HOW TO GUARANTEE UNITY WHILE REPRESENTING DIVERSITY? FROM THE SELECTION OF JUDGES TO THE POSSIBLE TRANSFER OF PRELIMINARY REFERENCES TO THE CFI

Summary of the discussions on the third and fourth session

by

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A. Size and Composition of Highest Courts – Selection of Judges

The discussions of the third session were marked by the understanding that the definition of the role and the functions of a court directly affects not only the way a court performs its duty but also the selection procedure for its members. This is one reason why nomination procedures may vary considerably between different supreme courts and international courts.

The reactions to *Norman Dorsen's* vivid narrative of historic and recent nominations to the US Supreme Court made apparent that both a judge's appointment for life and the role of a court as a political body, exercising discretionary power as capacious as a legislature's require very close political scrutiny of the choice of judges. Although similarly political, the Canadian Supreme Court was shown to be different: *Beverley McLachlin* explained how important it is, if legitimacy is to be ensured, to have judges trained in the different national legal traditions and representing all parts of a federal state. In addition, issues like independence, the importance of history and the desirability of interaction with civil society were at the heart of contributions from other constitutional judges with regard to national constitutional courts.

In the international arena, however, democratic legitimacy plays a different role, as *Christian Tomuschat* explained. For the International Court of Justice, where judges are appointed by vote of the UN General Assembly and the Security Council, the Permanent Members not, however, having a veto, parliamentary participation seems to be "*factually impossible*". In contrast, Judges at the Strasbourg Court of Human Rights have - at least - the merit of "*some democratic element*" through the Consultative Assembly. The functions of the supranational European Court of Jus-

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tice (cf. Session one on the functions of a constitutional Court) again require a different set of criteria. Following the ideas sketched out by the President, *Vassilios Skouris,* in the opening session, consisting in striking a balance between efficiency, on the one hand, and multilingualism, necessary dialogue with national judges, visibility, "quality of the case law", and presence of specific knowledge of 25 different national legal systems, on the other, nominations to the ECJ should follow an approach embracing national "representation" and European democratic legitimacy. In this respect, depending on the conception of European Constitutionalism and its various models of the ECJ as an institution, the Court could, in theory, be seen as acting in the name of the people(s), the Union citizens, the law, the State – or itself. The host, *Ingolf Pernice*, clearly pleaded in favour of a Court mindful of its link to the Union citizens.

Thus, although democratic legitimacy, public scrutiny and transparency were not identified as conditions of either the composition of courts or the selection of judges, there was no challenge to the proposition that constitutional judges, once (s)elected, have, as *Allan Brewer Carias* put it, a "*duty of lack of gratitude*".

B. Concentration of Preliminary References at the ECJ or Transfer to the High Court/CFI?

One buzzword of the discussion in the fourth session was "workload". The premise that the ECJ handles too many cases in proceedings which take too long and that, conversely, it would function more effectively if its caseload were reduced, has been disputed. While some commentators argued that European "*judges do not have sufficient time to reflect*" and stressed that a stricter docket control would be quintessential for a better performance, both in time and in quality, others expressed the view that, owing mainly to the arrival of 10 new judges and changes in its interior procedures, the ECJ was currently performing in a highly satisfactory manner, especially when compared to some national constitutional courts. It was agreed, however, that if the workload of the ECJ increased significantly, the question of the transfer of preliminary references to the CFI, as mentioned in the Nice Treaty, would become relevant.

So how should cases involving EU law be distributed between the different jurisdictions? While *Bo Vesterdorf*, *Joseph Weiler*, *Josef Azizi* and *Koen Lenaerts* were all in favour of the outright transfer of preliminary references to the CFI, albeit with differences in the precise demarcation of the subject matters, the majority seemed to be still rather doubtful: Most outspoken opponents were the former and the current President of the ECJ, *Gil Carlos Rodrigues Iglesias* and *Vassilios Skouris*, who reminded participants that the preliminary reference procedure was at the very heart of the unity and coherence of Community Law. This point was further stressed by *Tom Ejisbouts* who recalled the importance of consistency of the emerging legal struc-

ture, but simultaneously stressed the importance of national systems on which the Community legal order should build. The crucial issue of the relationship between national and Community courts was a source of lively debate, in which the controversial proposal of the President of the German Bundesgerichtshof, *Günter Hirsch*, to filter some preliminary references through national high courts figured prominently. On the other hand, a "green light" procedure by the ECJ was discussed - and evaluated rather positively, though for different reasons, by *Francis Jacobs* and *Ninon Colneric*. Both issues raised delicate questions with regard to the spirit of cooperation between the ECJ and national courts and the mindset of judges and lawyers acting on the different levels, since hierarchy and a top-down approach are certainly not the best terms to describe the Community Courts system. The last point of discussion was the statement that "*CILFIT will go!"*, which triggered some uneasiness. It became apparent that in practice the highest national courts have effectively and understandably ignored the restrictive criteria of the *CILFIT* jurisprudence enabling them not to refer. It was noted that there was a risk that, if the ECJ were to uphold or extend the duty to refer to Luxembourg rather than to allow a tentative relaxation of it, that might be perceived at national level as an indication of distrust.