Interview with Pierre Pescatore: the Judge's duty to come to judgment and the development of case-law (Luxembourg, 12 November 2003)

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[Susana Muñoz] Is the Community court the *mouthpiece of the law*, or does it create law? Are you aware of having been involved in a U-turn in relation to case-law or having contributed to prompting a U-turn in legislation?

[Pierre Pescatore] Everyone quotes that passage from Montesquieu: 'The judge is the mouthpiece of the law', but I should point out that Montesquieu has been repealed, if I may use the expression, by Portalis. As far as interpretation is concerned, Montesquieu's ideas are no longer current. It is the ideas of Portalis that one finds in the introduction to the Civil Code where he distinguishes between the role of the judge and the role of the legislator. He says that the role of the legislator is to set down the broad principles of the law; it is for the judge to implement those principles in the individual cases referred to him. Portalis also accords the judge a more developmental role, he is more than just the *mouthpiece of the law*. He uses that wonderful expression: 'it is for the legislator to establish principles fecund in their consequence.' It is, therefore, for judges to adjust those principles to the circumstances of the individual cases which they are called upon to hear. Portalis has, then, to be the basis for matters of interpretation.

You asked whether the court creates the law. No, it does not, it fulfils its role, which is to resolve disputes. People always see judges as some kind of subordinate legislator, but that is not the case. According to Article 4 of the Civil Code — which is common to all those countries that have adopted the Civil Code — a judge cannot, under the pretext of the silence or insufficiency of the law, refuse to come to judgment. That is his function. The function of the judge is to come to judgment, and, if need be, he must interpret the law and fill the gaps. He must do all that is needed to bridge the gap between the general rule and the individual case. And that is just what the Court of Justice has done, because the Treaty of Rome, which first established the Court, included many promises for the future. It was an evolving Treaty, a dynamic Treaty, and the Court had, of course, to be part of that process. I joined the Court at a time when the transitional period was not at an end — we were in fact right in the middle of it. The transitional period itself exhibited the kind of dynamism that drove forward the creation of a common market, established in 1970. So the Court has never considered itself as a real creator of the law, its task has been to resolve disputes and to identify in the whole range of legal provisions available to it — the Treaty, the regulations and directives — the principles that it could apply to resolve the disputes referred to it, particularly in the form of references for a preliminary ruling. It is the preliminary ruling procedure that has really made the Court's case-law.

You also ask me about U-turns in case-law. I have always been vigorously opposed to that very notion, and it was only after my departure that a crafty old Judge managed to introduce the idea. I believe that a supreme court should not depart radically from case-law, and, if it does, it should not say so. Everything that occurs in case-law is part of a long process of development and, basically, of discovery by the judges. They may have begun by resolving a problem, enunciating a principle, determining an approach, but then cases arise which reveal new aspects that could not have been foreseen at the outset. Then, as new aspects emerge in real circumstances, case-law gradually evolves — that is clear. Of course, it adapts. But I think it really is a destructive approach to talk of U-turns in case-law. That happens in some countries, like France, where individuals find themselves buffeted from one radical departure from case-law to the next. The Court has always been careful both to adapt to developments and to develop its case-law, while, at the same time, maintaining continuity.