

THE CONSTITUTIONAL FUNCTIONS OF THE EUROPEAN COURT OF JUSTICE

Summary of the discussions on the first and second session

by

Frank Hoffmeister*

Participants agreed with the presentation of Judge *Vesterdorf* that the EC Treaty fulfils the functions of a modern constitution, as it organizes the European institutions, contains vertical rules on their relationship with the citizens and offers judicial protection. Thus, it is also sound to refer to constitutional functions of the European Court of Justice (ECJ) as the Court established by that Treaty. It appeared from the discussions that there are at least five of those functions.

First, the ECJ rules on the validity of secondary Community law. That classical function of a Constitutional Court is, however, incomplete. As Lord Justice *Brennan* observed, foreign policy and security acts adopted under the second pillar, are excluded from judicial review under Article 46 of the EU Treaty. This may be regarded as an unfortunate hole in the constitutional powers of the European Court as compared with national courts. The latter may be required to exercise a certain restraint vis-à-vis foreign policy acts of their governments, but may nevertheless be seized on these matters.

Second, the ECJ exercises powers as an arbiter between the Community institutions. In that respect it resembles State Arbitration Courts. Participants did not object to Judge *Colneric*'s observation that the Court jurisprudence on the institutional balance and on the correct choice of the legal basis for Community acts serves this purpose. The Court also decides quasi-federal disputes on the distribution of powers, when reviewing the competence (or lack thereof) of the Community to legislate within a certain area. As Prof. *Hirsch* pointed out with support from the participants, no special bodies are warranted to deal with this task. The Court already represents all the national legal systems, and there is no need to create a special "Competence-Court" or "Subsidiarity-Court" to outsource this function.

A third constitutional function is entrusted to the Court, when it gives interpretations on the conformity of national law with Community law. Following Prof. *Berman*'s exposé, participants underlined that the lack of formal power to invalidate the law of the Member States tells only half the story. The other half of it is that relevant

* Dr. iur, Member of the Commission Legal Service, Professor at the Vrije Universiteit Brussels (part-time).

findings of the Court create an obligation of the Member State not to apply the inconsistent piece of national legislation or even to abolish it. Hence, the Court's jurisprudence has a very strong effect on the law of the Member States. Some participants inquired whether the Court should not be more cautious in this respect. Restricting the effects of its judgments to the future would be most important especially in cases which have an impact on national taxation law.

Ensuring access to Court for citizens was identified as the fourth constitutional function. For sure, as with some national Supreme Courts, there is no right to a constitutional complaint against any Community act, including of a legislative nature, allegedly infringing a human right of an EU citizen. Rather, Article 230 (4) of the Treaty allows bringing an action of annulment against a decision addressed to a person or against a decision, which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. Discussions centred around the question raised by Advocate-General *Jacobs* whether the Plaumann-Formula, is not in breach of the right to access to court as guaranteed by Article 6 of the European Convention on Human Rights. Defendants of the Court pointed out that it has to respect the conditions laid down in the Treaties. There are limits for dynamic judicial interpretation. It was already a remarkable step of the Court to remind Member States in the *Unión des Pequeños Agricultores* judgment that they should consider amending the Treaties to allow for better access of citizens to the Community courts. Furthermore, as judges *Chaskalson* and *Cruz Villalón* showed in their presentations, the historical experience of a country is an important factor in determining the powers of the highest Courts for judicial protection. As the Community lacks a comparable historical record, it is difficult to reach a consensus among Member States about the appropriate degree of scrutiny by Community courts in this field of individual protection.

A fifth constitutional function was finally proposed by Prof. *Weiler*. The Court should consider counterbalancing the still prevailing democratic deficit in the Community. It could use its powers as arbiter between the institutions to call for more democratic practices within the institutions. ECJ judgments could lead, for example, to enhanced transparency in law-making and a revision of the comitology-system. His suggestion that such democratic engineering could be based on the common democratic traditions of Member States was, however, not endorsed by other participants. It was felt that the Court could be criticised as being overly active, and that there are considerable difficulties to establish a common standard in the field of democratic principles with relevance for the institutional architecture of the Community.