SELF-CONCEPTION, CHALLENGES AND PERSPECTIVES OF THE EU COURTS

by

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*Ladies and Gentlemen,***

After the creation in 1989 of the Court of First Instance through the Single European Act, the Treaty of Nice introduced the most significant package of reforms relating to the European Courts adopted since the establishment of the Court of Justice in the 1950s. For the sake of clarity and comprehension, I would like to outline the main features of these reforms before I deal with their impact on the current and future state of affairs of the Court.

The Treaty of Nice, which entered into force on the 1st of February 2003, is characterised by three key innovations with regard to the organisation and internal functioning of the Court.

The first innovation was the concept of the Grand Chamber formation. Comprised of 13 judges (the President of the Court, the three Presidents of the 5 judge Chambers, the Judge-rapporteur and eight other judges by rotation), the Grand Chamber is now the formation that hears the cases that are considered more important. The Court also sits in a Grand chamber when a Member State or an EU institution which is a party to the proceedings so requests.

The second innovation was the election of the Presidents of the 5 judge Chambers for a period of three years. Currently there are three chambers which sit in such a formation.

The third innovation concerns the reconsideration of the role of the Advocate General. Notwithstanding the enlargement of the European Union, there are still only 8 Advocates General serving at the Court. If they were to deliver an Opinion in all the cases brought before the Court, this situation would lead to a dramatic increase in their workload in comparison to their 25 counterparts on the judges' side. Faced with a high risk of considerable procedural delays due to a "bottleneck" effect at the stage of the intervention of the Advocate General, the Treaty of Nice has introduced for the first time the possibility for the Court to give judgements without an opinion of the Advocate General in cases where no new points of law are raised.

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The Treaty of Nice also dealt with the division of jurisdictional competencies. In line with the overall trend entrusting the Court of First Instance with the tasks of a first instance jurisdiction, the provisions of the Treaty of Nice dealing with direct actions before the Community Courts further strengthen the position of the Court of First Instance by giving it jurisdiction over all direct actions except those reserved for the Court of Justice. In short, the Court of First Instance mainly hears direct actions brought by individuals and companies while the Court of Justice retains – with some exceptions – responsibility for actions brought by Member States and Community institutions.

Further, the Treaty of Nice provides that the Court of First Instance shall have jurisdiction for preliminary rulings 'in specific areas laid down by the Statute'[1]. To date, the Statute has not been amended to give the Court of First Instance any specific preliminary ruling jurisdiction and all references continue to be heard by the Court of Justice. In any case, the Treaty of Nice provides that 'where there is a serious risk of the unity or consistency of Community law being affected', a review of a preliminary ruling of the Court of First Instance should be possible. The conditions under which this review is to be exercised were later elaborated in the Statute. Where the First Advocate General of the Court of Justice considers that there is a serious risk of the unity or consistency of Community law being affected by a decision of the Court of First Instance, he may propose, within one month of delivery of the decision of the Court of First Instance, that the Court of Justice reviews that decision. Within one month of receiving this proposal, the Court of Justice shall decide whether or not the decision should be reviewed and, should it decide in the affirmative, it deals with the case by means of an urgent procedure. If the Court of Justice then finds that the decision of the Court of First Instance affects the unity or consistency of Community law, the answer it gives will replace the one given by the Court of First Instance.

But the Court of First Instance itself may also refer a case to the Court of Justice at the very outset of the procedure where it considers that the case 'requires a decision of principle likely to affect the unity or consistency of Community law'.

The Treaty of Nice also allowed the establishment of so called judicial panels with jurisdiction to hear and determine at first instance certain classes of action or proceedings brought in specific areas[2]. Such panels may be established by the Council, acting unanimously on a proposal from the Commission and after consulting the Parliament and the Court of Justice, or at the request of the Court of Justice and after consulting the Parliament and the Commission.

The Council hence decided in November 2004 to establish the European Union Civil Service Tribunal. Attached to the Court of First Instance and an integral part of the Court of Justice for institutional and organisational purposes, this judicial panel

1 Article 225(3) EC.
2 Article 225(2) EC.

exercises jurisdiction at first instance in European civil service disputes. Appeal against its decisions may be lodged at the Court of First Instance on points of law only. The seven judges of this new judicial panel were sworn in in October 2005.

Finally, the Court system was also made more flexible through the *simplification of the procedures* by which legal instruments regulating the operation of the Courts can be *amended*.

Statute provisions are now subject to amendments without the need for Treaty revision: the Council may, acting unanimously at the request of the Court of Justice or the Commission and after consulting the other institutions, amend all provisions of the *Statute* except those of Title I which are concerned with fundamental and non-contentious principles of judicial independence. This amendment procedure has already been used.

Prior to the Treaty of Nice, even the most minor changes to the Rules of Procedure required the unanimous approval of the Council and the delays involved were considerable. A compromise was reached whereby the Rules of Procedures can now be amended by a qualified majority of the Council. The Court of First Instance must still establish its Rules of Procedure in agreement with the Court of Justice, as must any new judicial panel set up by the Council.

Subsequent to the innovations, the Rules of Procedure were amended in order to speed up and simplify certain stages of the procedure. Enumerating all the measures here would be a laborious exercise, but let me stress one of the most recent of them.

Within the framework of the preliminary ruling procedure, Article 104, paragraph 3 of the Rules of Procedure allows the Court to give simplified and more rapid answers to the referring judge. This corresponds to a now well established practice of responding to certain requests by way of a simple order, without the opinion of the Advocate General. Since October 2005, the obligation to inform the national court and to hear the parties before the Court can give its decision by order has been removed in two situations: where a question is identical to a question on which the Court has already ruled, or where the answer can be clearly deduced from existing case-law.

Last but not least, various purely internal measures were adopted in order to improve the efficiency of the working methods of the Court.

As a result, if the Treaty of Nice did not bring about any immediate and radical structural reform of the Community Courts, it permitted significant evolution while maintaining the core principles of judicial organisation that underpin the now well-established and well-respected Community legal order.

As I am addressing you today, the latest figures concerning the Court's judicial activities are quite encouraging and tend to demonstrate that the reforms introduced by the Nice Treaty were not just cosmetic:

- the number of cases decided each year is increasing;
- the number of incoming cases remains stable;
- as a consequence, the number of pending cases is decreasing;
- the length of procedure has gone down to 20,5 months for preliminary rulings and to 21 and 22 months respectively for direct actions and appeals.

Certainly, these figures are partly the result of events over which the Court has no real control, but I believe that they are to a certain extent also the result of the efforts and reforms made in order to improve its efficiency.

Improving the efficiency of the Court has been a major concern for some years now. Even though continuous and cautious attention should be paid to improving efficiency, it is a process that can only go so far as it should never endanger the very *raison d'être* of the Court's role and position within the European judicial architecture. I believe that improving efficiency is a process that may reach its limits when it calls into question the foundations of the Community judicial system such as multilingualism, the dialogue with the national judge, the balance between the various types of action and, last but not least, the quality of the case law.

I will now discuss these different aspects, underlining the balance to be achieved in each of them – bearing in mind that they are all interrelated.

Presenting these different aspects will also allow me to draw a picture of the current state of the Court's activities and to underline the challenges to be faced.

A. Achieving the right balance between efficiency on the one hand and coherence and quality of case law on the other hand

With a Court of Justice consisting of 25 judges, soon to be 27 or even more, the fear was expressed that this court would bear more resemblance to a deliberative assembly than to a collegiate body. One should indeed bear in mind that rulings of the Court are drafted and discussed, if necessary word by word, among judges sitting together around the same table; an exercise which would prove time-consuming and exhausting, if not impossible, if all the judges were to deliberate all the cases as a full Court. It would simply lead to a paralysis of the system. For political reasons as well as for the good of Community law, which requires representation in the Court of the legal traditions of all the Member States, the rule according to which one judge per Member State is to sit in the Court has nevertheless been maintained.

The challenge here consists in distributing the tasks among the judges without endangering the coherence of the case-law.

I. Distribution of tasks vs. coherence of the case-law

As already mentioned, the cornerstone in this regard has been the introduction of the Grand Chamber. The full Court will most probably only sit on rare occasions provided for in the Statute. The decision on whether a case is important enough to be heard by the Grand Chamber is made at the weekly General Meeting of the Court, on the proposal of the Judge-Rapporteur for the case. This weekly meeting is a key moment where decisions are taken on the main features of the future handling of a case: allocation to a 3 or 5 judge Chamber or to the Grand Chamber; whether or not the Opinion of the Advocate general is necessary; date for the hearing if the parties have expressed the wish to be heard orally (the 5 judge Chambers have become the usual formation of the Court and deal with 54% of the cases heard in 2004; about 30% of the judgments delivered in 2004 were delivered without an Opinion).

Because the Court sits in 8 different formations, it may well be the case that the first and last occasion for some of the Members to get acquainted with a case is the weekly General Meeting. In this context, the coherence of the case-law becomes of the essence.

The fact that the Presidents of the 5 judge Chambers are elected for a 3-year term of office is an important safeguard for the coherence of the case-law. Since these Presidents necessarily sit, along with the President of the Court, on all the cases brought before the Grand Chamber in addition to all the cases pending before their respective Chambers, they are the permanent and key link between the Grand Chamber and the 5 judge Chambers with regard to the development of their respective case law.

The role of the Advocate General should not be forgotten in this context. Since an Advocate General will be presenting Opinions in less cases and only in those cases where new points of law are raised, he will be able to concentrate on the more substantial cases brought before the Court, thus constituting another safeguard for the coherence of the case-law. This enhanced responsibility of the Advocate General has been mirrored in the role attributed to the First Advocate General in the review procedure of the decisions of the Court of First Instance by the Court of Justice.

Some critics have expressed a fear that the existence of a Grand Chamber and of stable Presidents of the 5 judge Chambers would lead to a hierarchical division between an elite group of judges who sit in the Grand Chamber over a long period of time and other judges who are excluded. Traditionally, there has been no sense of hierarchy among the judges of the Court. However, the objective system employed for designating the judges sitting in the Grand Chamber, based on seniority in office and on a rotation basis – as provided by the Rules of Procedure – should suffice to overcome this fear.

II. Efficiency vs. 'quality' of case law

Efficiency also means rapidity. However, rapidity can be the enemy of perfection. How did the Court try to solve this dilemma, well-known to all judicial bodies?

A detailed timetable has been introduced internally for all preliminary reference cases. Although the deadlines are the same for all cases, not all the cases are the same and these deadlines necessarily have to be considered as indicative and not imperative. This is especially true when it comes to the deliberation of a case. The time required for legal thoughts and decision-making should definitely not be too strictly framed. If judges do not have sufficient time for the proper handling of a case, there is a considerable risk of having a ruling that is unconvincing or in conflict with existing case law. The President of the Court and the Presidents of Chambers thus apply and monitor the timetable with some degree of flexibility. The existence of this timetable nevertheless raised the awareness of all services of the Court, at all stages of procedure, of the necessity for the dealing with cases as quickly as possible.

Furthermore, it has been decided to keep judgements and opinions as short as possible without, of course, compromising their clarity. The primary aim is not that of reducing translation time, but of making judgements more concise and readable by shifting the focus to the actual legal reasoning of the Court. I would here just mention as an example some instances where a judgement of 40 pages contained 35 pages of presentation of the legal framework, the facts of the case and the arguments of the parties, whereas only 5 pages were devoted to pure legal reasoning. Focusing on the legal reasoning contributes to legal certainty and predictability, to the benefit of the citizens.

I would like at this point to tackle some of the criticisms that have been voiced concerning the case law of the Court. Amusingly enough, the critical voices go in two opposite directions.

Criticism n°1: the Court is no longer giving audacious or ground breaking judgements

Since the Court has been developing its case law for more than fifty years, it has already explored the framework of the Community legal and judicial system. Principles such as primacy and direct effect of Community law or the responsibility of the Member States for the violation of Community law having been established, the Court is now called upon to refine its case law in these matters. Although less spectacular, this refinement process is not less essential for the development and uniform application of Community law. Judgements of the first generation whose effect was to remove the most obvious barriers to free movement within the common market are probably also more spectacular at first glance than judgements giving an interpretation of a specific provision of an ever-growing body of Community secondary legislation. Cases simply become more complex and accordingly require a cautious analysis.

That being said, a number of very important cases have been brought before the Court recently: in the course of this two-day colloquium, we will probably have the occasion to present recent rulings such as the one dealing with criminal penalties in the field of environmental protection[3] or to evoke pending cases in sensitive areas of EU law such as the field of judicial cooperation in criminal matters[4] or in the anti-discrimination field[5].

Criticism n°2: the Court is driven by a pro-European judicial activism

This criticism mainly focuses on the case-law of the Court in the areas of social law and tax law. Although this criticism deserves an elaborated answer, allow me please to deal with it here as briefly as possible: first, the Court has to give effect to a Treaty that is based on the idea of integration and that has integration as its purpose. In interpreting this Treaty, how not to place this integrative approach at the heart of the legal reasoning? Second, interpreting a piece of legislation that lacks clarity or whose interpretation deliberately leaves some freedom of manoeuvre will inescapably lead the Court to fill in the gap.

I am deeply convinced that the case-law of the Court is, and can only be, the mirror of the state of European integration itself.

B. Achieving the right balance between efficiency and visibility of the European Community remedies system

The European Community remedies system has developed naturally in a two track procedure, preliminary rulings and direct actions, ultimately aimed at safeguarding the individual rights granted by the European legal order.

The Court wears different hats depending on the way in which it has been seized. In the framework of the preliminary ruling procedure, the Court fulfils its task of giving the ultimate interpretation of Community law and ensuring uniformity in its application on a wider scale. This procedure also enables the Court to scrutinise the compatibility of Community legislation with primary Community law and, albeit indirectly, the compatibility of national legislation with Community law.

In the framework of direct actions, the Court ensures that the various institutional players of the European Union respect the law while exercising their respective competencies in accordance with the Treaty.

In terms of safeguarding individual rights, the system certainly has its shortcomings. The weak point of the preliminary ruling procedure is that where a national

3 Case C-176/03, *Commission vs. Council*, judgement of 13 September 2005, not yet reported.

4 *See, e.g.,* Case C-303/05, *Advocaten voor de Wereld*, pending.

5 *See, e.g.,* Case C-144/04, *Mangold*, judgement of 22 November 2005, pending at the time of the Colloquium and not yet reported.

judge does not refer a question, individuals may not bring the matter before the Court. Weak points are to be found in direct actions as well. Whereas the vast majority of infringement actions stem from complaints by individuals or companies to the Commission, the latter enjoys a full discretion in bringing an infringement action before the Court; and the infringement judgements as such only have declarative value. Furthermore, individuals are granted standing for bringing actions for annulment or for failure to act only if certain strictly interpreted conditions are met.

Some remedies to these shortcomings have nevertheless been developed through case-law or through amendments to the Treaty, and I will restrict myself to mentioning the fact that a Member State may be liable for a decision of one of its national courts adjudicating at last instance not to refer a question to the Court[6]. As a corrective to the declarative value of infringement judgements, lump sum and penalty payments are now foreseen in the Treaty for Member States who have not complied with a judgement of the Court[7].

All in all, the European Community remedies system is coherent and comprehensive and it is striking to observe that, leaving aside appeals, the respective percentage of these actions before the Court has been maintained throughout recent years.

The European Community remedies system is underpinned by a judicial architecture which has already undergone one major adaptation, namely the creation of the Court of First Instance which has proved to be a success: it has helped the Court to face up to an ever-increasing case load and only 20% of its decisions are subject to appeal. Furthermore, only 20% of these appeals are quashed by the Court.

As already mentioned, the Treaty of Nice reviewed the respective competencies of the Court of Justice and the Court of First Instance and opened the possibility of creating judicial panels in certain specific areas. In doing so, it set the basis for a new three-tier Community court structure in which competencies could be gradually redistributed so as to ensure a more efficient administration of justice in a context where it was predicted that, following the enlargement of the European Union, the European Courts would have to face a surge of incoming cases, thus being forced to re-think the various types of action and to adapt the judicial architecture.

The first result of the opening up of this possibility was the creation of the European Union Civil Service Tribunal. This judicial body will further lighten the respective workload of both the Court of First Instance and the Court of Justice since around a quarter of the cases currently dealt with by the Court of First Instance will be transferred to the new body and the Court of Justice will cease to be the appellate body for staff cases.

6 Case C-224/01, *Köbler* [2003] E.C.R. I-10239.

7 Article 228(2), third para., EC. *See, e.g.,* Case C-304/02, *Commission vs. France*, judgement of 12 July 2005, not yet reported.

The Commission is thinking of submitting proposals to set up further judicial panels in the field of patents and trademarks.

I would nevertheless suggest that we pause for a while and consolidate our '*acquis*' in terms of the judicial system before we hastily introduce further judicial panels, and this for three main reasons:

I.

First, the predicted post-enlargement flood of cases has not happened so far[8].

With no sudden increase in the number of incoming cases and with 10 new judges working as Judges-Rapporteurs, the Court could actually take advantage of the situation and reduce to a certain extent its "stock" of pending cases. Hence, one could safely say that, in the short term, a noteworthy reduction in the number of pending cases could be achieved.

At this stage we are still not in a position to foresee the consequences of enlargement in respect of the rate of incoming cases. One can only speculate. The efforts made by the new Member States to adapt their legal systems to the '*acquis communautaire*' before enlargement might serve to postpone for a while infringement actions brought against them by the Commission. As to preliminary references, experience shows that the number of cases brought before the Court has little to do with the size of a Member State, but much more with the willingness and the zeal of each legal and judicial system. The enhanced 'judicialisation' of society and the increased visibility of European law might well become additional criteria to be taken into consideration when assessing the number of cases to be lodged in the future.

II.

The second reason is that there is an existing body of case law in the field of staff cases which is not available for instance in the field of patent law. Entrusting a new judicial panel with the task of dealing with cases in this completely new area of Community law could thus represent a threat to the uniformity and the coherence of Community law that an appeal and/or a review procedure could not completely rule out.

8 At the date of the Colloquium, the Court had received 5 preliminary references from Hungary and one from Poland; one action for annulment from Poland and one infringement action against Estonia had been introduced.

III.

Reforms aiming at achieving more efficiency should naturally provide for more clarity. Multiplying competencies could create confusion, blur the image of the European Courts and make the European Community remedies system difficult to understand – thus achieving the reverse effect in terms of better access to justice.

C. Achieving the right balance between efficiency and dialogue with the national judge

The success story of the preliminary ruling procedure owes a lot to the willingness of the national judges to co-operate with the Court. It is thus totally understandable that the Court of Justice should take extreme care when dealing with national judges. Maintaining the privileged dialogue with the national judge is at the heart of its concerns.

Two years ago, the statistics of the Court indicated a constant increase in the time required to give judgements on requests for a preliminary ruling. In 2003, the time needed to give an answer to the national judge amounted to an average of 25, 5 months.

Such a long delay is clearly unacceptable especially since the cases pending before the national courts are suspended during the procedure before the Court. Such a long delay may deter the national judge from asking the Court for a preliminary ruling in spite of a real need for an interpretation of EC law.

In 2003 the Court conducted an in-depth examination of its internal working methods with a focus on the preliminary reference procedure. These measures, added to the reforms introduced by the Nice Treaty, have so far allowed the Court to reduce the length of a preliminary ruling by 5 months on average.

The efforts made by the Court aimed at providing the referring judge with a helpful answer as quickly as possible will not cease.

However, a dialogue involves a counterpart and I do believe that we have reached a point where one could legitimately expect the national judge to show some understanding of the necessity for the Court to tighten its criteria for handling references, for example the criteria governing admissibility. So far indeed, those criteria have been generously applied.

The referring judge should also be prepared to receive more rapid but simplified answers. As a consequence of the development of the case-law, the Court will most probably be in a position to respond more often to certain requests for a preliminary ruling by way of a simple order adopted on the basis of Article 104, paragraph 3 of its Rules of Procedure, referring to previous judgements or relevant case-law.

This slight shift in the dialogue with the national judge can only take place in a context where he is submitting better drafted references and where his knowledge and awareness in terms of European law have increased. This slight shift lies within a general trend of enhancing the role of the national judge in litigation involving European law – the most recent and striking example is to be found in the field of European competition law.

D. Achieving the right balance between efficiency and multilingualism

The linguistic aspects are of particular importance in a context where the multilingual regime of the Court is a guarantee that all citizens of Europe have access to justice and access to the case law in their own language. It is interesting to note in this regard that the Treaty of Nice transferred the courts' language regime, a politically sensitive issue, to the Statute[9], thereby making it subject to amendment only with the unanimous approval of the Council.

But a good translation of legal documents takes time and this is a factor which entails the risk of procedural delays.

Subsequent to the enlargement of the European Union, it is indeed possible now to bring proceedings before the Court in 20 languages. All the judgements of the Court and all the opinions of the Advocates General must be translated into all 20 languages. This amounts to no less than 380 linguistic combinations – it goes without saying that managing this variety is not a simple task and that ensuring direct translations of documents into all languages is not a realistic goal.

The aim of better management is a more efficient allocation of the limited translation resources of the Court and consequently they should be used only when it is really necessary.

In this regard, a distinction can and should be made between the internal and the external requirements of the multilingual regime. On both levels it seems to be possible to rationalise the use of several languages without compromising the accessibility of the Court and its case law.

I.

At the internal level, the Court enjoys through its qualified staff a multilingual environment which allows some flexibility.

In spite of some concerns expressed in view of enlargement and its possible consequences on the internal linguistic regime, French has remained the internal working language of the Court. I personally support this matter of fact, not so much on

9 Article 64 Statute of the Court of Justice

the basis of a personal preference for the French language, but because being able to deliberate in one and only one language is essential for the Court. Deliberating in more than one language would definitely hinder the judges in their task of interpreting Community law.

The Court has adopted measures so as to ensure that submissions in the 9 new official languages can be translated by qualified lawyer-linguists at least into French for the sake of speedy internal use.

Furthermore, the Court has introduced a "pivot" language translation system in order to provide the safeguard of relay translation when necessary.

Following this line, a new practice was introduced, whereby Advocate Generals now draft their opinions if possible in one of the "pivot" languages.

II.

At the external level, it is essential that measures related to efficiency do not create a distance between the Court of Justice and EU citizens, which makes any decision in this field very sensitive.

Here again, a distinction has to be made between some specific addressees, namely the Member States and the Community institutions, and the wider public.

The Court used to provide the governments of the Member States with an integral translation of the orders for reference – which are often lengthy and complicated documents – in order for them, should deem it appropriate, to be able to submit their observations on the case. The Court has proposed that only the actual preliminary questions submitted by the national courts be translated into all official languages. It has been recognised that a speedy and efficient judicial process before the Court of Justice is not only of interest to the Court itself but also to the governments of the Member States and to national courts and this proposal has been partly accepted by the Member States. Where appropriate, the Court's services will from now on prepare a summary of the order for reference that is to be communicated to the Member States and all necessary measures have been taken in order to ensure the high quality of these summaries.

As to the wider public, it has been ensured that judgements and opinions delivered after the 1st of May 2004 are translated promptly into the new languages. For the majority of judgements, all linguistic versions are nowadays available either on the day of delivery or just a few days later.

On the other hand, the Court has decided to introduce a system of selective publication of its judgements and orders. Indeed, not all of them are generally relevant enough to the wider public to justify a cumbersome and lengthy translation and publication process. Whereas preliminary rulings are always published, judgements in direct actions or appeals delivered by a 3 judge Chamber, or by a 5 judge

Chamber without an Advocate General's opinion, are no longer published in the Court Reports, unless the formation to which the case has been assigned decides otherwise. They are nevertheless accessible on-line in all the languages available (i.e. normally the language of the case and French) since nowadays a citizen is more likely to look for a judgement on the internet than in the Court Reports.

E. Conclusion

Calling for a break in the reform process of the European Courts system does not mean at all that the reflection on the future of the judicial architecture of the European Union should not continue at all levels.

If circumstances are quite favourable to the European courts for the time being, a dramatic surge in incoming cases would inevitably bring the Court back to the pre-2004 situation and it would be very advisable to have a solution ready should this situation occur.

The growth of the scope of European law constitutes another challenge. The relatively new competencies of the European Union in the so-called 'Justice and Home Affairs' field will lead the Court to handle very sensitive questions in this area where any delay might result in a threat against fundamental rights. In this context, it is worth mentioning the areas of asylum or parental responsibility.

In the so-called "The Hague Programme" of November 2004, the European Council has called for thoughts to be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings in the area of freedom, security and justice, where appropriate, by amending the Statute of the Court. The Commission has been invited to put forward - after consulting the Court of Justice - a proposal to that effect.

Rest assured that a process of reflection on this matter has already been launched at the Court. I thank you for your attention.

COMPARING CONSTITUTIONAL REVIEW BY THE EUROPEAN COURT OF JUSTICE AND THE U.S. SUPREME COURT

by

Michel Rosenfeld*

A. *Introduction*

Neither the European Court of Justice ("ECJ") nor the United States Supreme Court ("USSCt") is a constitutional court, yet they both engage in constitutional review. These two courts are similar in one key respect: they are both non-specialized courts of general jurisdiction. The ECJ handles many different kinds of matters spreading over a wide range of specialized areas[1], as does the USSCt[2]. Moreover, the two courts function both as courts of first instance and as courts of last instance[3].

Although both courts are courts of general jurisdiction, that is typical in common law countries but not in the civil law countries of continental Europe[4]. Furthermore, both courts engage in extensive constitutional review though neither is unmistakably established as the authoritative constitutional interpreter within the legal system which enshrines it as its highest court[5]. There is, however, a major difference between the two. The USSCt is a national court operating in a country with a written

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1 *See*, Grainne de Burca & J.H.H. Weiler eds., *The European Court of Justice* 6 (2001).

2 *See* U.S. Con., Art. III.

3 In the area of constitutional review, however, the vast majority of ECJ cases are ones of first instance whereas the overwhelming majority of USSCt constitutional cases are appellate ones.

4 For example, unlike the ECJ, Germany has a system of specialized federal courts, including the Constitutional Court, the Labor Court and the Administrative Court, as does France with its Cour de Cassation, Conseil d'État, and Conseil Constitutionnel.

5 Unlike the German Basic Law, *see* Art. 93, or the French 1958 Constitution, *see* Art. 62 § 2, the U.S. Constitution does not designate the USSCt as the authoritative interpreter of the Constitution. *See* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts,* 2 Int'l J. of Con. L. (I.CON) 633, 637 (2004).

constitution whereas the ECJ is a transnational court operating in a legal context that lacks a functioning written constitution equivalent to the U.S. Constitution[6].

This difference between the two courts raises two threshold questions that must be answered before attempting any cogent comparison regarding constitutional review. First, can the ECJ as a transnational court operating in a legal regime such as that of the EU meaningfully engage in constitutional review? And second, can one plausibly maintain that the EU has a constitution that the ECJ can interpret and apply given that the European Treaty Constitution is not in force and that it or anything closely resembling it may never be?

Part I below deals with these two threshold questions and explores how the two courts may be regarded as comparable from the standpoint of constitutional review. Part II examines how each of these courts confronts and manages constitutional review. Part III focuses on the respective sources of, and threats to, legitimacy of constitutional adjudication for each of the two courts. Part IV provides an account of the contrasting styles and rhetoric of the respective constitutional judgments and opinions of the ECJ and the USSCt. Finally, Part V draws a comparison between the respective cannons of constitutional interpretation used by the ECJ and the USSCt, leading to an assessment of how the ECJ as a constitutional adjudicator within the EU fares in relation to the USSCt as its counterpart in the United States.

B. Are the ECJ and the USSCt Comparable from the Standpoint of Constitutional Review?

I. Transnational versus National Court

The first threshold question, whether a transnational court can function as a constitutional court, is ultimately inextricably linked to the second threshold question, whether the treaty-based EU can cogently be regarded as functioning within the bounds of a constitutional regime notwithstanding that it presently lacks a formal constitution. Nevertheless, these two threshold questions can be initially dealt with separately.

If one compares the ECJ and the USSCt on the one hand, and the German Constitutional Court on the other, one notices that neither of the former is explicitly empowered to engage in authoritative constitutional review whereas the latter is [7].

6 This is true in a literal sense in that the proposed European Constitution approved by the European Union's ("EU") member-states has not been ratified, and is unlikely to be after the negative results in the French and Dutch 2005 referenda. In addition, this may also be true even if some European constitution were fully ratified and implemented as it is unclear that a transnational constitution for an unprecedented supra-national socio-political entity could actually function as constitutions have within the ambit of democratic nation-states.

7 *See* note 5 *supra*.

Moreover, the German Constitutional Court is designated by the Basic Law as the authoritative interpreter of that country's constitution[8], a status that obviously neither the USSCt nor the ECJ can claim confidently.

The USSCt has maintained its right to engage in constitutional review since its landmark 1803 decision in *Marbury* v. *Madison*[9], and its legitimacy as constitutional adjudicator has been generally accepted ever since. Its claims to being the authoritative interpreter of the U.S. Constitution[10], however, are by no means uncontested[11]. In *Marbury*, the USSCt declared that the U.S Constitution is law, that it is superior to other law, that infra-constitutional laws must yield to the Constitution when the two are in conflict, and that the USSCt is empowered to interpret laws and to vindicate the superiority of the Constitution in the course of adjudicating legal disputes in "cases or controversies". No one contests that USSCt interpretations of the Constitution and invalidations of inconsistent infra-constitutional law are authoritative and binding on the parties to "cases or "controversies" standing before it. What is contested – and that only intermittently and with varying degrees of zeal – is the *erga omnes* effect of USSCt constitutional decisions. *De jure*, USSCt constitutional adjudications do not have *erga omnes* effects though, in most cases, *de facto* they do.

In contrast to the USSCt, the ECJ is the creature of a treaty rather than a constitution and its mission is to interpret EU treaties and the laws issued from, or pursuant to, them[12]. In the broadest term, treaties are typically concluded to regulate external relations between two or more sovereigns whereas constitutions typically regulate internal matters within a unified whole, most commonly a nation-state[13]. Thus, for example, a free trade treaty between two nation-states usually creates legal obligations that may well require judicial interpretation and adjudication, but the latter is clearly distinguishable from constitutional review[14]. From a formal standpoint, therefore, the ECJ appears to have no legitimate constitutional review function and does not engage in constitutional interpretation.

8 *Id.*

9 5 U.S. 137.

10 *See, e.g., Cooper* v. *Aaron,* 358 U.S. (1958).

11 *See e.g.,* Edwin Meese, *The Law of the Constitution*, 61 Tulane L. Rev. 979 (1987) (Meese who was then President Reagan's Attorney General claimed that, as coequal branches of the federal government, the Congress and the Executive Branch, were as qualified as the USSCt to render authoritative interpretations of the US Constitution).

12 *See* Art. 220 of Treaty Establishing the European Community as Amended by the Treaty of Nice ("TEEC").

13 *See* Michel Rosenfeld, *The European Treaty-Constitution and Constitutional Identity*: *A View From America,* 3 Int'l J. Con. L. (I. CON) 316, 319 (2005).

14 Judicial interpretation and implementation of treaties may, of course, raise domestic constitutional issues, but these remain separable from treaty interpretation itself. *See e.g., Missouri* v. *Holland,* 252 U.S. 416 (1920) (state of Missouri's objection to federal interpretation of migratory bird treaty with the U.K on US federalism grounds rejected as unwarranted under the U.S Constitution).