# THE COURT IN THE CONSTITUTION: HOW FEDERAL?

by

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*A.*

The question raised in the title is not an easy one. Are the provisions on the Court in the Constitution increasing the federal features of this institution? It could of course not be understood as meaning that there is an agreement on what "federal" is or, in other words, that there is a federal model that is generally applicable. We know that both things are not true, but the distinction should be clear between an intergovernmental model and a federal one.

When the Court is addressed as the most federal among the institutions (at least up to the creation of the ECB), one seems to refer to a conjunction of elements most of them appear to be inseparable of the nature of Community law itself.

We refer to the main differences which are well known between the Court and other so-called "classical" international courts: compulsory jurisdiction, access (although limited) of private parties, appeals for infringements against States by a Community institution, mechanism of preliminary rulings based on the cooperation between national jurisdictions and the Court, - the national judge becoming a "Community judge" in a kind of "dédoublement fonctionnel" (often referred to as a decentralisation scheme) without precedent -, enforceability ("*force exécutoire*") of the sentences containing a pecuniary obligation[1].

Having the Court a central position within an organisation of integration, it benefits of the main features of the law in such a process and, in particular, both ascending (direct access of individuals and undertakings) and descending (no "exequatur" for the sentences) immediacies, which are federal elements of supranationalism.

Its role as a constitutional court and not as a kind of arbitral jurisdiction among states has become prominent and it contributed a lot to the constitutionalisation of Community law by making clear the basic features of it: primacy, direct effect or better, invocability, and Member State liability for violation of Community law.

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1 See on the main features of the Community Judiciary, D. Simon, *Le système juridique communautaire,* Paris, PUF, 3e éd., 2001, p. 480 et s.

But the Court is not in a hierarchical position in respect with States, national institutions and especially the Courts. It is not the supreme court of a fully-fledged federal judicial system.

The Court is not entitled to declare a national act "null and void" as it can do with Community acts. It can only declare the former act as being contrary to the treaty in an appeal for infringement made by the Commission or, much more infrequently, a Member State. The national norm is paralysed in its effects but it is still part of the national legal order. The Court is not formally a cassation judge standing above the national courts. Its relations with national courts have been defined as based on co-operation and not on subordination. Cooperation through the preliminary ruling procedure, which was by itself a great innovation, was called by some "*subsidiarité avant la lettre"*, an alternative to centralisation. As I said, national judges are defined as Community "common law" ("*de droit commun*") judges. It will be for the national courts to draw the consequences of the, sometimes enigmatic, dicta of the Court.

There seems to be no political will among the Member States and the institutions to change anything important to these basic principles.

*B.*

The trend since the Amsterdam Treaty is to expand the jurisdiction of the Court to all the fields of action of the Union. With the removal of the pillars' system, started with Amsterdam Treaty and continued, but not fully completed, by the Constitution, the derogations to the jurisdiction of the Court have almost completely disappeared, at least in the field of the Freedom, security and justice area that were before part in the first (immigration, asylum), part in the third pillar (judicial and police cooperation in criminal affairs). Nothing significant would change in this respect with the Constitution as far as CFSP and ESDP are concerned, except for the possibility of the Court to decide on a request for a preliminary opinion on the compatibility with the Constitution of an envisaged international agreement in this field, under article III-227. More importantly perhaps, the Court would explicitly get, under Article III-376, the right to decide on the frontiers between the pillars, a right the Court has already recognised for itself[2]. It would have also, under the same article, the competence to control the legality of European decisions providing for restrictive measures of a non economic nature against physical and moral persons

2 See, recently, the judgment of 13 September 2005, case C-176/03, *Commission/Council*, where the Court declares null and void a framework decision of the Council imposing to the Member States the adoption of criminal sanctions for the violation of environment protection rules, a field which the Court declared of Community competence. See already, the judgment of the Court of 12 May 1998, aff. C-170/96, *Commission/Council*, *ECR,* I-2765.

On the other hand, it is in the Treaty of Nice and not in the Convention's draft, that the most important moves took place as far as the Court is concerned[3]. They were the object of a careful preparation during the IGC 2000 and they were confirmed by the Convention. Most of them concern ways of avoiding the overburdening of the Court, which is already a reality but which necessarily will increase due to the new fields of action of the Union, the deletion of the pillars' system and, last but by no means least, the unprecedented enlargement. There are three new possibilities opened by enabling clauses in the Treaty of Nice but the programme has been only partially implemented up to now: the transfer of direct actions from the Court to the Court of first instance, the creation of specialised tribunals attached to the Court of first instance and the conferment to the Court of first instance of the right to make preliminary rulings in specific cases to be determined.

More flexibility was created as far as the revision procedure of the Statute of the Court is concerned. Some provisions have been transferred from the Treaty (Constitution) to the Statute, which is easier to revise (under the Constitution, by the legislative procedure), except for its first part on the politically sensitive question of the status of the members of the Courts.

The procedure of appointment of the members of the Court was kept unchanged in the Constitution, except for the intervention (under Article III-357) of a consultative committee, advicing the governments (deciding by unanimity) on the merits of the applications. The mandates will remain of the same length, six years and they are renewable. The rejection of any prolongation of these mandates makes clear the political will of the Governments to keep an eye on "their" judges or advocate general, without interference of any other institution and, above all, not of the European Parliament. It is an interesting signal of the political importance of the Court in the eyes of national authorities. It is regrettable for the legitimacy of the Court. Fortunately, the effective independence of the members of the Court is generally recognised. But, in this matter, appearances are as important as reality.

## *C.*

Perhaps developments outside the chapter on the Court are as important for our subject as are changes of the parts related to the Judiciary.

To be sure, one of the main points is the introduction of the primacy of Union law in the Constitution. The new article I-6 on that matter was and in a way still is a matter of preoccupation for the unconditional servants of national sovereignty. As it is well known, the UK requested and obtained a declaration concerning this article to be annexed to the Constitution which refers to the case law of the Court in the

3 See the contribution of President Skouris, in this volume.

field of primacy, in order to avoid, for example, a generalised primacy independently from the direct effect of a Community provision in question. Professor Dashwood has very clearly presented his concerns (and the concerns of the British Government) in this respect[4]. On the other hand, the proximity of the provision on primacy (article I-6) and article I-5 on the relations between the Union and its Member States (in particular, the respect of their "national identity") has repeatedly been stressed.

I would suggest that the insistence on the future interpretation of primacy as understood in the case law of the Court is double-edged. It means in particular, the supremacy of Community law whatever its rank, i.e. also secondary law, on any national law, whatever its rank, i.e. also on the Constitution. A clear and fortunate message in a context where some Courts of new (and "old") Member States seem to be fascinated in particular by the former case law of the German constitutional court, aiming at a control of the conformity of Community law with the Constitution (so-called "*Solange Beschluss*" or "*Maastricht Urteil*" of 1993).

On the other hand, it is remarkable that, under the Constitution, all the Union's law would benefit of primacy, including the CFSP and ESDP. Of course, the Court will not be able to exercise its jurisdiction on this matter, and especially to adjudicate on the direct effect of this part of Union's law but national jurisdictions will be able to decide on both the "*justiciabilité*" of these norms and their direct effect and primacy. The Court has nevertheless recognised in a judgment of 16 Juni 2005 (case C-105/03, *Pupino*) that the principle of loyal cooperation and the inherent principle of "conform interpretation" apply in the field of Police and Justice cooperation in criminal affairs, a decision that has been described as of the same importance for this "pillar" as *Van Gend & Loos* for Community law (see R. Barents, note in *SEW*, 2006, p. 74).

## *D.*

Another important element which explains the insistence of the UK Government during the Convention and within the IGC, to water down the legal effect of the Charter on fundamental rights, is the importance for the case law of the Court of the insertion of the Charter in the Constitution, which is both a symbolic and an effective element. One should not overestimate the possible effects on the operability of the Charter of the so-called "horizontal provisions" which have been "enriched" in the negotiating process within the Convention at the request of the UK. Especially, the obligation for the judge to take into account the explanations of the Presidium would not necessarily impede a dynamic interpretation of the rights proclaimed by

4 A. Dashwood, « The Relationship between the Member States and the European Community/European Union", 41 CMLRev 355-381, 2004, (379-380).

the Charter. The insertion of the Charter, together with the accession of the EU to the ECHR[5], will make a lot for the further constitutionalisation of the system. Reluctance of some constitutional courts against the primacy of Union law on their Constitution will loose most of its "grounds" and of their practical impact if there is such a consolidation of the protection of fundamental rights in the EU legal order.

*E.*

One of the main weaknesses of the reform as far as the Court is concerned consist in the absence of remedies against the refusal of many national Courts of last instance to make a request to the Court for a preliminary ruling when the interpretation of Union's law is at stake and their trend to decide themselves on this question. And there is no control on the way jurisdictions having asked preliminary rulings of the Court are conforming to the ruling of the Court. At a colloquium held in Rouen in 2004, Julio Baquero, now a Marie Curie fellow at the EUI in Florence, tried to demonstrate that far from being the success that is so often underlined, the mechanism of preliminary rulings has revealed very serious limitations[6]. There are countries where it seems practically ignored by courts of last instance which are under a treaty obligation to refer to the Court questions of interpretation of Community law[7]. This situation creates severe problems for the uniformity of Union's law and discriminations in its application to private parties. On the other hand, as I mentioned before, the sentences very often leave the national judge with a cryptic answer not easy to interpret.

Two years ago, in *Köbler,* a judgment of 30 September 2003, C-224/01, the Court seemed to realise the problem and decided that the State was liable for the violation of Community law by a last resort judge but this new step is not a panacea. As

5 Not only is the accession an imperative for the Union under article I-7, paragraph 2, of the Constitution, but the new Protocol 14 to the European Convention on Human Rights, signed in May 2004, enables the Union to accede to the Convention.

6 See « La procédure préjudicielle suffit-elle à garantir l'efficacité et l'uniformité du droit de l'Union européenne ? », to be published in L. Azoulay and L. Burgorgue-Larsen (dir.), *L'autorité de l'Union européenne,* Brussels, Bruylant, 2006. See for a Spanish version, " De la cuestión prejudicial a la casación europea: reflexiones sobre la eficacia y la uniformidad del Derecho de la Unión", *Revista española de derecho europeo,* 2005, enero-marzo, 35-58.

7 See on the strict rules in this respect, judgment of 6 October 1982, case 283/81, *CILFIT, ECR,* 3415. Ch. Timmermans, "The European Union's Judicial System", 41 *CMLRev* 393-495, 2004, notes: "Too little is known of cases where Community law has not been applied where it should have been applied. Preliminary questions have not been raised when they should have been raised." (399). See, among many others, the judgment of the Italian *Consiglio di Stato*, of 19 April 2005 in the case Federfarma, N°s 10778 to 10788/2004. Comp. with the views of President Günther Hirsch in this volume, alluding to the possibility of "dezentrale Auslegungsinstanzen" with non specified "funktionale und verfahrensrechtliche Möglichkeiten" in order to preserve the "Rechtseinheit in der Gemeinschaft".

Baquero writes, it offers a kind of cassation instrument by the back door. Because, on the one hand, the Court judged that the violation was not serious enough as to open the right for compensation, but, on the other hand, it made clear that the supreme court judge was wrong, with the possible consequence of paralysing the effect of its case law for the future.

In another judgment of 9 December 2003, C-129/00, *Commission/Italy,* the Court condemned this country for an incorrect interpretation and application of Community law by both the administration and the judiciary, including the *Corte suprema di cassazione*. The possibility for the Commission to use the infringement procedure against a Member State, and to make an appeal before the Court, for a failure due to its Judiciary is not a new one, but everybody realises, and the practice confirms it, that this remedy can only be used in specific cases close to rebellion, considering the specific independence of judicial authorities.

In its judgment of 9 December 2003, the Court observes that

> "In that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.
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> Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law." (points 32 and 33).

Is the lack of cooperation, to say the least, by various higher courts in a number of Member States[8] a valuable motive to change fundamentally the present system of cooperation between the Court and national courts? That is the view exposed by Baquero in an impressive demonstration. He proposes to establish an appeal for cassation open to individuals and undertakings before the Court, against possible violations of Community law by the national supreme courts, when the cohesion and unity of Union law are at stake and consequently, to make in any case of the preliminary request a faculty and not an obligation anymore for the last instance judge. One immediately sees that the possibility of such a direct appeal against the decision of a national court introduces a fundamental change in the present system and a step towards a federal organisation of the Judiciary. One should remember that the Spinelli draft EU Treaty (article 43, 5th indent) provided for such a direct appeal in two cases: a lack of reference to the Court by a last instance judge or a violation of a preliminary ruling by this judge. This goes less far than the most radical suggestion of allowing the appeal for any violation of Community law by a national last in-

8 See Julio Baquero Cruz, who refers to the statistics included in the annual reports of the Court and points out the differences among states at this regard. The case law reported by the Commission is also illustrative.

stance judge. I must say that for the sake of the unity of interpretation of Union law, I would prefer, if an appeal for cassation would be introduced, to retain the obligation of the last instance judge to refer questions of interpretation to the Court. Another possibility would be to open a right of appeal of either the Commission (but that would be viewed as contrary to the separation of powers and one could object that the right for the Commission to make an appeal for infringement against a State under article 226 CE, already exists, although this is not identical to an appeal for cassation) or an advocate general (in principle, the first advocate general who will have special responsibilities under the Nice Treaty in relation with sentences of the Court of first instance[9]) against a sentence ignoring the obligation to ask for a preliminary ruling or ignoring a preliminary ruling by the Court as a way of coping with the problems raised by national case law endangering the unity and coherence of Union's law. One could hope that the discussion will develop on this question.

One should take into account that one of the explicit or implicit motives for the parties to refrain to ask and for the national judge not to request for a preliminary ruling of the Court is and perhaps will more and more be, the still too long duration of the time needed by the Court to answer the questions whatever the efforts done in order to shorten the delays. The transfer to the Court of first instance of the competence to decide on preliminary rulings in specific matters under Article 225, paragraph 3 of the EC Treaty would be a partial answer to the present excessive workload of the Court.

The reform started in Nice will probably not resolve the existential problem of the effectiveness of Union law, which is anyway more acute with the present enlargement and the next to come. Preliminary references have served a lot for the development of the bases of the Community system. But the mechanism, if it is kept unreformed, seems to have reached its limits. The reflection on the Judiciary should not have as the first objective to alleviate the burden of the Court but to preserve the unity of the EU legal order. It is evidently unacceptable that a national court should have to wait more than two years (sometime three or more) to receive an answer of the Court. But it is not only a "mere" question of organisation[10] and means to be given to the Court[11]. Nothing will be achieved if the lack of penetration of Union's law persists in many countries because national judges are in most of the cases not ahead of their citizens, but the reflection of the context where they work.

9 See articles 225 and 225 A, ECT and article 62 of the Statute of the Court. It is for the First advocate general to ask for a re-examination of a judgment of the Court of first instance in case of a serious risk for the unity and coherence of the case law of the Court.

10 Baquero insists on the possibilities offered by the multiplication of chambers of the Court.

11 And, where appropriate, necessary filters to be introduced.

## *F.*

In order to conclude on the question raised at the beginning, one should perhaps observe that the developments I have mentioned as far as the Court is concerned appear to regard more the rule of law principle than the question of federalism, although both concepts are to be inseparable. The organisation of the Judiciary is a central element in every federal construction. On the other hand, Primacy of Union law on the law of the component entities is a crucial element in an organisation of integration but it is not a constitutive element of every federal system. Especially for those systems which are based on the exclusiveness of competences of the federation and the regions, as in this defensive federalism of a sort or confederalism that exists in Belgium, for example. The question to be clarified in such a context is: who is competent ("*Wer ist befugt"*)? And not: which norm has the priority on the other? But if it is not possible to consider as a general norm that "*Bundesrecht bricht Landesrecht"*, primacy is a rule in most federal systems and it is something that supranationalism and integrative federalism should have in common.

The most important difference between both is the absence of a genuine federal judicial system within the Union. Proposals have been made in the past for the creation of decentralised courts, either national, Community or regional, in order to cope with the increased burden of the Court. Time seems not to be ripe for such a territorial decentralisation of the judicial system. The risk for a fragmentation of Community/Union's law is still too big.

We probably will have to live with a centralised system for some more time, with the exception of the jurisdictions on marks and the perspective of a patent tribunal, where specialised tribunals[12] are of the essence of the matter. But reflection should go on.

12 The Civil Service Tribunal has started to work last year.