PREFACE

by

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If the European Union is a community of law, as Walter Hallstein put it – and the European Court of Justice has confirmed that it is – then a functioning European judicial system is the cornerstone of the Union. It secures the effectiveness of the shared law of this unique European polity, which was established voluntarily and which functions entirely without the use of force. The European Union is the vehicle through which the peoples of Europe have been able to confer limited sovereign powers upon supranational institutions and to accept their decisions as legitimate and binding upon individuals, as well as on the Member States themselves. The Union has permitted – and continues to permit – the citizens of the European Union to live in peace, with liberty, for an unprecedented length of time, leaving behind centuries of bloody wars and misery. The "European Dream" (*J. Rifkin*) has its foundations in respect for the dignity of the human being and for the rule of law which gives it effect. Understanding the European judicial system as a non-hierarchical, multilevel judicial system, based upon voluntary acceptance, political equilibrium, and the mutual control of European and national courts,[1] casts light on the very nature of the European Union. It also has the potential to contribute to the search for institutions and principles of governance that can help to preserve freedom and peace internationally, and in other regions of the world.

The idea of organising an international conference on *The Future of the European Judicial System* at the Humboldt-University of Berlin, in order to examine the constitutional role of the European courts was born in the spring of 2004, shortly after the European Convention had completed its work on a Treaty establishing a Constitution for Europe. Juliane Kokott, Advocate General at the European Court of Justice suggested that a symposion might be held, involving members of the ECJ, on how the European judicial system might develop under within a constitutional framework. In consultation with Cheryl Saunders, representing the International Association of Constitutional Law (IACL), we agreed to organise such a symposium, on November 2 – 4th, 2005 as a high level joint venture of the IACL and the European Constitutional Law Network (ECLN) with the Walter Hallstein-Institute für European Constitutional Law of the Humboldt-University, Berlin. The Treaty estab-

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1 Cf. most recently: Franz C. Mayer, *The European Constitution and the Courts*, in: Armin von Bogdandy / Jürgen Bast (eds.), Principles of European Constitutional Law, 2006, p. 281.

lishing a Constitution for Europe was signed in Rome on October 29, 2004. It is now a matter of history that the subsequent referenda in France and in the Netherlands failed. This did not, however, diminish our conviction that a serious exchange of experiences and ideas on the future of the European judicial system by specialised practitioners and academics from Europe and from other parts of the world with multi-level judicial systems would be of considerable benefit to the Union and of interest in countries elsewhere.

The aim of the conference was to develop perspectives for the future development of the European Court of Justice, the Court of First Instance (CFI) and specialised Chambers or Courts at the European level in their relation to national Courts – including Constitutional Courts – and to the European Court of Human Rights. To that end, we invited distinguished jurists from a wide range of countries, including the Chief Justice of Canada, Beverley McLachlin, and the immediate past President of the Constitutional Court of South Africa, Arthur Chaskalson. The experience of such diverse world legal traditions, coupled with the theoretical analysis of eminent legal scholars during two days of intense discussion not only were expected to produce important new insights, concepts and practical proposals for the future development of the judiciary of the European Union, but also to initiate a profound dialogue, across the continents, on the role of constitutional and supreme courts in federal systems, on the constitutional problems with which they deal, on their composition, including the procedures for the election of judges and on their relationship to the ordinary judiciary.

The conference fulfilled, and perhaps even exceeded, our expectations. A public opening session set the agenda for the seven sessions that followed, not only from a political but also from a comparative and substantive point of view. In a welcoming address the German Federal Minister of Justice, Brigitte Zypries, suggested that the ECJ might evolve into a constitutional court with a limited number of judges, while the lower instance tribunals (CFI, Chambers) might be expanded in size so as to cope with the growing judicial workload. Vassilios Skouris, President of the European Court of Justice, analyzed the role and self-conception of the ECJ in the European legal system after the reforms of the Treaty of Nice. He explained his view that, as a result of these reforms the Court now functions adequately. Nevertheless, he observed that multilingualism and the growing body of European law, in terms of both substance and geographical reach, continue to pose significant challenges to the operations of the Court that require additional measures in order to safeguard the efficiency and speed of its procedures.

Most interesting insights were drawn from a comparison of aspects of the ECJ and the US Supreme Court by Michel Rosenfeld of the Benjamin N. Cardozo School of Law, New York. He drew attention to what he considered the remarkable extent to which national judges have accepted ECJ decisions, including the supremacy of these decisions, "in an exercise of judicial cooperation". In his view, this authority of the ECJ is even more noteworthy in light of the style of its reasoning. In the

constitutional system of the United States, judicial power is based on argument, judgment, and persuasion; the "power of the pen" as opposed to the executive power, which Rosenfeld identified as the "power of sword" or to the legislative power, which he termed the "power of the purse". Although a more discursive style might be appropriate to a system which is marked by the diversity of its members, like the EU, Rosenfeld suggested that the jurisprudence of the ECJ was rather more in the style of French judicial decisions, though some move towards more persuasive argument can be observed. An even broader comparative perspective was adopted by Peter Häberle from Bayreuth, who emphasised the need for comparative law as a special (fifth) method of interpretation. According to Häberle, comparison of the actual forms of constitutional adjudication shows many common features, the most important being the protection of the constitution. The constitutional courts are entrusted with special powers, to act as the "open society of the constitution's interpretors".

This is not the occasion to repeat or to summarise the presentations and discussions during the conference as a whole. However, some specific observations should be mentioned, as insight into what follows in this volume. George Bermann, from the Columbia University School of Law, New York, noted striking paradoxes in relation to the question of Kompetenz-Kompetenz which remain – and apparently need to remain – unresolved within the EU, as long as national courts respect in practice the supremacy of European law as required by the ECJ. Joseph H.H. Weiler, of New York University made a similar observation, drawing attention to the "remarkable success of the ECJ in persuading the key constituencies in the Member States". On the other hand, as he noted perceptively, this jurisprudence can also be considered an aspect of the problems of the EU, commonly characterised in terms of democratic legitimacy and social legitimacy following market integration, affecting aspects even of its human rights agenda. In a somewhat different vein, Jean-Victor Louis, of the Free University of Brussels, who was subsequently followed in this respect by, José Maria Beneyto, of Universidad San Pablo-CEU, Madrid, emphasised that the ECJ is not in a position of hierarchical superiority with respect to member States and thus not a "supreme court"; rather, the European system is based on cooperation. Even so, for him, the refusal to prolong the mandate of the ECJ judges signals the political importance of the Court in the eyes of national authorities.

There are many other highlights of the Conference that might be mentioned. These include, for example, the thorough comparative analysis of the Latin-American Constitutional Courts by Allan Brewer-Carías, of the Universidad Central de Venezuela and the studies of the relationship of the European and national courts to the European Court of Human Rights drawing on the EU Charter of Fundamental Rights by Advocate General Francis Jacobs of the ECJ, Judge Egbert Myjer of the ECHR and Judge Heinz Aemisegger, former President of the Swiss Federal Court. The full value of the contributions, however, can only be discovered by a careful reading of the written proceedings, as brought together in the present volume.

The concluding session of the conference took the form of a round table, chaired by Reinhard Müller[2] of the Frankfurter Allgemeine Zeitung. Vassilios Skouris, Hans-Jürgen Hellwig, former President of the CCBE, Cheryl Saunders and Juliane Kokott responded to questions about the *Consequences and Perspectives for the ECJ* that resulted from the conference.

This Conference could not have taken place, and nor could this volume have been published, without the extraordinary support by the Fritz Thyssen-Foundation to which the organisers would like to express their deep gratitude. We also thank Minister Zypries, and the German Ministry of Justice for their moral support and for hosting a dinner for the conference presenters. In addition, we express our gratitude to Gerhard Sabathil and to the European Commission which he represents in Germany, for their support, which included hosting the second evening at the Commission's premises in Berlin.

My former and present assistants, Frank Hoffmeister, Stephan Wernicke and Franz C. Mayer were so kind as to summarize and comment upon the three main parts of the Conference, although their obligations at the Legal Service of the European Commission, at the cabinet of Judge Colneric at the ECJ and at the Walter Hallstein-Institute, left them with limited time to do so.[3]

Patricia Stöbener and Julia Mall of the Walter Hallstein-Institute for European Constitutional Law, have organised the publication of this volume, dealing with all technical aspects of it, including correspondence with the authors and lay-out. We owe them special thanks. We also express our deepest gratitude to the assistants and other staff of the institute, and in particular to Petra Krause, Julia Mall, Patricia Stöbener, Jan Witzmann and Gabriele Müller, for their tireless work and great enthusiasm over a period of more than eighteen months, making the project not only a success in intellectual terms but also providing, for many participants, an unforgettable opportunity to meet and to renew or establish friendship.

Berlin, in May 2006

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(Writing also on behalf of Juliane Kokott and Cheryl Saunders)

2 See his comments on the Conference: Reinhard Müller, Fehlendes Grundvertrauen. Die europäische Gerichtsbarkeit bleibt von der Verfassungskrise nicht unberührt, Frankfurter Allgemeine Zeitung Nr. 264 of November 12, 2005, p. 10.

3 See their report on the Conference: Frank Hoffmeister, Franz C. Mayer, Stephan Wernicke, The Future of the European Judicial System – The Constitutional Role of European Courts, 6. Internationales ECLN-Kolloquium vom 2. bis 4. November 2005 in Berlin, JZ 2006, p. 241-243.