

The Law of the EUROPEAN UNION

Teaching Material



THE COMMUNITY SYSTEM OF JUDICIAL REMEDIES:
OVERVIEW

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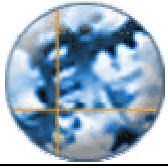
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NOTE AND QUESTIONS

There are three readings in this first section:

- an Excerpt from Josephine Shaw introducing **The European Court of Justice** (3rd edition) and a short description of the composition and competencies of the **Court of First Instance**;
- an Article by J.H.H. Weiler “**The Judicial Après Nice**”;
- and an insight in the changes proposed by the Treaty establishing a Constitution for Europe.

These first two readings combined with primary sources (treaty articles on the Courts their composition and jurisdiction, and the Statue of the Court) contain knowledge which you need to have but which there is no point in covering in class by lecture or discussion.

Class discussion will be directed first at constructing an overall systemic vision of the principal "heads of jurisdiction" of the Court and to resolve what at first blush seems a "fundamental paradox": The Community system of judicial remedies, like other international judicial dispute resolution mechanisms, seems to lack the apparatus of enforcement which national courts have. And yet, its "compliance pull" and effectiveness is much closer to national than international equivalents. How so?

QUESTIONS

- 1. Consider first the following Treaty Articles which capture the principal foundations of the system of Judicial Review in the European Community.**

Article 220 (ex 164) (*)

The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty.

Article 226 (ex 169)

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 227 (ex 170)

A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

* Amended by the Treaty of Nice.

Article 228 (ex 171)

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 227.

Article 230 (ex 173) (*)

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that 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.

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

* Amended by the Treaty of Nice.

Article 231 (ex 174)

If the action is well founded, the Court of Justice shall declare the act concerned to be void.

In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

Article 232 (ex 175)

Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the ECB in the areas falling within the latter's field of competence and in actions or proceedings brought against the latter.

Article 234 (ex 177)

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

2. Examine the following matrix

	X	Y
A	Art. 226 (ex 169) Art. 227 (ex 170) Art. 228 (ex 171)	Art. 230 (ex 173)
B	Art. 234a (ex 177a)	Art. 234b (ex 177b)

- a. What "descriptors" would you put for A, B, X, Y?
- b. There is "duplicity" in the provisions for judicial review. Identify the duplicity and consider its purpose.
- c. How do the different provisions for judicial review complement each other?

1. THE EUROPEAN COURT OF JUSTICE: A GENERAL DESCRIPTION

1.1 Excerpt from Josephine Shaw

N.B.: The work this excerpt has been taken from has been published in 2000 and does NOT yet reflect ToA renumbering (see Primary Sources pack for a table containing pre and post-Amsterdam numbering) and developments that followed its publication – the entry into force of the Treaty of Nice, the Convention on the Future of Europe and Treaty establishing a Constitution for Europe.

The Court of Justice and the Court of First Instance

Since 1988 the so-called 'Community judicature' has comprised two courts sitting in Luxembourg: the Court of Justice, and, attached to it, and empowered to hear only certain categories of case, the Court of First Instance (Article 225 EC and Council Decision 88/591 OJ 1988 L319/1). The Court of First Instance is not really a separate entity from the Court of Justice (it is 'attached' to it), but to a certain extent the two courts are beginning to develop separate identities, as they work on different fields of EC law and become engaged with slightly different sets of priorities. The division of jurisdiction between the two courts has evolved gradually over the years such that the Court of First Instance now hears all direct actions brought by natural or legal persons the EU institutions (including staff cases). Appeal lies on points of law from the Court of First Instance to the Court of Justice itself. The Court of Justice hears all** references for preliminary rulings submitted by national courts [...], and actions brought by the institutions or Member States against each other.

Each court now has fifteen judges (one from each Member State)***, and the Court of Justice is assisted by eight Advocates General, who submit opinions on each**** of the cases heard by the Court. The Court of Justice is often influenced by the views of the Advocate General, whose opinions frequently contain detailed discussion of the background to the legal issues at issue which is not to be found in the judgments themselves, often backed up by comparative research which has been essential to the development of EC law. In some fields, important developments in the law have emerged from 'dialogue' between the Court and the Advocates General (for more details see Vranken, 1996). Advocates General have the same status and privileges as judges; they are Members of the Court of Justice. The Court held in *Emesa Sugar* (Case C-17/98 *Emesa Sugar (Free Zone) NV v. Aruba*, Order of the Court of February 4 2000) that Advocates General 'are not public prosecutors nor are they subject to any authority... They are not entrusted with the defence of any particular interest in the exercise of their duties.' The Court rejected an argument based on fundamental rights which invoked the Court's new fundamental rights jurisdiction under Articles 46(d) and 6(2) TEU, and held that Article 6(1) ECHR giving the right to a fair hearing by an independent judge did not support the assertion that the applicant should be entitled to submit written observations after the Advocate General has delivered his or her Opinion, in order to reply to that Opinion. The Court of First Instance does not have Advocates General, but a member of the Court may adopt that role where the Court considers it necessary.

The Judges and Advocates General of the Court of Justice are chosen from persons 'whose

** Amended by the Treaty of Nice. See Article 225(3).

*** While the ECJ will, as before, be composed of one judge from each Member State, steps have been taken to maintain the effectiveness of the jurisdiction and coherence of its jurisprudence. The "grand chamber", comprising eleven judges (including the president of the Court and the presidents of the five-judge chambers), will generally deal with cases today handled by plenary session. The presidents of the five-judge chambers will be elected for a three-year term of office which will be renewable once.

The Court of First Instance will have at least one judge from each Member State (the number is determined in the statute, which currently makes provision for fifteen judges). As before, the number of judges in the Court of First Instance (stipulated up to now in the Decision establishing the CFI) can be changed. It should be noted that in response to a request submitted by the Court the COREPER agreed to an increase of six judges for the CFI. The arrangements regarding the system of rotation for appointments has still to be decided.

**** After amended by the Treaty of Nice of Article 222 TEC Advocates General will not be required anymore to present their opinion in every case (See Article 222 Paragraph 2 TEC and Article 20 Paragraph 3 of the Statute of the European Court of Justice).

independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognised competence' (Article 223 EC). The qualification to be a judge of the Court of First Instance is likewise independence, and 'the ability required for appointment to [high] judicial office' (Article 225(3) EC*). The members of both courts are appointed by common accord of the Member States for six years, with partial replacement every three years (Articles 223 and 225** EC). Each court elects a President. The members of both Courts are assisted by a number of *référéndaires* or legal secretaries, who help with matters such as drafting and research, and typically come from more than one 'home' legal jurisdiction.

Further provisions governing the operation of the Court of Justice and the Court of First Instance are contained in the Statute of the Court of Justice appended to the founding Treaties, the Rules of Procedure of the two courts which are approved by the Council, and the Council Decision establishing the Court of First Instance referred to above. It is one of the persistent objections of the two Courts to the operation of the judicial system in the EU that they do not have the right to lay down their own Rules of Procedure, particularly in view of the fact that small changes to those rules can make a large difference to the burden which the Courts' ever increasing workload actually places on the institutions. Procedures before the two Courts differ somewhat from those before a court in the United Kingdom (see Edward, 1995; Arnall, 1999a: Ch. 1). Amongst the most distinctive features of the ways the courts work are:

- a greater use of written, as opposed to oral, submissions; the written procedure is more important than the subsequent oral procedure;
- -all judgments are collegiate, with no single judge benches, except exceptionally for the Court of First Instance, and no dissenting judgments;
- the advisory role of the Advocate General (before the Court of Justice);
- the role of the judge rapporteur appointed by the President of the Court, who draws up the Report for the (oral) Hearing and the initial draft of the decision which is then discussed by the judges in secret;
- the judgments of the Court of Justice in particular are very brief, and often lack the full reasoning associated with the judgments of courts in the UK;
- this brevity is not so apparent in the judgments of the Court of First Instance where there is normally no Advocate General; moreover, one of the particular functions of the Court of First Instance is to provide a forum which can give a detailed resolution of often complex submissions of fact and law on, for example, a Commission finding of an infringement of the competition rules;
- multilingualism: there are twelve procedural languages, one of which will be the language of the case, but the Court of Justice itself will normally work in French (Irish is added to the list of eleven EU official languages).

The Court of Justice sits in plenary session, or in chambers of five or three judges***. In order to make the work of the Court more effective, and to limit the role of the plenary session to that of deciding the most important cases, it now sits in plenary session in cases to which an institution or a Member State is party, only where a request is made by one party. Most preliminary rulings are also heard by chambers. The quorum for a plenary is nine, and the Court very rarely sits [as full court]****. The Court of First Instance normally sits only in chambers of three or five judges. In response to a request by the Court of Justice, the Council has made it possible for single judges to hear cases in the Court of First Instance (Council Decision 1999/291 OJ 1999 L114/52). The first single judge judgment was handed down in October 1999, in a staff case brought against the EU body CEDEFOP (Case T-180/98 *Cotrim v. CEDEFOP*, October 28 1999). Delegation to a single judge is not possible in the most legally significant of the Court of First Instance's areas of jurisdiction, notably direct actions in the areas of competition law and merger law, state aid and anti-dumping measures adopted to protect trade.

* Now Article 224(2) TEC.

** Now Article 224 TEC.

*** See Statute of the Court of Justice Article 16 and following.

**** The Court sits as a full Court where cases are brought before it pursuant to Article 195(2), Article 213(2), Article 216 or Article 247(7) of the EC Treaty or Article 107d(2), Article 126(2), Article 129 or Article 160b(7) of the EAEC Treaty. Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

The basic task of the Community judicature is simple: it is to ensure that the law is observed (Article 220 EC; see also Article 31 ECSC). Articles 226-243 and 288 EC govern the most important types of action which can be brought before the courts and the types of rulings which it may give. Reference should be made to 1.6 for an outline of the basic work of the Court (Arnull, 1999a: Ch. 2).

In addition, it has an important – if relatively rarely used – advisory jurisdiction, under which it can be called upon by [the European Parliament]*, the Council, the Commission or a Member State to give an opinion as to whether an international agreement envisaged for adoption is compatible with the provisions of the EC Treaty (Article 300(6) EC). An adverse opinion from the Court prevents the agreement into force, and if necessary the Member States must adopt amendments to the Treaties under Article 49 TEU if they wish to bring it into force. The Court can also be asked about the feasibility of amendments to the Treaties which might be needed for specific instruments to enter into force.

The Treaty of Maastricht brought a number of important changes to the jurisdiction of the Community judicature. Amendments were made to include the new institutions of Economic and Monetary Union, in particular the European Central Bank, within the system of judicial review. Judicial review was extended to cover the acts of the European Investment Bank and the Parliament which have legal effects, and formally to confer limited standing rights on the Parliament. Provision was also made for financial penalties to be imposed on Member States which fail to comply with judgments of the Court of Justice establishing an infringement of the Treaties or rules adopted there under (Article 228 EC) [...]. The Court was not, however, given jurisdiction to rule over what was Article F(2) TEU, which laid down for the first time within the EU treaty system a guarantee of fundamental rights protection.

Changes to the scope of the Court's jurisdiction were also made by the Treaty of Amsterdam. However, most notably, the new Title IV of Part III of the EC Treaty on matters related to visas, asylum, immigration and other free movement issues 'communitarised' certain third pillar issues and thus implicated the role of the Court of Justice – which was previously largely excluded from justice and home affairs policy as a whole. National courts of last resort *only* have the right (and obligation) to refer questions to the Court of Justice under Article 68 EC, and there may be costs of this limitation in terms of the lack of consistency of national case law and limited judicial protection for those involved in judicial actions related to asylum and immigration (who might frequently lack the resources to pursue the national case all the way to the court of last resort). The Court is explicitly denied the jurisdiction under Article 68(2) EC to rule on Council measures connected with the removal of controls on the movement of persons across internal borders 'relating to the maintenance of law and order and the safeguarding of internal security'. Otherwise, the Court's jurisdiction is broadly the same as elsewhere under the EC Treaty. Under the revised third pillar, Article 35(1) TEU gives the Court of Justice a preliminary rulings jurisdiction in relation to a range of measures adopted under that Title, although only at the request of the national courts situated in Member States which have declared that they accept the involvement of the Court. Again, in parallel with Title IV EC, Article 35(5) TEU prevents the Court from reviewing the validity or proportionality of national policy operations or national measures concerned with 'the maintenance of law and order and the safeguarding of internal security'. Arnull (1999a: 71) describes both Article 68(2) EC and Article 35(5) TEU as 'iniquitous' and 'designed to weaken judicial scrutiny'. These are provisions which are hard to reconcile with the principles of respect for fundamental rights and the rule of law which the EU is now founded upon (Article 6(1) TEU). In addition, measures in the third pillar provide for limited jurisdiction of the Court to rule on the validity of certain secondary measures adopted by the Council, and in relation to disputes between the institutions and the Member States over these measures. Only the Member States and the Commission can bring annulment actions.

Arnull's conclusion (1999a: 73; see also Arnull, 1999b) on these changes to the jurisdiction of the Court of Justice – notwithstanding some of these hard to justify limitations – is that they do not reflect a general dissatisfaction amongst the Member States with the workings of the Court of Justice, albeit that in the run up to the 1996-97 IGC a number of Member States, but most notably the UK, thought this would be a good opportunity to 'clip the wings' of the Court because of its historically activist stance.

The changes are much more likely to be simply determined by the subject-matter, and to reflect an unwillingness on the part of the Member States to accept *too quickly* (as opposed to not at all) the

* Article 300 (6) was amended in Nice to give the European Parliament too the right to initiate this procedure.

disciplines of the judicial system and EU legal order as fashioned by the Court of Justice.

At first glance, the role of the Court of Justice, like the other institutions, is limited by the principle of 'attributed powers'. As a creature of Treaty, the Court of Justice can only hear actions and give remedies where provided for in the constitutive Treaties; however, it is arguable that with the evolution of the institutional structure and the range of competences and activities of the EU the overriding duty of the Court to ensure the rule of law should be regarded as more important than the strict limitations of the Treaties. In fact, the Court of Justice made a number of innovations within the jurisdictional structure of the Treaties, allowing acts of the European Parliament to be subject to judicial review and giving it a limited power to bring actions against the acts of the other institutions. These *de facto* developments were formally recognised by the Treaty of Maastricht. Arnall (1990a) has argued that in fact the Court of Justice has an inherent jurisdiction which requires it where appropriate to fill in gaps in the system of legal remedies under the Treaties. In his view, in extending its jurisdictional scope, the Court is acting no differently to the other institutions which have *de facto* extended their powers in response to political imperatives. Such comments must be read, however, in the light of explicit limitations on the scope of the Court's jurisdiction. Under Article 46 TEU, even after amendments by the Treaty of Amsterdam, the Court has only limited jurisdiction over the common provisions of the Treaty of European Union and the provisions on PJC – a jurisdiction which in part the Member States must explicitly accept and not all have yet done so –, and no jurisdiction in relation to CFSP.

Issues regarding the reform of the Community judicial architecture have tended in recent years to concentrate less upon the scope of its jurisdiction than upon how it will be possible in future for the two Courts to master their ever increasing workload, especially as the EU becomes a larger and more complex polity. On this question, notwithstanding contributions from the European Parliament and both Courts, no real moves were made at the Amsterdam IGC. However, this is unsurprising in that the difficult foundational discussions relating to the other institutions were also deferred from the Amsterdam IGC to a point in the future. This future now appears to have arrived with the 2000 IGC (3.15), and the Court of Justice is firmly on the agenda.

The Court of Justice produced a report on the functioning of the Treaty on European Union which served as part of the material considered by the Reflection Group preparing the Amsterdam agenda. The Court of First Instance produced a separate report differing in certain respects from the approach taken by the Court itself. The Court of Justice was necessarily limited in any criticisms it could make of the Treaty structure under which it operates, but it did point to the unsatisfactory level of judicial protection given to individuals under the second and third Pillars of the EU. Some of the most significant comments by both Courts are directed to the structure of the Community judicature. The Court of Justice opposed any suggestion that references under what was then Article 177 EC (now Article 234 EC) should be dealt with other than by itself. It did suggest, however, that some appeals from the Court of First Instance might be subjected to a 'filtering system'. The Court of First Instance advocated the limited use of single judge courts – a reform which has come to pass in the meantime without Treaty amendment. Both courts also suggested changes to their composition. For the Court of Justice the problem arises because of possibility that its plenary session (involving all the judges) might, as a result of further enlargements, become unmanageably large and 'cross the invisible boundary between a collegiate court and a deliberative assembly'. At some point in the future, the Member States may need to accept that not all Member States should in the future have judges – in the same way that the composition of the Commission might be revised. If this possibility is unacceptable, then other managerial possibilities could include a plenary consisting only of the President and the Presidents of the various Chambers, plus a limited number of judges, and a maximum size for the full plenary.

This could make the Court a more hierarchical and less collegial institution, in the interests of the consistency of its case law and the efficiency of its operation. The Court of First Instance could more enthusiastically welcome the possibility of an increase in its membership, as it largely sits in chambers, not in plenary. Such an increase is essential, as just two years after its creation the Court of First Instance was already receiving more new cases each year than it could handle, thus leading to increasing delays in the dispensing of justice. That said, not all those who observe both EU courts would agree with the proposal for more judges. According to Koopmans (1991c: 24), 'One of the worst methods for increasing judicial productivity is to enlarge the number of Judges and Advocates-General.'

The effect of creating too large a judicial structure in Luxembourg is destabilising in the view of some. Even so, no concrete support has yet been lent to a longstanding suggestion that the Community judicial architecture should be reworked along regional lines (Jacqué and Weiler, 1990).

The strains on the Community judicature are now very plain, with the Courts reporting 'a dangerous trend towards a structural imbalance between the volume of incoming cases and the capacity of the institution to dispose of them' in a proposal which they made to the Council regarding the future influx of intellectual property cases. It now takes longer than before the Court of First Instance was instituted for a reference for a preliminary ruling to be decided within the Court of Justice (21 months). In May 1999 the Court of Justice produced a Report on *The Future of the Judicial System of the European Union** (Arnull, 1999c) and in January 2000, an independent Working Party convened by the Commission to assist it in preparing its report for the 2000 IGC, but mainly composed of ex-members of the Court of Justice, produced an extended report on *The Future of the European Communities' Court System*. Both contain cautionary words and constructive suggestions. The basic division relates to measures of reform which require Treaty amendment or changes to the Statute of the Court, and those which do not, but can be executed by Council Decision (e.g. single judge chambers in the Court of First Instance) or by changes to the Courts' Rules of Procedures, or internal reorganisation within the Courts. The two are linked, however, as Article 245 EC requires the Council to give *unanimous* approval to the Court's Rules of Procedure. One suggestion – even demand – from the Court of Justice has been to be given the flexibility to adopt its own Rules of Procedure, or at the very least to have them approved by the Council acting by a qualified majority**. In that event, delays before the Council could be reduced, which is especially important if there may need to be increasingly frequent changes to the Rules of Procedure as the EU widens and deepens.

[...]

What has been notable about the Court of Justice during its very nearly fifty year history [...] has been its judicial activism. This has been most obvious in its role in 'constitutionalising' the Treaties, and in 'federalising' the relationship between EC law and national law. In the 1970s in particular, commentators were fond of pointing to the Court's 'teleological' or 'purposive' methods of interpretation (see the extracts in Ellis and Tridimas, 1995: 563-569; Kutscher, 1976; Tridimas, 1996). On occasion its interpretative methods have led it to be severely criticised for being over-activist, and giving judgments which go against the text (Rasmussen, 1986; 1992; Hartley, 1996, 1999). But it is more frequently the case that academics and practitioners in the field have leapt to its defence (Cappelletti, 1987; Weiler, 1993; 1994a; Arnull, 1999a). What has intrigued political scientists more than anything about the Court has been the level of compliance on the part of Member States with its judgment which it has attracted – what some have termed 'legal integration' (Alter, 1998a, 1998b; Mattli and Slaughter, 1998). Over the years this has lent to the legal order a 'federalist' and 'constitutionalist' aura which has often stood in stark contrast to the political and economic order (Burley and Mattli, 1993). As each of the chapters of this book will make clear, the time is perhaps past for the Court to be viewed as a 'heroic' figure in the development of the EU. Its importance is probably no less than it ever was. It certainly works now in a stronger glare of not always approving publicity. But it is now the case the Court more than ever occupies a place in constantly evolving dialogue with each of the institutions, offering a specifically 'legal' voice within a ever-changing policy process.

* See <http://www.curia.eu.int/en/instit/txtdocfr/autrestxts/ave.pdf>.

** This change has been introduced by the Treaty of Nice. See Article 223 (6) and 224 (5). The Courts have recently (date of entry into force: 1. Aug.2003) adopted new Rules of procedure.

1.2 The European Court of First Instance

Attached to a Community institution, namely the Court of Justice, the Court of First Instance is an independent court.

The Nice ICG has made many reforms to the Union's legal system. The main provisions concerning the Court of First Instance, and particularly its responsibilities, are henceforth to be found in the Treaty. In addition, the Treaty provides for the possibility to set up internal chambers to deal at first instance with certain proceedings relating to specific issues.

The Treaty has introduced greater flexibility in order to prepare the legal system for the future, settling certain issues in the Court's statute, which can henceforth be amended by the Council acting unanimously at the request of the Court or of the Commission. The approval of the rules of procedure of the Court of Justice and of the Court of First Instance will henceforth be by qualified majority.

Composition

The Court of First Instance will have at least one judge from each Member State (the number is determined in the statute, which currently makes provision for fifteen judges). As before, the number of judges in the Court of First Instance (stipulated up to now in the Decision establishing the CFI) can be changed. It should be noted that in response to a request submitted by the Court outside the framework of the ICG, the COREPER agreed to an increase of six judges for the CFI. The arrangements regarding the system of rotation for appointments has still to be decided.

Unlike the Court of Justice, there are no Advocates-General but the duties of Advocate General may be performed in a limited number of cases by a Judge designated for that purpose.

Since 1995 the Court of First Instance has been composed of five Chambers, each of which may sit as a bench of three or five Judges. The Judges elect the Presidents of the chambers from among their number for a period of three years. They may be re-elected once.

In certain cases governed by the Rules of Procedure, the CFI may sit as a full court or be constituted by a single Judge. The Rules of Procedure may also provide that the CFI may sit in a Grand Chamber

The independence of the Court of First Instance in relation to the Court of Justice is also demonstrated by the existence of the separate registries. The Registrar is appointed by the Judges of the Court of First Instance for a term of six years.

Distribution of responsibilities between the Court of Justice and the Court of First Instance

The Treaty sets out the distribution of responsibilities between the Court of Justice and the Court of First Instance but it will be possible to make adjustments through the statute.

Since 1994 it has dealt, irrespective of the matter concerned, with all actions brought by individuals and undertakings against measures of the Community institutions which are addressed to them or which are of direct and individual concern to them.

The CFI is the common law judge for all direct actions:

- proceedings against a decision (Article 230 of the EC Treaty),
- action for failure to act (Article 232 of the EC Treaty),
- action for damages (Article 235 of the EC Treaty), with the exception of those which will be attributed to a specialised chamber and those the statute reserves for the ECJ.

The Court of First Instance also has jurisdiction to hear and determine disputes between the Community and its officials and other servants.

Lastly, it decides cases concerning public- or private-law contracts concluded by the Community if they contain an arbitration clause.

In the performance of its task the CFI deals, amongst other things, with disputes relating to decisions adopted by the Commission and addressed to undertakings which have not respected the "free play" of competition guaranteed by the Treaties. More often than not the decisions impose fines on those undertakings. The Court also has to give judgment in fields as varied as those relating to State aid, concentrations of undertakings, "anti-dumping" measures or trade-mark law. Also brought before it are actions for the reparation of damage caused by the Community institutions and their servants.

These cases, often extremely voluminous, frequently call for examination of complex factual situations and economic data and for far-reaching preliminary enquiries.

The ECJ retains responsibility for other proceedings (particularly action for failure to fulfil obligations, Art. 226 of the EC Treaty), but the statute can entrust to the Court of First Instance categories of proceedings other than those listed in Art. 225 of the EC Treaty. The idea is to maintain within the Court, as the jurisdictional supreme body of the European Union, disputes concerning essential Community issues.

The ECJ, which is responsible for ensuring uniform application of Community law within the European Union, in principle retains competence for investigating questions referred for a preliminary ruling; however, pursuant to Art. 225 of the EC Treaty, the statute may entrust to the CFI the responsibility for preliminary rulings in certain specific matters, which will most likely be done sometime soon.

Appeals

An appeal may be brought before the ECJ, within two months of the notification of the decision appealed against, against final decisions of the CFI and decisions of the CFI disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. Interveners other than the Member States and the institutions of the Communities may bring an appeal only where the decision of the CFI directly affects them.

With the exception of cases relating to disputes between the Communities and their servants, an appeal may also be brought by Member States and institutions of the Communities which did not intervene in the proceedings before the CFI.

Specialised chambers

The Treaty of Nice allowed for the Council to set up “judicial panels” (Art 225a TEC and 140b Euratom) to examine at first instance certain categories of actions in specific matters (e.g. in the area of intellectual property). The Council has to act unanimously on a proposal by the Commission and after consulting with the European Parliament and Court of Justice. The IGC through a declaration asked that a draft decision be prepared to set up such chambers in order to settle disputes between the Community and its servants (Article 236 of the EC Treaty).

An appeal in cassation can be made before the Court of First Instance against a decision by the specialised chambers.

The members of the judicial panels are to be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They will be appointed by the Council, acting unanimously.

The judicial panels will also establish their Rules of Procedure in agreement with the Court of Justice and after approval of the Council, acting by a qualified majority.

1.3 Procedure before the European Courts

European Court of Justice

Written Procedure	
<u>Direct actions and appeals</u> <ol style="list-style-type: none">1. Written application2. Service of the application on the defendant3. Publication of the application in the OJ4. Defense5. Reply6. Rejoinder	<u>References for preliminary rulings</u> <ol style="list-style-type: none">1. Order or judgment from the national court2. Translation of the request for a preliminary ruling into all the Community languages and service on the parties, the MS and institutions3. Publication of the request for a preliminary ruling in the OJ4. Written observations of the parties, MS and institutions
Oral Procedure	
<ol style="list-style-type: none">1. Hearing2. Opinion of the Advocate General (for exception see Art. 222(2))3. Deliberation of the Court4. Judgment	

Court of First Instance

The procedure before the Court of First Instance takes its inspiration from that followed by national courts. Whatever the nature of the case, the procedure is divided into two successive phases, one written, the other oral. A Judge-Rapporteur is designated from the outset by the President to follow closely the course of the proceedings. At the close of the written procedure and, as the case may be, of the measures of enquiry the case is argued orally in open court. The oral argument is interpreted simultaneously into several official languages of the European Union. The Judges then deliberate on the basis of a draft judgment prepared by the Judge-Rapporteur and the judgment is delivered in public.

1.4 The scope of the Court's review when hearing an appeal: C-7/95 John Deere

John Deere Limited

C-7/95

Court of Justice

28 May 1998

[1998] ECR I-03111

<http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

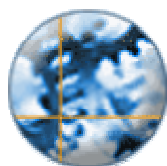
[...]

17. Before the grounds of appeal put forward by the appellant are examined, certain principles applying to appeals, and in particular to the extent of the Court's jurisdiction, should be recalled.
18. Article 168a of the EC Treaty and Article 51 of the EC Statute of the Court of Justice state that an appeal is to be limited to points of law and must be based on the grounds of lack of competence of the Court of First Instance, breach of procedure before it which adversely affects the interests of the appellant or infringement of Community law by the Court of First Instance. Article 112(1)(c) of the Court's Rules of Procedure provides that an appeal must contain the pleas in law and legal arguments relied on.
19. It follows from those provisions that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see the order in Case C-19/95 P *San Marco v Commission* [1996] ECR I-4435, paragraph 37).
20. That requirement is not satisfied by an appeal confined to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that court; in so far as such an appeal does not contain any arguments specifically contesting the judgment appealed against, it amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which under Article 49 of the EC Statute the Court of Justice does not have jurisdiction to undertake (see, to this effect, in particular the order in *San Marco v Commission*, cited above, paragraph 38).
21. It also follows from the foregoing provisions that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the Treaty to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, in particular, the order in *San Marco v Commission*, cited above, paragraph 39).

22. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see, in particular, the order in *San Marco v Commission*, cited above, paragraph 40). The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice (judgment in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraph 42).

[...]

2. THE EUROPEAN COURT OF JUSTICE AND THE COURT OF FIRST INSTANCE: “APRÈS NICE”



NOTE AND QUESTIONS

Note the importance of changes in the Judicial Architecture of the EC after Nice. In your Primary sources please look at the relevant TEC articles as modified by Nice and at the Statute of the Court of Justice, which is attached to the treaty as a Protocol.

Note the changes in the composition and the different formation (Chambers) of the ECJ and the CFI, the changes in the jurisdiction of the CFI, but also the amended Article 230 and the recognition of the European Parliament as Privileged Plaintiff.

2.1 Article from J.H.H. Weiler “The Judicial Après Nice”

The European judicial architecture may not be crumbling¹ but it is certainly in need of rethinking – not an easy project: Traditionally the custodianship of the Community legal order has been given to lawyers – a conservative bunch. What’s more, the unintended genius of the system which at its core and most original combines national courts and the European Court of Justice through the Preliminary Reference procedure has produced spectacular systemic results. If it works (or appears to work) why fix it? Last, though not least, despite the urgent incentive for radical innovation in the face of pending Enlargement and the rhetoric of, no less, constitutionalism emanating from various capitals², the actual pace of change in recent IGCs has been lackluster in both ambition and result, incremental rather than radical. Why expect more for the judicial branch of Union governance?

Yet, ever since the Single European Act one lives in fear that what might look like an anaemic outcome of the latest Intergovernmental Conference will, in fact, turn out to be a lion in a sheep skin. After the disappointment of Amsterdam, Nice was meant to provide the final opportunity of grasping firmly the nettle of Enlargement and allowing the governments of the Member States to make the structural changes necessary for a Union of twenty five and more. The outcome, which ostentatiously lists the number of votes the likes of Romania will have in the Council, is, however, more like a sheep in the skin of a lion. Once again the truly hard decisions have been postponed. The original Community system

¹ H.Rasmussen, ‘Remedying the Crumbling EC Judicial System’, (2000) 37 *CMLRev* 1071. In addition to Rasmussen’s insightful piece see, too, the prescient J-P.Jacqué, ‘L’avenir de l’architecture juridictionnelle de l’Union’, (1999) 35 *RTD Eur.* 443 and, A. Arnulf, ‘Judicial architecture or judicial folly? The challenge facing the European Union’ (1999) 24 *ELRev.* 516 commenting on the Community’s Courts 1999 Discussion paper on the future of the judicial system of the Union, May 1999 <http://europa.eu.int/cj/en/pres/avemg.pdf>. G.Hirsch, ‘Dezentralisierung des Gerichtssystems der EU’, 33 *ZRP* 57 (2000). I also profited from the reflection at the Colloquium on Revising the EU’s Judicial System organised jointly by the CCBE and the College of Europe, Bruges, which took place on the 19 and 20 November 1999 see C. Turner and R. Munoz, ‘Revising the Judicial Architecture of the European Union’ (forthcoming *Yearbook or European Law*).

² See e.g. the IHT Op. Ed by Valéry Giscard d’Estaing and Helmut Schmidt International Herald Tribune, April 11th, 2000. Then came the Fischer eruption. See generally: C. Joerges, Y. Meny, J.H.H. Weiler (eds.) *What Kind of Constitution for What Kind of Polity – Responses to Joschka Fischer* (RSC Center, EUI, 2000). For a more honest discussion by a leading public figure admitting the statal implications of the new construct see G. Federico Mancini, ‘Europe: The Case for Statehood’, (1998) 4 *ELJ*, 29-42, and *Harvard Jean Monnet Working Paper 6/98*. Romano Prodi is also known to favor a constitutional exercise. A Jürgen Habermas may be considered a public figure too: See, ‘The European Nation-State and the Pressures of Globalization’, (May 1999) *New Left Review* no. 235, 46-59, and, earlier, *Die Einbeziehung des Anderen*, Chapter III “Hat der Nationalstaat eine Zukunft?”, 128-191, Suhrkamp, Frankfurt, 1996

received its nth coat of new paint but it is still the old Commission-Council-Parliament engine creaking beneath the bonnet.

When it comes to reform of the judicial architecture the picture is more complex. The beauty of Nice is, as ever, in the eyes of the beholder. Driven by the results of a high powered consultative committee of insider-outsiders and by indirect input from the Courts themselves³ and concerned mostly by the mismatch between a heavy caseload and a finite number of judges i.e. by a concern for efficiency in the administration of justice, Nice introduces some important innovations which hold the potential for a significant inroad into the perennial problem of logged dockets and delayed justice at least in as much as direct actions are concerned.⁴

Most notable is the new Article 220⁵ which, in conjunction with Article 225a provides for the possibility of introducing 'judicial panels' in effect a new, first instance tier, appealable to the Court of First Instance to hear and determine "... certain classes of action or proceeding brought in specific areas."

For its part the Court of First Instance becomes the 'default' jurisdiction for most direct actions, accepting cases reserved to the Court of Justice and those eventually to be reserved to the Judicial Panels.

There are additional improvements designed to streamline the functioning of both Courts notably the revamped system of chambers, Grand Chamber and a Full Court⁶ and the sanctioning of disposing of a case without a submission from the Advocate General⁷. These innovations are in line with improvements already introduced prior to Nice in the internal operation of the Court.

But Nice goes further. In relation to the judicial branch the IGC, with the input of the Due Committee and the two Courts, may indeed already have taken two crucial steps which at least potentially open the way to the more radical change necessitated by Enlargement:

First, though Nice, in a measure constitutionalizing practice, stipulates one judge per Member State for the Court of Justice, it provides for at least one judge per Member State for the Court of First Instance.⁸ The way has been opened for a Court of First Instance which contains more judges than the Union contains Member States and in which the principle of parity of "representation" is no longer applicable.

Second, of huge future importance is the opening of the door, at least a crack, in Article 225(3)

The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.⁹

The potential cumulative impact of these innovations are on par with the introduction of the Court of First Instance itself.

But these are harbingers for the future. The actual outcome of the Conference in this area too, as with the political Institutions, is an inability to break away from the scheme of the original Treaties. At the core of this architecture and its most important feature by any perspective one may care to adopt, is the

³ See Report by the Working Party on the Future of the European Communities Court system (January 2000) Five of the seven members of the Committee set up by the Commission to advise it on reform were former Members of the Court. Another was a former high ranking member of the Commission. The last was a high government official. For this and other details on the work of the Working Party, see H. Rasmussen op. cit. supra note 1, p.1086 and seq.

⁴ Whilst heavy work load is not the only concern it weighs heavily in the Report by the Working Party, in H. Rasmussen at p.1079-1083 and passim.

⁵ The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed. In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in the Treaty.

⁶ See Article 16 of the Protocol on the Statute of the Court of Justice SN 1247/1/01 REV 1, 14 February 2001

⁷ See Article 20 of the Protocol on the Statute of the Court of Justice see reference note 6 supra.

⁸ Article 221 and Article 224 respectively of the EC treaty as modified by the treaty of Nice SN 1247/1/01 REV 1

⁹ Article 225(3) also provides for the possibility of the CFI referring a Preliminary Reference to the Court of Justice in important cases which require a decision of principle likely to affect the unity or consistency of Community law. This strikes me as an unfortunate idea to have enshrined in the Treaty. As I shall argue below one of the weaknesses of the classical Preliminary Reference procedure is that the Court of Justice is the first and last instance to decide issues of Community law. Especially in cases such as that, it would be good to have a decision of the Court of First Instance and then, to invoke the second provision in Article 225(3) which allows review by the Court of Justice. The Article permits such a result since the transfer of the case to the Court is facultative and not obligatory on the Court of First Instance.

Preliminary Reference and the Preliminary Ruling. This procedure has remained substantially unchanged for half a century. A Court of First Instance with newly found dignity, Judicial Panels and all the rest notwithstanding, Europe continues to drive in its rusty and trusted 1950 model with the wheel firmly in the hands of the Court of Justice.

Put differently, the IGC was not willing to engage in either profound rethinking or profound reengineering of the judicial function in view of a much changed polity to the one in which the current system was set. Indeed, perhaps not surprisingly, the Court(s) themselves, who provided the principal intellectual input into the reform effort, were unable fully to grasp both some inherent weaknesses in their positioning nor the significance of the current constitutional moment. It is part of human nature to screen oneself from one's own weaknesses. They opened the door but did not walk in. Perhaps that is the wisdom of judicial prudence.

And yet the context in which the judicial system is situated has changed radically in the last fifty years. The increase of size from six Member States to a potential of twenty six is really only part of the problem and possibly not even the most important part. Not a limited jurisdiction over some technical areas but a complex polity with jurisdiction ranging from human rights to monetary policy to difficult aspects of immigration and even citizenship.¹⁰ Not a world dominated by the Cold War but one inflicted with very hot transnational and transcontinental trade disputes and rivalries – squarely within the jurisdiction of that Community and Union.

And then the Court itself: No longer an instance for dispute settlement, but a judicial giant which has successfully positioned itself at the constitutional center of Europe, a Europe in which national legal orders suddenly feel under threat.¹¹ In this respect the Court is (a lucky) victim of its own spectacular success.

It is against these changes that the problems of the stasis at the core of the European judicial function is must be assessed. The architecture that served well the Community at its foundation and consolidation phases would merit rethinking and reform even if the Community were not to enlarge.¹²

The matter is complicated since big chunks of what needs to be changed are not a matter for the IGC but for the Court and the other actors which play a role in shaping its composition and role.

I want to begin by raising three issues which are considered by some as taboo in the debate on the future Judicial Architecture: The tasks of the Court, the qualifications of the judges and the nature of the judicial conversation between the European Court and National Courts.

My theses here are simple:

- a. The Court cannot effectively discharge its duty with its present tasks and present composition. This is not just a question of work load – a problem which may to some extent be addressed by the Nice changes. It is also a question of competences and credibility.
- b. The style of judicial decisions is outmoded, does not reflect the dialogical nature of European Constitutionalism, and is not a basis for confidence building European constitutional relations between the European Court and its national constitutional counterparts.

Any discussion of the Judicial Architecture must start with the preliminary reference procedure, one of the most remarkable and successful dimensions of the European legal order and European constitutionalism.

¹⁰ H. Rasmussen op. cit. supra note 1, p.1077-1078, also G. Hirsch op. cit. supra note 1, p.58; J-P. Jacqué op. cit. supra note 1, p.444 and C. Turner, R. Munoz op. cit. supra note 1, Section I - The Current Position of the Community Courts and Foreseeable Developments in Demands: "Can the Community Courts Provide What is Presently Required of them? Where are the Cracks and the How Badly are they Showing?" I. Introduction and II. Lengthening of proceedings – the current position of the Community Courts. Cf P. Craig, 'The Jurisdiction of the Community Court Reconsidered' [in this volume] ...section II.

¹¹ This is most notable in the area of private law, see Caruso. But also in areas of public law. Cf. generally the Member State Reports in A-M. Slaughter et. al *The European Court and National Courts - Doctrine and Jurisprudence*. (Hart Publishing, Oxford, 1998).

¹² G. Hirsch op. cit. supra note 1, p.58

Its success [means], however has come with some costs¹³:

Barring the very few cases of “inappropriate” references, the ECJ is obliged to deal with a growing number of references – a number expected to rise with Enlargement.¹⁴ The reference procedure is the equivalent of almost all cases pending before national courts going to the national constitutional court before they can be disposed of at lower instances. The new system of chambers and the streamlined provisions may ease the backlog but not eliminate the root cause. It also means that the ECJ has to answer questions on all aspects of European Law: One day a most specialized issue of agricultural law, the next day a complex issue of product liability and, increasingly, other aspects of private law and on day three, address, most critically, profound issues of constitutional law which engage the highest courts and the deepest legal values of the Member States.

Couple these two features together and the trajectory becomes one of implosion.

The issue of workload is not simply the delays which the heavy load on both Court and Tribunal create – justice delayed is justice denied. It is, and this is usually only whispered, an issue of quality of justice.

Even a cursory examination of the timetable of a Court of Justice judge reveal that between meetings and deliberations and actual hearings the workload is such that judges have very little time to think deeply about many of the cases – especially those for which they are not the Reporting Judge – which they eventually have to decide.¹⁵ This has various consequences, one of which concerns the role of Legal Secretaries. In the United States the question of the appropriate role and influence of judicial clerks has been discussed intensely. I believe that similar questions may be legitimately raised about the role and influence of Legal Secretaries at the ECJ. This is not meant in any way to impugn the integrity of the process but simply to bring arithmetic to bear on the problem. The year has so many days, the day has so many hours, the Court has so many judges, the judges have so many cases (indeed many) – time to think, to reflect, to deliberate is the most scarce resource of the Institution. Justice delayed is justice denied, but so is hurried justice, scantily deliberated justice, justice in which Legal Secretaries write and judges merely approve. The fault is not that of the Court. We ask too much of it.

The success of the Preliminary Reference also makes us forget the fact that in this procedure, the ECJ is both court of first and last instance – in principle a very unsatisfactory situation in itself constituting a violation of a fundamental principle of justice. This fact alone would call at least for the most careful and deliberative process in each and every case – since there is no appeal – but this is exactly what we do not allow the Court to do because of the heavy burden we place on it.

But the matter does not end simply with workload and time burden. Strangely, even paradoxically, the ECJ concept follows more the Anglo-American model of a plenary court supposedly competent in all areas of law rather than the Continental model of specialized courts – as we find in different ways in Germany, Italy, France, Greece and other countries. There is the general issue of specialization and the most delicate one is the functioning of the ECJ when it sits as the Constitutional Court of the Union.¹⁶ One of the peculiarities of the European system is that its most decisive constitutional issues depend, as a matter of legal realism, on a relationship of trust, confidence and credibility between the European Court and its national counterparts. The European Court can pronounce on the supremacy of Community law or on the Francovich principle of Member State liability all it wants, so to speak. These doctrines become effective only when accepted and practiced by national courts under the guidance of the highest courts in each Member State.

It is no secret that the 1990s have seen a certain erosion in the relationship. The German “Maastricht Decision” in which the German Constitutional Court declared, in defiance of established case law of the ECJ, that national authorities may disregard European law measures if they fall outside the competences

¹³ See also J.H.H. Weiler, ‘The European Court, National courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist view of Article 177 EEC’, in *Article 177 EEC: Experiences and Problems*, H. Schemers et al., North-Holland, (Asser Instituut 1987), 366 and J-P. Jacqué, J.H.H. Weiler, ‘On the Road to European Union – A New Judicial Architecture’, (1990) 27 *CMLRev* 187 and seq.

¹⁴ H. Rasmussen op. cit. supra note 1, p.1072

¹⁵ H. Rasmussen op. cit. supra note 1, p.1080 and see also J-P. Jacqué, J. H. H. Weiler op. cit. supra note 13, p.188

¹⁶ In some respects, every time it is called upon to interpret the Treaty it could be said to be sitting as the Constitutional Court since the Treaty is the Union’s constitution. I mean, instead, when it sits on matters that would be considered of a constitutional nature in the legal cultures of most Member States.

of the Community as understood by German State organs, is notorious.¹⁷ Less well known area, a number of decisions by other high courts in various Member States that display similar defiance. The Italian Constitutional Court declared that it did not regard itself in most cases that come before it as a Court or Tribunal in the sense of Article 177 (now 234) and, thus, considered itself outside the duty to make preliminary references. Troubling decisions have come out of Denmark, Belgium and possibly Spain.¹⁸

It should not surprise us, even if this is rarely spelt out in good company, that there is a certain credibility issue. The members of the ECJ are jurists of the highest quality. But only few of them are constitutionalists. When European law and the European Court demand subordination even of the most important constitutional principles of a Member State (such as the protection of fundamental human rights) to European law, it is critical that such decision emanate from a tribunal which is capable, *and seen to be capable* of comprehending the constitutional sensibilities of the Member State at issue and communicating that comprehension to its national counterparts. Without this we can only expect more “Maastricht Decisions.” The same can be said, of course, also regarding decisions of the Court on complex economic matters such as intellectual property, Competition and the like. I focus on the constitutional dimension because it is politically the most sensitive and it touches often on legal values which go to the very identity of the Member States. The position of the European Court is different from that of the Supreme Court of the United States and even of the House of Lords. Its relationship with, and dependence on, national courts is far more delicate and sensitive.

In thinking about the future of European law, consideration must be given to whether finally the European Court system should become European (rather than Anglo-American) and see the establishment of specialized jurisdictions, among them a European Constitutional Court composed of judges whose qualifications and expertise would be mostly in this field.

Après Nice is meant to be a reflection of what really ought to be done with Enlargement and a growing jurisdictional reach of the Union in place. Tony Arnall once wrote, tongue in cheek, that the back of an envelope would suffice to jot down a blueprint for the reform of Europe’s judicial system.¹⁹ He may have exaggerated. The back of a postal stamp on that envelope could do the job just as well. Here, then, are my two bits to the discussion of what a new architecture may look like – a concept car rather than a prototype.²⁰

The proposed new architecture has two limbs too – the process at the level of the ECJ and the CFI and the process at the level of national courts.

At the heart of the system would be a reversal of our habitual positioning of the Court and the Court of First Instance. It is the Court of First Instance which is to become the centre piece of the judicial system, its workhorse, with the Court of Justice standing at the hierarchical apex as its own brand of Supreme Court of the Union.²¹ Nice, as noted, already opens the door: Article 220 provides that the “... Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the Law is observed.” (emphasis added). This is an important symbolic empowerment which holds important potential implications for the future.

There are three crucial elements in this concept. The first is that Preliminary References would, in

¹⁷ German Constitutional Court, judgement of 12 October, 1993, 89 BverfGE 155, English translation 33 I.L.M. 388 (1994)

¹⁸ Italian Constitutional Court 15 December 1995, n°536, Rac.uff. corte cost. V.118, 1995, p.729; Danish Supreme Court, case n° I 361/1997, Judgement of 6 April 1998, UfR 1998.800 H, English translation [1999] 3 CMLReports 854; Cour d’arbitrage arrêt n° 12/94 of 3 February 1994, Moniteur Belge 1994, p.6137-6147; cf Tribunal Constitucional case, Declaration of 1st July 1992, English translation [1994] 3 CMLReports 101 see on this point A. Estella de Noreiga, A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration, 5 EPLaw 269 (1999).

¹⁹ A. Arnall op. cit. supra note 1, p.516

²⁰ Most of the proposals were already outlined in two papers delivered by me in 1999 at the Walter Hallstein Institute of European Law at the Humboldt University of Berlin and at the Institute of International Economic Law at Helsinki. I thank both institutions for the opportunity to present my ideas and to receive some feedback. Cf. *The Function and Future of European Law* in Veijo Heiskanen & Kati Kulovesi (eds.) *Function and Future of European Law: Proceedings of the International Conference on the Present State, Rationality and Direction of European Legal Integration* (Institute of International Economic Law, Helsinki, 1999).

²¹ The nomenclature would, of course, be of some significance. Supreme Court and Constitutional Court are two terms probably to be avoided because they carry a set of associations which might be politically unwelcome. The European Court and the European High Court perhaps?

most cases be addressed to the Court of First Instance.²² As noted Article 225(3) provides that the Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute. This crack should be opened fully. One has to get rid once and for all, of the fetish that it is somehow non-functional or non-respectful or in any other way inappropriate that national jurisdictions should turn to the CFI rather than the ECJ for a Preliminary Ruling. As we shall see, however, in this concept a special privileged relationship is foreseen for the highest courts of the Member States.

Judicial Panels are very important for discrete areas of specialized jurisdiction and they should remain under any future scenario. But in that future it would have to be Court of First Instance which, modeled on the experience in most European countries which should have its own functional chambers or divisions: A General Chamber and several specialized chambers. Without being exhaustive one can imagine specialized chambers in matters of Customs Law including Antidumping and other Safeguard Measures; Competition, Social Security, Agriculture. Matters not falling within the jurisdiction of a specialized chamber would fall within that of the General Chamber.

The second crucial element in the new concept is that the number of judges of the Court of First Instance would be decided on a purely functional basis.²³ Here, too, Nice already opens the door as indicated above. It may thus be that the Customs law chamber would have 12 members because of the number of cases it has to deal with and the Agriculture Chamber only 6. The General Chamber too could have more judges than the number of Member States so as to ensure a reasonable burden on each panel and a reasonable time scale in rendering decisions. The General Chamber would have a plenary forum (one judge from each MS) for important cases and could also sit *en banc* for very important or complex cases very much in line with the provisions of Nice for the jurisdiction of the Court of Justice sitting as a “full” court.

Specialized chambers would be composed of judges selected on the basis of their expertise from a Community-wide pool. Critically, and this is the third element, as the Community enlarges, the principle of parity will eventually have to yield. Here, prior practice at the Court and Nice already chart the way with its model of Full Court, Grand Chamber and other chambers in which, per force the principle of nationality is suitably differentiated. For reasons of coherence, any specialized panel of judges hearing a case in a chamber could always include one judge from the General Chamber too. Of course the full apparatus of the Advocates General, if this office is to be maintained, will also be transferred to the CFI. The present situation would be inverted, the presence of the AG would be the rule at the CFI level and possibility to call upon one would be open at the ECJ level.²⁴

As noted above, according to this suggestion, the CFI (for which a more suitable name could be found) would have plenary jurisdiction under the existing jurisdiction of the ECJ – i.e. it would entertain both direct actions and preliminary rulings under the existing rules and procedures established by the Treaty.²⁵ But its elevated number of judges would mean that the current delays associated with turning to the European Court would be eliminated.

This architecture would ensure both a balance between the specialized and generalized judge, it would substantially expedite the administration of justice and, because of the combination of specialization and reduction in docket burden, would also improve the deliberative quality of the decisions rendered. And yet, the advantages of the classic European system of preliminary references and direct actions will be maintained – the best of both worlds.

The European Court of Justice would become, under this vision, a kind of European Supreme Court. It would have primarily Appellate Jurisdiction from decisions of the Court of First Instance in direct actions, on the same principles that govern the relationship between the two Courts today. In cases involving the

²² H. Rasmussen op. cit. supra note 1, p.1098 et. Seq. also that the author is recognizing the advantages of ‘partial renationalization of the EC’s judicial architecture’ and envisages ‘national “preliminary judicial body”’ as proposed by the Working Party. p.1111, see also on this issue G. Hirsch op. cit. supra note 1, p.59 who suggests rather a ‘Dezentralisierungsmodelle’ which is ‘stärkere Europäisierung’ preferable to ‘Renationalisierung’ p.60. Both authors recognize the advantages of this reform in terms of saving time and costs. Cf J-P. Jacqué op. cit. supra note 1, p.447-449. See also C. Turner, R. Munoz, op. cit. supra note 1, Section V – Finding Solutions – Major Revisions to the Preliminary Ruling Mechanism, I. Transfer of preliminary ruling to the CFI?, II. Transfer of preliminary rulings to regional courts.

²³ J-P. Jacqué op. cit. supra note 1, p.445 and Craig, The Jurisdiction of the Community Court Reconsidered [in this volume] ...section VI.B

²⁴ See H. Rasmussen op. cit. supra note 1, p.1080

²⁵ Subject of course to any improvement in that system. Cf. Craig, The Jurisdiction of the Community Court Reconsidered [in this volume] ...

legality of acts of the Institutions and of failure of Member States to fulfil their obligations under the Treaty, the Institutions and Member States would have an automatic right of appeal. Individuals would have leave to appeal if the Tribunal itself certified that the matter was of such interest that it should be heard by the European High Court or if they petitioned the High Court and it itself decided to hear such an appeal.

The European High Court would, however, have one new Jurisdiction – the appeal from Preliminary Rulings. These I propose would be taken by a reference made by the highest courts in the national jurisdictions – either in dealing with a case that came to them on appeal from a lower national court where a reference had already been made in the matter at issue, or, if the first reference was made by the highest national court itself, it could re-refer the matter to the European High Court if it were unsatisfied by the decision of the Court of First Instance.

I would also suggest that when a reference were made from the highest courts of the Member States to the Court of Justice, to underscore the importance of the matter and the national interest in the case and to ensure the fullest possible consideration of all national sensibilities, the deciding Panel should always include one judge of the national Court making the reference, though not from the actual group of judges deciding the case – in other words a national ad-hoc judge from the highest court of the Member State in those cases where the highest court makes a reference or appeal to the European High Court. One should not gasp. The notion of ad-hoc judges is not novel and faced with an ever more complicated relationship between the ECJ and national jurisdictions some such provisions merit consideration.

The composition of the recast ECJ should reflect its more ‘august’ responsibilities. Member States should reflect much harder on the candidates they send – It would be worth reflecting whether European High Court judges should not come normally from the highest courts of the Member States. Particularly, the experience of the judges in constitutional matters should become far more relevant than it is today. Though not a constitutional court in the formal sense, it would be in practical terms just that.

The final issue derives from the same special relationship and dependence between the ECJ and its national counterparts. Whereas in relation to the architecture I think the model should be less Anglo-American and more Continental, as regards the style of judgments, I think the Court should abandon the cryptic, Cartesian style which still characterizes many of its decisions and move to the more discursive, analytic and conversational style associated more with the common law world – though practiced by others as well, notably the German Constitutional court. As noted above, especially in its Constitutional jurisprudence, it is crucial that the Court display in its judgments that national sensibilities were fully considered and taken into account. And it must amply explain and reason its decisions if they are to be not only authoritarian but also authoritative.²⁶ The Cartesian style with its pretense of logical legal reasoning and inevitability of results²⁷ is not conducive to a good conversation with national courts. In the same vein I would argue for the introduction of separate and dissenting opinions.²⁸ One of the virtues of separate and dissenting opinions is that they force the majority opinion to be reasoned in an altogether more profound and communicative fashion. The dissent often produces the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected.

As a precondition for these changes in the style of ECJ decisions the Member States in the next IGC would have finally to eliminate a continuous affront to the integrity of the European legal system, namely the renewability provisions for sitting judges on the Court. The European Parliament has proposed, twice, in its input to two successive IGCs that judges on the ECJ be appointed to one non renewable term of office, thus removing any appearance of dependence on a Member State. (Whilst we are at it, the same should be true also for Commissioners who are meant to be independent...)²⁹ The refusal of the Member States to accede to that request is simply unacceptable. Once this elementary anomaly is corrected, the conditions for dissents and separate opinions would be open.

²⁶ See J.Vining, *The Authoritative and the Authoritarian* (Chicago : University of Chicago Press, 1986)

²⁷ Cf. M.Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 *Yale L.J.* 1325 (1995).

²⁸ C.Turner, R.Munoz, *op. cit. supra* note 1, Section VII – Finding the Solutions – More Fundamental Revisions to the Judicial Architecture, II. Changes to the system of adoption of judgements: Dissenting judgements

²⁹ A.Arnulf *op. cit. supra* note 1, p. 522, the author is particularly concerned by the issue of the transparency in relation with the nomination of the judges and advocates general. See also C.Turner, R.Munoz, *op. cit. supra* note 1, Section VII, I. Changes linked to the organization of the ECJ (Composition-Terms-Appointments-Procedure for amending the Rules of Procedure).

The new Architecture should also address issues at the national level. The main recommendation here is to encourage a more proactive style of relationship between the national courts and their European counterparts.

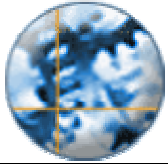
National courts must be encouraged to move away from the model that to be a good European Court is to make Preliminary References to the European Court of Justice and to say Amen to the pronouncements of the Court. To be a good European Court is to engage the European Court of Justice in a continuous conversation such that it is not only the parties and the Commission which inform the sensibility of the European Courts but also the judicial branch of national judiciary. Right now we have two models: Lower Courts (with some notable exceptions like the formidable Finanzgericht of Hamburg) simply frame questions for the European Court and follow the Rulings. By contrast, some of the most august Higher Courts regard themselves as the custodians of national constitutional values, the gatekeepers whose task is to make sure that core values of the national polity are not compromised by European norms. They do not regard themselves as part of a European constitutional conversation whose object would be to both shape European constitutional values and re-shape national ones.

The standalone attitude of the Italian and German Constitutional Courts both of which to date have never made a Reference despite decisions which clearly should have been the subject of References is not only not conducive to the Rule of Law but compromises the very interest and integrity of their own constitutional order.

A new style of conversation should encourage Member State courts at all levels not simply to ask the question but to propose what they think ought to be the correct Ruling and, most importantly, inform the European Court in the Reference itself of the constitutional and other concerns that the national legal order has when referring the question to the European Court of Justice.

Europe's judicial branch does not simply require the application of oil to creaking cogs designed to allow the system to cope with the quantitative burden of Enlargement. It requires a recasting of roles and relationships to meet an altogether more complex political and legal challenge.

3. THE EUROPEAN COURTS IN THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE



NOTE AND QUESTIONS

This section provides a greater insight in the changes to the judicial system of the Union agreed at the Convention on the Future of Europe and incorporated in the Draft Constitution. Some of them will be discussed in greater detail in other parts of these materials.

As you have learnt from previous readings the judicial branch did not undergo many substantial reforms during the past IGCs. The Nice IGC was in fact the first to make at least a step into that direction. But many problems have still not been resolved by the Nice Treaty. Does the Constitutional Treaty attempt to address any?

Pay particular attention to:

- the amendment of the conditions of admissibility concerning proceedings for annulment brought by natural or legal persons relating to "regulatory acts";
- the setting up of an advisory panel which would be required to give an opinion on the suitability of applications for posts of Judges and Advocates-General of the Court and the High Court;
- Improving the system of penalties by providing for simplification of the preliminary procedure for referral to the Court by the Commission;
- Adding the possibility of challenging acts or omissions by "agencies and bodies of the Union.

3.1 Article I-29 of the Constitution for Europe

Article I- 29: The Court of Justice of the European Union

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles III-355 and III-356. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall in accordance with Part III:
 - (a) rule on actions brought by a Member State, an institution or a natural or legal person;
 - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
 - (c) rule in other cases provided for in the Constitution.

See also: Constitution for Europe, Part III; especially Articles III-353 – III-381.

3.2 Changes proposed by the Treaty establishing a Constitution for Europe

Source: A Constitution for Europe: Fact sheets;
http://europa.eu.int/scadplus/constitution/institutions_en.htm

Following the changes made to the judicial system by the Treaty of Nice, including a better distribution of competences between the two bodies and the possibility of setting up of judicial panels attached to the Court of First Instance, the Constitution proposes some additional changes.

The Constitution changes the name of the Court of Justice. In the future, the term "Court of Justice of the European Union" will officially designate the two levels of jurisdiction taken together. The supreme body is now called the "Court of Justice" while the Court of First Instance of the European Communities is renamed "General Court". Article I-29 states that the Court of Justice of the European Union includes "the European Court of Justice, the General Court and specialised courts".

Article III-359 of the Constitution states that specialised courts may be attached to the General Court by means of European laws, adopted under the ordinary legislative procedure. These laws, adopted on a proposal from the Court of Justice or the Commission, will lay down the rules on the organisation of the General court and the extent of the jurisdiction conferred on it.

Article III-357 of the Constitution provides for the setting up of a panel to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General, before the governments of the Member States take the decisions regarding their appointment.

The Constitutional Treaty does not make any changes to the Court's tasks. However, it stipulates that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article I-29).

However, private individuals' access to the Court of Justice will be facilitated by the provision that any natural or legal person may institute proceedings against "a regulatory act which is of direct concern to him or her and does not entail implementing measures" (Article III-365). In this way, the Constitution should make it easier for citizens to challenge the Union's regulatory acts under which penalties are imposed, even if these acts do not affect them individually (unlike what is required under the existing treaties).

SUMMARY TABLE

Articles	Subject	Comments
I-19	The institutional framework	Major changes
I-30 and III-382 - III-383	The European Central Bank	-
I-31 and III-384 - III-385	The Court of Auditors	
I-29 and III-353 to III-381	The Court of Justice	
I-29	The Court of Justice (name)	Major changes
III-355 and III-357	The Court of Justice (selection of Judges and Advocates-General)	
III-359	The Court of Justice (specialized courts)	
III-365	The Court of Justice (actions brought by citizens)	