CONSTITUTIONAL COURTS AND SUPREME COURTS – A COMPARATIVE ANALYSIS WITH PARTICULAR REFERENCE TO THE SOUTH AFRICAN EXPERIENCE

by

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It is an honour to have been invited to participate in this colloquium. I come from South Africa which has had comparatively little experience of constitutionalism. I am conscious of this and of the fact that the political, social, economic and cultural environment of my country is far removed from that of Europe. I hope that the South African experience that I will relate will be of interest and possibly of some relevance to the theme of the colloquium.

A. The importance of history

The constitution and institutions of a country, including the structure and functioning of its court system, are shaped by history. This colloquium is concerned not with a country but with a continent, in which the various treaties establishing and giving substance to the European Union have had to make provision for institution building to accommodate twenty five sovereign states with diverse communities, different histories, different languages and cultures, and different levels of development.

It was in these circumstances that the treaty establishing a constitution for Europe was signed on 29 October 2004. It was not long after that, that the organizers of this conference decided that the theme of the colloquium would be the future of the European judicial system. Circumstances have, however, changed since then. Although the European Union retains its strength and important place in world affairs there is much uncertainty as to whether there will be a European constitution, and if so, what its provisions will be.

Law has been and is likely to continue to be a binding force in the affairs of the European Union and to play a crucial role in keeping the Union together. Despite the setbacks in the constitution-making process, and whether or not the constitutional treaty comes into force, the focus of the conference remains important.

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B. The South African Constitutional Court

In South Africa a decision was taken a little more than ten years ago, after the collapse of apartheid, to establish a single constitutional state out of what had been the racially-based, repressive and undemocratic legal order of the fragmented apartheid state. We had to grapple then with different histories, different languages, different cultures, and different social and economic circumstances, not within a continent, but within our own country. We also had to address the impact of centuries of institutionalized racial discrimination which had resulted in there being huge disparities of wealth and privilege amongst the people of our country. We chose to do so through a constitution which would lay the foundations for an open and democratic society. For us the constitution was one of the foundations on which we would build our future. It was a transformative constitution designed to change our society – to heal the divisions of the past and establish a society based on democratic values social justice and fundamental human right.[1]

During the second half of the 20th century constitutionalism had become a feature of the legal order in many different parts of the world. After the collapse of fascism in Western Europe constitutional states were established in Germany, Austria, Italy and France and later in Spain and Portugal. In Africa and Asia colonial empires were dismantled. In the process of decolonization most former colonies adopted constitutions containing bills of rights. The same happened in Eastern Europe after the collapse of communism. In Latin America dictatorships were replaced with democratic forms of constitutional government. In no small measure the shift to constitutionalism in countries in different parts of the world was a reaction against arbitrary and repressive rule that had been imposed on the populations of these countries. Not all states that followed this route have been successful. We knew this, but in the light of our history we were determined to build our future on a commitment to democracy, human rights and social justice. We thus adopted a constitution which established a constitutional state, and entrenched fundamental rights and freedoms, and made provisions for the constitution to be upheld by the courts.

The constitution-making process was undertaken in two stages. First an interim Constitution was adopted to prepare the ground for the adoption of a constitution by an elected constitutional assembly[2]. An account of these events falls beyond the scope of our discussions at the colloquium. The two constitutions are, however, relevant to what I have to say.

1 See in this regard the preamble to the Constitution. As to the relevance of this to the interpretation of the Constitution, see: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490 (CC) paras [72]- [81].

2 The interim Constitution, 2003.

C. Common law countries

Because of our colonial history we had a common law legal system strongly influenced in its structure and functioning by that of the colonial power which had been England. There was a unitary court system in which there was a Supreme Court, consisting of an Appellate Division, which was the highest court, and Provincial and Local Divisions which functioned as superior courts of first instance.[3] Statutes were superior to the common law, but there were only a few general codes[4] and much of the law was made and developed by judges on the basis of precedent. Decisions of the Appellate Division were binding on all other courts. The Appellate Division followed its own decisions unless it was satisfied that an earlier decision was "clearly wrong".[5] Parliament was supreme and could pass laws to vary court decisions with which it disagreed.

Countries which had formerly been part of the British Empire had similar court systems, adapted where necessary to deal with federal issues. Invariably in these Commonwealth countries, which differed in this respect from the United States where the jurisdiction of the US Supreme Court is more restricted because of its particular federal structure, there is a single highest court which is a court of general jurisdiction with the competence to deal with all law whether it be common law, state law or federal law. I will call this model the Supreme Court model. There is not a career judiciary. Instead, Judges are usually appointed to the superior courts from the practicing legal profession. Appeal courts are usually, though not invariably, staffed by judges promoted from superior courts of first instance, and where there is a three tier system, from judges of appeal. The Supreme Courts had a general jurisdiction, and in those countries where constitutions with entrenched rights were later adopted as the supreme law, their jurisdiction included the judicial review of legislative action and the conduct of organs of the state.

D. Civil law countries

Constitutional courts were then a feature of civil law countries. Unlike common law countries where constitutional adjudication was conducted within and as part of the normal court system, Constitutional Courts were established apart from the ordinary courts. Specialised constitutional courts fitted well into the judicial architecture of

3 The Supreme Court Act 59 of 1959. The Supreme Courts were distinct from lower courts, such as Magistrates Courts, which had limited jurisdiction as to subject matter and quantum.

4 There was for instance a Criminal Procedure Act which codified procedural criminal law but not the substantive common law of crimes. In interpreting the Criminal Procedure Act and other codes such as the Income Tax Act courts followed the common law rules of statutory interpretation and precedent.

5 Bloemfontein Town Council v Richter 1938 AD 195 at 232.

civil law countries with their detailed codes and different court systems where there is less emphasis on judge-made law and precedent than is the case in common law countries. A specialised constitutional court with exclusive jurisdiction in constitutional matters was calculated to promote legal certainty in constitutional matters, and to avoid conflicting decisions being given on the constitutionality of legislation in the different courts. What is also relevant is that constitutional norms are expressed in general terms and leave greater room for interpretation than the detailed codes do. This calls for different techniques than those used by judges of civil law courts in the application of codes to the facts of a particular case. Constitutional adjudication also has a greater political impact than other forms of adjudication. The establishment of constitutional courts allowed specialists in constitutional law to be appointed as judges to these courts, and for the adoption of special procedures for the appointment of such judges.

E. The establishment of a Constitutional Court in South Africa

Apartheid had been enforced by the application of harsh and unjust laws, including draconian security laws, which were condemned internationally as gross violations of basic human rights. These laws had been upheld and maintained by the courts under the doctrine of parliamentary supremacy. The supreme parliament, however, was one in which the majority of the population had no say and in apartheid South Africa that doctrine lacked any legitimacy. The legacy of that experience hung over the ordinary courts which had enforced apartheid law and there was a political imperative that a new court with no institutional links to the past be established to be the guardian of the constitution. We chose, therefore, to establish a constitutional court for this purpose. The choice of a constitutional court was a departure from the common law norm. It was made in the interim Constitution and was affirmed, though with some changes, in the Constitution adopted in 1996 by the Constitutional Assembly. The choice was dictated largely by history, though specialization was seen as a positive factor.

The problem we had to confront then was a problem common to all systems in which there are constitutional courts. What competences will be vested in the court? How and by whom may the court be engaged? How will the court relate to other courts? And if the constitution is the supreme law, and the constitutional court has exclusive or the highest authority in constitutional matters, where does it find its place in the court hierarchy? The answers to these questions had to be provided in the context of a unitary common law court system.

Some of these concerns were addressed directly in the interim Constitution. The Constitutional Court was established within the normal court system "as the court of

final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution".[6] The interim Constitution provided that the Constitution would be the supreme law,[7] that any law or act inconsistent with it provisions would be of no force and effect to the extent of the inconsistency,[8] and that courts finding a law or any provision thereof to be inconsistent with the Constitution must declare such law or provision to be invalid to the extent of its inconsistency.[9] It also provided explicitly that "a decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state."[10] The legitimacy of the Court and of its powers of judicial review is therefore derived from the Constitution itself.

The Constitutional Court had original and appellate jurisdiction and was the highest court in respect of constitutional matters. It had exclusive jurisdiction in respect of certain matters including enquiries into the constitutionality of provisions of an Act of Parliament and disputes of a constitutional nature between national and provincial organs of state.[11] Other matters, such as the control of subordinate legislation for compliance with the Constitution, and claims under the Bill of Rights which did not involve the validity of provisions of Acts of Parliament, were within the jurisdiction of the Provincial and Local Divisions of the Supreme Court, which dealt with such matters as courts of first instance.[12] Although the Constitutional court also had original jurisdiction in respect of such matters, it was a discretionary jurisdiction, which the Court was reluctant to exercise save in exceptional circumstances.[13] It took the view that it is undesirable for a court having to deal with issues which may be of great importance to the development of the law to have to do so as a court of first and last instance. Also, if oral evidence were necessary, it was not practical for the court of eleven judges, who sat en banc, to hear the evidence. Unless there was great urgency for a final decision to be given, the Constitutional Court ordinarily required all such cases to be dealt with first by a Provincial or Local Division. Appeals against decisions of such courts on constitutional issues would lie to the Constitutional Court. [14]The Appellate Division (previously the highest court in respect of all matters) had no jurisdiction in respect of matters within the jurisdiction of the Constitutional Court.[15] The exclusion of the Appellate Division from constitutional adjudication seems to have been designed to protect the standing of the Ap-

6 Section 98(2)
7 Section 4
8 Id.
9 Sections 98(5) and 101(4)
10 Section 98(4)
11 Section 98(3) read with section 98(2)(a) and 101(3) and (6).
12 Section 101(3)
13 Bruce v Fleecytex 1998(2) SA 1143(CC)
14 Section 102(12)
15 Section 101(5)

pellate Division, and to avoid judgments given by it being taken on appeal to the Constitutional Court.

There were thus two apex courts, one in respect of constitutional matters and one in respect of other matters. This gave rise to problems of demarcation. The kompetenz kompetenz issue, which has been a source of some disagreement between the ECJ and national courts, was addressed directly in the interim Constitution which provided that the Constitutional Court had the power to determine whether or not any matter was within its jurisdiction.[16]

The interim Constitution anchored constitutional review, including judicial review of all legislation, in the Courts, requiring them to declare law or conduct inconsistent with the constitution to be invalid. However, the jurisdictional and procedural provisions dealing with the determination of constitutional issues gave rise to a number of practical problems that were later addressed in the 1996 Constitution.

If a constitutional issue within the exclusive jurisdiction of the Constitutional Court arose in proceedings before a Provincial or Local Division, the interim Constitution empowered that court to refer the issue to the Constitutional Court for determination if the "issue may be decisive for the case" and if it was "in the interests of justice" to do so.[17] If the constitutional issue was not referred, the Court had to deal with the case on the assumption that the legislation was valid. If the party who challenged the constitutionality of the statute was unsuccessful on the merits of the dispute, the constitutional question could be raised on appeal to the Constitutional Court.

The question whether the validity of an Act of Parliament might have been decisive, and thus competent for referral to the Constitutional Court by the court of first instance, depended on a number of factors which could not always be determined in the absence of legal argument and evidence. These might have included the interpretation of the legislation (could it be given a narrow construction to avoid unconstitutionality in the circumstances of that case), the interpretation of the Constitution to decide whether or not there was substance in the constitutional challenge, other possible cause of action or defences to the concrete claim, and the remedy that would be appropriate if the legislation in issue was held to be inconsistent with the Constitution. If a referral was made the hearing of the case would be interrupted until a decision was given by the Constitutional Court. If the referral was incorrect it would be rejected by the Constitutional Court and the matter would have to go back to the court of first instance to be concluded without the constitutional question having been decided.

Constitutional issues within the jurisdiction of Provincial and Local Divisions could and did arise in litigation before such courts in disputes in which issues within the jurisdiction of the Appellate Division were also raised. Appeals in such cases

16 Section 98(2)(f)
17 Section 102(1).

had to be noted in the first instance to the Appellate Division. The Appellate Division was required to dispose of the appeal without deciding the constitutional issues if that could be done. If that could not be done, the Appellate Division had to refer the constitutional issues to the Constitutional Court for decision.[18] There are not always clear boundaries between the constitutional issues and the other issues in such cases. The importance of the constitutional issues to the outcome of the appeal might only have become apparent once argument on issues within the jurisdiction of the Appellate Division had been heard. In that event the appeal would have to be interrupted and the constitutional matter would have to be referred to the Constitutional Court. If evidence on the merits was relevant to the determination of the constitutional issue two courts might have to consider the same evidence for different purposes and possibly come to different conclusions on the weight to be given to it.

The referral procedures led to the interruption of hearings, inconvenience to the parties and unnecessary costs being incurred. Moreover, where the Constitutional Court had to deal with disputes concerning the validity of Acts of Parliament, it would do so as a court of first and last instance, without the benefit of a decision on such issues by another court. It also meant that the Appellate Division played no part in developing the new constitutional jurisprudence destined to be at the core of the new legal order established by the Constitution.

F. The 1996 Constitution

The role of the Constitutional Court was affirmed and strengthened in the Constitution adopted by the Constitutional Assembly in 1996, which makes provision for the following forms of constitutional review:

I. Anterior abstract review

If the President or the Premier of a province has doubt as to the constitutionality of a bill put before him or her for signature, he or she may refer the bill to the Constitutional Court for a decision on its constitutionality.[19] There have been only three such referrals since the establishment of the Constitutional Court.[20]

18 Section 102(5) and (6)

19 Sections 79(4) (b) and 121(2) (b).

20 In re Constitutionality of the Mpumalanga Petitions Bill 2002 (1) SA 447 (CC); Ep: President of the RSA, in re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC); Ep: Speaker of the National Assembly: In re Constitutionality of certain provisions of the National Education Policy Bill 1995 (3) SA 289 (CC)

II. Posterior abstract review

Within 30 days of the signing of an Act of Parliament, and on an application supported by one third of the members of Parliament, the Constitutional Court may be required to determine whether all or part of the Act is inconsistent with the Constitution.[21] A similar provision exists in respect of Provincial laws but the application requires the support of only 20% of the members of the provincial legislature concerned.[22] No application has yet been made to the Constitutional Court in terms of these sections.

III. Posterior concrete review: jurisdiction and procedure

This accounts for most of the work of the Constitutional Court. The referral procedure established by the interim Constitution did not fit easily into the court structure of a common law country where decisions are made, not in abstract, but in the context of concrete disputes and in the light of the evidence in the case. This procedure was abandoned in the 1996 Constitution which now provides that constitutional matters are generally within the jurisdiction of all superior courts, including the Appellate Division (now called the Supreme Court of Appeal). The Constitutional Court retains exclusive jurisdiction in certain matters. However, these do not often arise in practice.[23]

In place of the referral system the Constitution adopted a procedure similar in some respects to the "green light" system proposed as being appropriate for referrals to the ECJ. The procedure is designed to ensure that the Constitutional Court controls declarations of invalidity concerning provisions of an Act of Parliament, a Provincial Act or conduct of the President. The 1996 Constitution now provides that any such order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status must be referred to the Constitutional Court for confirmation. Pending confirmation such order has no force.[24] An order dismissing the constitutional challenge does not have to be referred, but an aggrieved party is entitled to appeal against the order. This has proved to be more effective than the referral system of the interim Constitution. It enables cases to be disposed of in the lower

21 Section 80.

22 Section 122

23 Disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state (section 167(4)(a) of the Constitution); the constitutionality of a parliamentary or provincial bill referred to it for that purpose by the President or a Premier of a province as the case may be(section 167(4)(b)); the constitutionality of an Act of Parliament referred to it by 30% of the members of parliament within 30 days of its promulgation, and the constitutionality of a Provincial Act referred to it by at least 20% of the legislature within 30 days of its promulgation (section 167 (4)(c)); the constitutionality of an amendment to the constitution (section 167(4((d)); and whether Parliament or the President has failed to fulfill a constitutional obligation (section 167(4)(e)).

24 Section 167(5)

courts without interruption, and allows the Constitutional Court to draw on the expertise of other courts before making a final decision on the validity of provisions Acts of Parliament or a Provincial Legislature and the conduct of the President. This is not only calculated to provide certainty, but also ensures that all courts are involved in the development of our constitutional law. This is beneficial to the Constitutional Court and enhances its jurisprudence.

G. The competence of the Constitutional Court under the 1996 Constitution

The Constitution provides that the Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters. A constitutional matter "*includes* any issue involving the interpretation, protection or enforcement of the constitution". [25] Since law or conduct inconsistent with the Constitution is invalid, and obligations imposed by the Constitution must be fulfilled,[26]any breach of the Constitution is justiciable.[27] The Constitution also requires the common law and customary law to be developed and all legislation to be interpreted to "promote the spirit, purport and objects of the Bill of Rights".[28] Constitutional matters thus cover an extremely wide field.[29] Consistently with the interim Constitution the 1996 Constitution also provides that the Constitutional Court makes the final decision on what such matters are.[30]

H. The scope of the Bill of Rights, standing, and the Constitutional Court's powers.

The competence of the Constitutional Court is enhanced in substance by the reach of the bill of rights, the breadth of the provisions of the Constitution dealing with

25 Section 167(7)
26 Section 2
27 The court must carry out the obligation imposed on it in the Constitution to declare law or conduct inconsistent with the Constitution to be invalid and there is accordingly no room for the "political question" doctrine applied by the US Supreme Court to avoid dealing with certain constitutional challenges.
28 Section 39(2)
29 In Carmichele v Minister of Safety and Security 2001(4) SA 938(CC), para 54 the Constitutional Court said that our Constitution "embodies, like the German Constitution, an objective normative value system." It referred to the decision of the German Federal Constitutional Court in 39 BVerfGE 1at 41, and went on to say that "it is within the matrix of this objective normative value system that the common law must be developed."
30 Section 167(3) (c).

standing,[31] and the extensive powers in respect of the relief that may be granted by courts in constitutional matters.

The Bill of Rights has a wide reach going beyond state action. It "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".[32] It also binds natural and juristic persons in certain circumstances.[33] The State is required to "respect, protect, promote and fulfill the rights in the Bill of Rights"[34] which include conventional civil and political rights,[35] rights less commonly found in constitutions as entrenched rights, such as a right to fair labour practices,[36] environmental rights,[37] a right to have access to information,[38] and a right to just administrative action,[39] and positive obligations in respect of socio-economic rights,[40] The Constitution therefore impacts on the exercise of all public power, the development of the common law, the interpretation of statutes, the competences of the national and provincial governments and other matters dealt with in the Constitution. Decisions on disputes concerning such matters are within the competence of the Constitutional Court.

31 Section 38 of the Constitution provides: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

32 Section 8(1).

33 Section 8(2): "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

34 Section 7(2)

35 Equality(section 9), human dignity (section 10), life (section 11), freedom and security of the person (section 12), prohibition of slavery, servitude and forced labour (section 13), privacy (section 14), freedom of religion, belief and opinion (section 15), freedom of expression (section 16), freedom of assembly, demonstration , picket and petition (section 17), freedom of association (section 18), political rights (section 19), citizenship (section 20), freedom of movement and residence (section 21), freedom of trade occupation and profession (section 22)language, culture and communities (sections 30 and 31) access to courts (section 34) and rights of arrested, detained and accused persons (section 35).

36 Section 23

37 Section 24

38 Section 32

39 Section 33

40 Sections 25(5) (access to land), section 26 (access to housing), section 27(access to health care services, food, water and social security), section 28 (children's rights), and section 29 (education).

I. Remedy

The Constitution provides that "when deciding a constitutional matter within its power, a court – *must* declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."[41] The court is, however, empowered when doing so to make any order that is "just and equitable", including an order limiting the retrospective effect of a declaration of invalidity, or suspending a declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.[42] Courts are also required to grant "appropriate relief" for the infringement or threatened infringement of a provision of the Bill of Rights.[43] The Constitutional Court has held that this includes the power to make mandatory orders, and supervisory orders to ensure that orders are complied with.[44] If it is necessary to do so, courts "may even have to fashion new remedies to secure the protection and enforcement of these all important rights"[45] When it considers it to be appropriate and just and equitable to do so, the Court is willing to make orders, which involve severing offending words from a statute[46] or reading words into a statute to cure a defect which would otherwise have rendered the provision invalid.[47] It considers this to be less intrusive than striking down the statute. If parliament wishes to address the defect differently, it is not precluded by such an order from doing so. Similar techniques are used by supreme courts and constitutional courts in other countries.[48]

J. Supreme Court or Constitutional Court

The Venice Commission of the Council of Europe publishes Bulletins dealing with decisions on constitutional matters given by Constitutional Courts and Supreme Courts in different parts of the world. A special edition of the Bulletin describing the structure and functioning of 44 different Supreme and Constitutional Courts, outlining the basic texts, composition and organization, and powers of the different

41 Section 172(1)(a)
42 Section 172 (1)(b)
43 Section 38
44 Minister of Health and Others v Treatment Action Campaign and Others 2002(5)SA721(CC), para 106
45 Fose v Minister of Safety and Security 1997 (3)SA786(CC), para 19
46 Coetzee v The Government of the Republic of South Africa 1995 (4) SA 631(CC), paras [15] – [18]; the same result may be achieved by "notional severance", in which a statutory provision is declared to be invalid "to the extent that" it is too broad, Ferreira v Levin NO and Others 1996(1) SA 984 (CC), para 157.
47 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1(CC), paras [61]-[88]
48 Id. Para 71

courts, shows the different ways in which constitutional adjudication is carried out in these countries, and the different competences that the courts have.[49] There are broadly speaking three models. The Anglo American model, the German model, and the French model. As the US Supreme Court was the first to engage in judicial review of Parliamentary legislation I start with the Anglo American model.

I. The Anglo American Model

The US Supreme Court, because of history, found its place as the apex court of a Federal Court system, deciding cases on appeal and determining constitutional issues raised in the cases that came before it, which involved concrete disputes. Although it has limited original jurisdiction it is seldom used. Supreme Courts functioning in much the same way are, as I have previously mentioned, also found in most of the common law countries of the Commonwealth, but not exclusively so. For instance, Argentine, Denmark, Japan, Sweden and other countries do not have specialized constitutional courts, and deal with constitutional issues through the ordinary court system, which has a Supreme Court at its apex.

II. The German Model

After the collapse of Nazism the German Federal Constitutional Court was established. The German model was extremely influential in the establishment of Constitutional Courts in Europe during the second half of the twentieth century. These courts are apart from and not part of the ordinary court system. They deal with norm control in respect of issues referred to them by other courts, and with the determination of constitutional complaints raised after other remedies have been exhausted.

III. The French Model

This is a system of anterior review by a specialized court which is not part of the ordinary court system. It conducts normative review in abstract proceedings before laws come into force.

IV. Similarities and Differences

History, and in particular the differences between common law and civil law courts, determine the type of constitutional court that a country has. Apart from exercising control to ensure that legislation (or proposed legislation in the case of the French model) is consistent with the constitution, courts in all three models also deal to a

49 ISSN 1025 – 8124/Special edition – description of courts.

greater or lesser extent with electoral matters, and in federal systems, with rulings relating to competences of the different levels of government. There are differences between the jurisdictions of different courts within the same models. For instance, some have a competence to give advisory opinions and others not. Some make provision for bills or newly enacted legislation to be referred to the Constitutional Court for abstract review, and others do not. In many countries international treaties are referred to the Constitutional Court prior to ratification to determine whether or not the treaty is consistent with the constitution. There are other differences of detail. The main differences, however, are (a) between normative control which is a feature of the German and French models and the resolution of concrete disputes which is a feature of the Anglo-American model; and (b) the difference between anterior constitutional review (the French model) and posterior review (the other models).

Supreme Courts, through certiorai proceedings, are able to control their dockets more easily than most Constitutional Courts can do. In Europe, where cases are referred to constitutional courts by other courts, and instead of appeals, there are constitutional complaints, it is much more difficult to control the case load. This is a problem experienced by the ECJ where referrals from national courts are so numerous that the court has difficulty in coping with its work-load. This has resulted in delays and in the increasing use of "panels" of three or five judges to enable it to get through its work.

K. The ECJ

The structure and functioning of the ECJ must cater for the sovereignty of the nation states that constitute the Union. Any comparison with the structure and functioning of national Supreme and Constitutional must have regard to this.

Although there is no formal constitution of Europe, the various treaties define the powers of the different organs of the Union. The question whether a particular law or action is within the purview of such powers is in substance a "constitutional" question. The ECJ is in effect a "Supreme Court" for European law, deciding both "constitutional" and "non-constitutional" matters. No good purpose would be served by converting it into a specialised constitutional court. To do so is likely to cause more problems than it would solve, for it is often difficult to determine whether or not an issue should be characterised as "constitutional". The present system is well established and there is no need to burden it with problems of demarcation. The root cause of the excessive work load is not its competences, but the referral system which obliges the ECJ to deal with cases referred to it by national courts.

As an outsider I hesitate to suggest what the solution might be. But if I may be permitted the liberty of doing so, I would make two observations. First, I think that there are great advantages to courts sitting en banc rather than in panels, (as the ECJ

often does), for this leads to greater coherence in decision making, and also to a more varied discourse between the judges of the court, than may be possible when decisions are taken by court panels. I also take the view that decisions given by courts on appeal offer opportunities for greater reflection and discussion, and the achievement of greater coherence within the entire judicial system, than decisions given by courts sitting as courts of first and last instance. Looking from afar, it seems to me that the balance sought between the uniformity of European law and efficiency, is more likely to be achieved if the ECJ were permitted to concentrate on more important cases which are of fundamental importance to European law. The solution may be to devise a system whereby the ECJ is able to deflect referrals which are of lesser importance to the Court of First Instance, and to be able to control appeals to it from the Court of First Instance by certiorai proceedings.