agencies had failed as restraints on royal absolutism. In their attempt to fill a great gap in French political institutions they brought disaster on themselves and caused a lasting impairment of their own function whose effects in France are not yet spent.[1]

1. Professor John P. Dawson of Harvard Law School, in Oracles of the Law, University of Michigan, Ann Arbor, Thomas M. Cooley Lectures (series) 1968.

Denne afhandling er af det jurisdiske fakultet ved Københavns Universitet antaget til offentligt at forsvares for den jurisdiske doktorgrad.

København, den 17. september 1985.

Hans Gammeltoft-Hansen
Dekan

This thesis has been accepted by the Law Faculty of the University of Copenhagen to be defended in public for the law doctorate.

Copenhagen, September 17, 1985.

Hans Gammeltoft-Hansen
Dekan

Forsvaret finder sted fredag den 26 september 1986 kl. 14 præcis i Annexauditorium A, Studiestræde 6, DK-1455, København K.

Preface

In his book 'l'Europe des Juges'[1] Robert Lecourt, the former president of the Court of Justice of the European Communities, demonstrated the importance of judges for the development of the European Communities. Community Law would be of little impact if it were not cautiously applied by the national judiciaries in the national legal orders. Compared to other international organizations, one of the principal forces of the Communities is that their rules need no further acts of national governments, but are applied directly by the national Courts.

In guiding the national judiciaries, the Court of Justice plays an essential role deciding how Community Law will be pallied. It offers the authentic interpretation, not only of all Community acts, but also of their effect in the national legal orders. Furthermore, the Court has its tasks in deciding the legality of Community Acts and in establishing breaches by Member States of their Community obligations. In performing these tasks, the Court has to determine what rule to apply when Community Law is unclear or incomplete. Its role in the filling of gaps is more important than in any national legal order because of the frequent failure of the Council to adopt the necessary legislation. Inevitably, the political impact of the constitutional role of the Court of Justice is enormous. No Court can fully escape policy-making. Constitutional Courts are more obliged than other Courts to make policy decisions, and the Court of Justice must do so on a relatively larger scale than most constitutional Courts.

Is it acceptable that eleven of thirteen individuals, however wise and well trained, exert such an influence on the developments in Europe? On the one hand, it is of the greatest value that in individual cases objective and relatively quick decisions can be taken and that there are no gaps in the application of the legal order. On the other hand, these judges should not

1. Bruylant, Brussels 1976.

be permitted to replace the governing institutions of Europe, as they are not democratically elected, nor under any form of democratic control. In the Community, as everywhere, the task of the judiciary should somehow remain restricted.

The importance of the judiciary in Western Europe is based on the great authority that it traditionally has. When the Court has spoken, the decision is taken and it is generally accepted that the court's ruling must be followed. Why is this? Usually one of the two parties will be of the opinion that the Court was wrong. Why will he nonetheless execute the Court's decision? Possible legal sanctions are part of the explanation. There is also a strong tradition and a generally felt need that disputes must be somehow terminated, and that the decision of a neutral and wise judge offers the best method of termination. However, this only works as long as the judge is accepted as being neutral and wise. He may lose that authority if he seems to be guided by personal interests or personal convictions. Much less than previous generations, our present generation takes authority for granted. There is a real risk that Court judgments will be seen as just opinions of individuals, that they will lose the somewhat magic aureole of undisputable authority. For that reason all Courts must be careful not to try to expand their powers beyond reasonable limits in order not to put their authority at risk. Any policy-making role of judges should be limited to the necessary minimum.

The great merit of the present book is that it thoroughly discusses the necessary limits to judicial policy-making by the Court of Justice of the European Communities. In order to appreciate the book, one does not need to share the author's conclusion that the Court of Justice actually transgressed the borderline to the Community's judicial function. Of far greater importance is the fact that the author analyses the problems and demonstrates how they can be approached by methods developed both in legal and in political science. His comparison to federal legal systems and his studies of the opinions of many authors add to the understanding of the problems concerned. Of particular importance is his further study of the forces which, by support or criticism, may stimulate or restrict the Court of Justice in expanding its influence, such as governments, the other institutions of the Communities and also private authors. Finally, the author offers his suggestions for improving the position of the Court of Justice. It is of particular importance that the policy-making role of the Court of Justice is recognized and accepted, though, of course, within limits.

I hope and expect that this book proves to be an important contribution to the necessary academic supervision of the politico-legal developments concerning the Court of Justice, its authority, and its policy-making task.

Leiden, December 1985 Henry G. Schermers

Contents