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The European Courts: A Procedural Analysis

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I. Introduction

According to *Article 220* of the European Community Treaty, the Court of Justice and the Court of First Instance shall ensure that in the interpretation and application of the Treaty and the law are observed. While on its face this provision may seem quite clear, its application is a bit more convoluted, as the role of the supranational Courts in Europe is not as stable and precise as it may first appear. In analyzing the structure of the Courts, the malleable manner in which challenges may be brought, coupled with certain transparency issues, and caustic critiques, depict the simplicity, which once appeared so enticing, as much more intricate. In coming to understand the inherent complexity present in this system, it becomes necessary to first understand the structure and composition of the Courts. From there, the jurisdiction of the Court of First Instance and the European Court of Justice become important as well. Delving into the various types of challenges that may be brought to the Courts' attention guides one towards understanding the power of the supranational Courts to decide matters and enforce decisions. Finally, critiquing the system uncovers the lack of transparency, and for that matter, accountability present, as well as a massive backlog of cases exposing the somewhat disorganized nature of the massive branch of government. It is only when detailed insight into the operation of the legal procedures is understood that an educated view into the European legal system emerges; one that is not as tidy and orderly as the European Union may have wanted it to be.

II. Structure of the Courts

The structures and compositions of the Court of First Instance (CFI) and the European Court of Justice (ECJ) are at first quite straight forward. The ECJ was founded in 1952 and is based in Luxembourg (EUnavigator). The Member States appoint the judges to both Courts, provided there is consensus. Each state appoints one judge to the ECJ and one to the CFI *id.* The judges vote and select a president of the Court of Justice, analogous to the Chief Justice of the Supreme Court in the United States *Id.* Once elected, the president directs the judicial business and calendar *id.* There are also eight Advocate Generals who write preliminary opinions on the cases that come before the Court *id.* Involvement of an Advocate General is no longer compulsory in every case (Bradley Blog). Following the Treaty of Nice, the Court itself may decide whether an opinion of the Advocate General should be submitted (Bradley Lecture).

The ECJ is the supreme legal authority in the EU (*Costa ENEL*), with the Court of First Instance created to help reduce the workload of the ECJ. One of the glaring faults with the Courts is their size. With twenty-seven judges sitting on both Courts, they become unwieldy judicial bodies. As EU enlargement continues decisions will have to be made as to when to freeze the courts. The problem then becomes one of enforcement. Enforcing judgments on nations who are not represented in the Courts may cause animosity and backlash. This would be the antithesis of the purpose in the creation of the bodies in the first place. As a partial means of rectifying this conflict, both Courts may either sit in Grand Chambers, with all judges in attendance, or in smaller chambers, with only some judges in attendance. According to the Commission this may also prove problematic as it may lead to inconsistency in case law.

It is imperative to note that the judges are not considered representatives of their individual member states (Bradley Lecture). According to *Article 223* of the Treaty, the judges are independent of political influence and are appointed for six-year terms. Judges can only be removed by a unanimous vote by their associates. (Bradley Lecture). Their anonymity is

protected by the fact that their decisions are written anonymously. This fact is reinforced by *Article 3* of the *Rules of Procedure* which states, “a Judge shall take the following oath: I swear that I will preserve the secrecy of the deliberations of the Court.” Some believe this has led to a lack of accountability and transparency, which will be discussed further.

III. Jurisdiction

Where jurisdiction is concerned, the Court of First Instance hears claims brought by and for the following: individuals against acts of Community Institutions which are of direct concern to them; actions brought by the Member States against the Commission; actions brought by the Member States against the Council; actions to establish extra-contractual liability, actions based on an arbitration clause, actions concerning the Community trade mark and the protection of Community plant variety rights, and member states. (Bradley Lecture).

The European Court of Justice has the supreme jurisdiction in the EU (*Costa ENEL*). It hears the following actions: actions for failure to fulfill obligations (*Articles 226 to 228*), actions for annulment and for declaration of failure to act of an institutional nature, brought by the Member States (*Articles 230 and 232*), actions for annulment or failure to act brought by an institution of the Communities or the European Central Bank against acts of or failures to act by the European Parliament or the Council, direct actions brought by institutions and Member States; appeals of decisions by the Court of First Instance (*Articles 225(1)(2)*); references for a preliminary ruling on interpretation or on validity made by national courts (*Article 234*); requests for an opinion (*Article 300*).

IV. Enforcement Power

It is imperative to first understand the enforcement power behind the Courts, for without enforcement, they are simply powerless bodies barking orders at powerful Member States. The enforcement power of the ECJ has proven to raise significant concerns. If a Member State does not comply with its treaty obligations in one way or another, the Commission or the other Member States have standing to bring an enforcement action against the state in noncompliance (*Article 227*). Although Member States possess this valuable power, it is very rarely used; especially when compared to large supply of Treaty infringement issues (EU XXI Commission Report). Member States may be hesitant to use this power as it could provide a basis for ill will between nations. This is a double edged sword as nations may continue in their noncompliance, because other Member States do not wish to bring a challenge for fear of later repercussions.

The Commission has recognized this problem and has implemented various techniques to quell the need for enforcement actions. For instance, the Commission will use a regulation where possible to avoid the need to transcribe a directive into national law. The benefit of a regulation is that it becomes law simultaneously in all Member States once it passes. This would cut out the interpretation of national governments in putting forth laws to enact a directive. Another solution to avoid enforcement actions has been the use of “soft law”. Soft law puts forth standards or codes of conduct without the strict legally binding rules of regulations or directives (Bradley Lecture). Therefore, there are rarely compliance issues that would lead to enforcement actions associated with “soft law” (Commission Communication).

The ECJ does have the power to impose a fine under *Article 228*. This power is used rarely but has been exercised several times including a penalty imposed on France under *Article 228* for its noncompliance with fishery conservation rules (*Commission v. France*). The ECJ has also ruled that states can be liable for their failure to enforce EU directives and regulations. This precedent was established in *Andrea Francovich and Others v. Italian Republic*. In that case workers suffered damages after their employer became insolvent. Under *EU Directive 80/987/EEC*, the workers were entitled to compensation for their damages. Italy had not yet

implemented the EU Directive and the ECJ found Italy liable for the damages. (*Francovich and Others v. Italian Republic*).

V. Challenges Brought Before the Courts

The CFI and ECJ are not only accountable for adjudicating enforcement actions, but are also responsible for ruling on whether EU institutions are complying with their community law obligations. Under *Article 230* a Member State or other institution can bring a challenge before the ECJ if it feels another institution has breached its duty.

It should also be noted that in rare instances individual persons may bring a claim under *Article 230*. The challenge must be “of direct and individual concern” to the individual (*Article 230*). This basically amounts to very few cases falling within this limitation as, “At the point where a EU authority sought to enforce the regulation against an individual or firm that individual or firm would have the right to challenge the enforcement action and also the regulation on which it was based” (Bradley Blog). In order for an individual person or firm to bring a challenge they must first set themselves apart from others, and show that the challenge would only apply to their particular circumstances. The ECJ describes this in *Plaumann v. Commission*:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons any by virtue of these factors distinguishes them individually (*Plaumann v. Commission*).

This process is also evidenced in the case of *Codorniu SA v Council of the European Union*. In this case, a Spanish company had produced a product called “Gan Cremant de Codorniu” for many years. The ECJ stated that the firm did therefore have standing to challenge an EU Regulation which stated that the word “cremant” could only be used to describe similar products from France and Luxembourg.

Another means of reaching the ECJ comes from the preliminary reference procedure. This procedure dictates that national courts may refer a question of European Union Law to the ECJ. This helps to ensure the uniformity of law throughout the European Union by giving national courts the option of asking for help in rulings on these, sometimes complex, issues. This sentiment is echoed in the Working Party’s Report:

Through the direct dialogue which it has made possible between each national court and the Court of Justice, as the supreme judicial body in the Community, through the authority and certainty of the answers it thereby gives to the questions raised and through the simplicity of its operation, the uniform application of Community law throughout the Union, thereby forming the keystone of the Community’s legal order (Working Party, 12).

This process is exemplified in the case of *Wilhelm v. Bundeskartellamt*. In *Wilhelm*, the Commission began proceedings under Regulation 17 against several dyestuffs manufacturers, including 4 German companies, for allegedly engaging in concerted activity in the pricing of aniline in violation of EC Treaty *Article 81*. Later that year the German Bundeskartellamt imposed fines on these German companies under the German law against restraints on competition. The companies challenged the Bundeskartellamt decision before a Berlin court, which sought a preliminary reference ruling on the question of whether the Bundeskartellamt could take action against conduct that at the time was the subject of proceedings before the Commission. (*Wilhelm v. Bundeskartellamt*). These preliminary references help guide the national courts toward the trend of the European Union supranational law (Cohen).

The preliminary reference process only works if the national courts make a reference to the ECJ. There is, however, no incentive to do so. Further, under the *Acte Claire Doctrine*, a national court is not required to refer a question of European Union Law to the ECJ; thereby adding to the

disintegration of European Law (Working Party 14). It is also unclear whether the Courts would prefer the national courts to use this procedure. The more it is used, the greater the burden it places upon the ECJ because of increasing caseloads. (Lanearts, 212).

VI. Critiques

One of the main critiques of the European Union Court system is the system's faltering ability to hear many cases. There are simply too many cases for the Courts to hear. In the Court of First Instance alone there were 171 cases in 1992 and by 1998 1,007 cases. (Working Party, 8). In 1998 the average time to examine and adjudicate a case was 32.2 months. This is a serious problem. If the Courts are not accessible the legal authority loses its credibility. Further, according to Arnall, the overcrowding in the Courts is exacerbated by the fact that, "European law is no longer confined to the realm of trade and commerce, but reaches into the nooks and crannies of national life" (Arnall, 516). This means that as the areas of law that the European Courts are afforded the right to rule upon expands, there are more cases in varying areas of law on their docket.

Similarly, the preliminary reference procedure has put more stress on the Courts as the ECJ strives to provide more substantial and direct rulings, rather than abstract rulings, which leave some of the guess work with the national courts. In putting forth these direct rulings, or "*response utiles*", the Courts have the adverse affect of narrowing the holdings of the cases. This thereby allows for similar challenges to be brought forth in future claims. (Arnall, 217). According to some accounts the ECJ takes the opportunity to weigh in on national court rulings in order to expand European Union law beyond the scope of the Treaty (EUobserver.com).

There have been several suggestions to alleviate the massive caseload. One suggestion involves setting up a "devolved judicial bod[y] specializing in preliminary rulings" (Working Party, 21). This would help dislodge cases from stagnation and free up the CFI and ECJ to deal with significant matters of European Union Law. However, this would prove to be a difficult fix as the conversational approach between the CFI and the national courts would be usurped. Once the dialogue between the national courts and the European Courts is interrupted by this proposed middleman, it is likely that cracks would form in the uniformity of interpretation of Union Law, thereby circumventing the whole purpose of the preliminary reference procedure.

A second critique of the court system stems from problems with the Union's enlargement. The Court System is already strained. It costs massive amounts of money to run the current system and it is already quite large. As enlargement continues the amount of litigation will also undoubtedly increase. If the Courts are already having difficulty hearing the current number of cases what will they do once three or four more members enter the European Union?

Similarly, with an influx of new Member States come additional languages. This presents a serious operational hurdle. There are currently eleven procedural languages in use (Working Party, 9). Many of the procedural documents filed from the individual Member States must be translated into a single working language. Then, all judgments and orders must be translated into the other languages. This process represents an enormous cost, increase in time, as well as a necessary increase in bureaucratic infrastructure; all of which lead to increased spending.

Transparency is a very important issue for the ECJ (Commission Report 2003). The lack of transparency within the Courts' decisions has led to Member States not knowing if a judge has criticized his or her own state in an opinion. Further, the judicial record for the Courts will not necessarily provide insight into how the judges will rule on a particular matter (Bradley Lecture). An attorney cannot play off of the individual attitudes and personalities of judges, such as is done in the United States. On its face, this may appear to supply a system free from personal biases and opinions; conversely, the anonymity may lead to judges voicing even stronger personal convictions within the confines and secrecy of the chambers. Even more, the decisions of the European Court of Justice are not reviewable. There is no body in place, judicial or otherwise, that can receive a case on appeal from the European Court of Justice. (Bradley Blog). With this in

mind it is easy to see why many have criticized the ECJ for its lack of transparency. Final decisions seem easier to make when no one in particular can be held accountable; however, yet again there is a converse argument as, because of the lack of accountability, the judges are more apt to make the difficult decisions free from the political influence that is often present in Supreme Court decisions in the United States.

VII. Conclusion

The Court system of the European Union, once a shining beacon of legal streamlined procedure, now appears to waiver under the demands of the 21st century. The fledgling institution does not have the history and tradition of the older national courts, and as such, is constantly seeking its place in the supranational identity of the European Union. Revolutionary in its creation, inordinate in its size, and multi-lingual in its procedure, the Courts represent the unity present in the diversity of the Union as a whole. It is unclear as to whether the current legal system will be able to meet the demands of the supranational behemoth that is the European Union. Overwhelming caseloads, transparency issues, enormous procedural costs, and slow adjudication seem to dictate that major changes will be needed for the current system to maintain its place as the supreme legal authority in the European Union (*Costa v ENEL*). However, European ingenuity and ability to adapt should never be underestimated. It is likely that when the negatives outweigh the positives we will see adaptations, new expectations, and procedural reforms from across the pond.

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