DEVELOPMENTS

Conference Report – Legal Unity Through Specialized Courts on a European Level?

By Stefan Kirchner[*]

A. Introduction

After last year's successful *Academia Juris Internationalis*[1] workshop on local products,[2] Prof. Dr. Thilo Marauhn and Dr. Sebastian Heselhaus (Academia Juris Internationalis Franz von Liszt, Faculty of Law, Justus-Liebig-University, Giessen) organized the second Jean Monnet - Workshop in the Senate Hall of the Main Building of Justus-Liebig-University in Giessen, Germany, on 2 July 2004.

The German concept of different judicial tiers of specialised courts has led to an institutional diversification of legal protection but also at times to differences between different judicial tiers.[3] Article III-359[4] of the Treaty establishing a Constitu-

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[1] The Academia Juris Internationalis is a research unit of Justus-Liebig-University in Giessen, Germany, which focusses on the study of applied international law from a wide range of perspectives, bringing together experts on private, public and criminal law cooperating in international legal research. For further information see SARAH ISABELLE REICH, STUDIES IN APPLIED INTERNATIONAL LAW (Tätigkeitsbericht 2003, S/A/I/L, Giessen (2004)).

[2] *See* STAATLICHE FÖRDERUNG FÜR REGIONALE PRODUKTE – PROTEKTIONISMUS ODER UMWELT- UND VERBRAUCHERSCHUTZ (Thilo Marauhn ed., 2004).

[3] *See* BVerfGE 58, 300 (Nassauskiesungs-decision by the Federal Constitutional Court on property rights). Also see the jurisprudence of other high ranking federal courts: BGHZ 6, 270; BGHZ 64, 220; BVerwGE 15, 1; BVerwG, DÖV 1974, pp. 390 et seq. The conflicting opinions between the different high courts arises from Germany's multi-tier court structure in which, e.g., administrative courts form a separate tier, as do "ordinary" courts dealing with criminal and private law matters, labour law courts etc. Each tier has its own highest federal court, as the court of last instance. The German Federal Constitutional Court, unlike many national Supreme Courts in other countries, is not a court of last instance but is restricted to only dealing with questions of constitutional law.

[4] Art. III-359 of the future constitution for Europe reads as follows: "1. European laws may establish specialised courts attached to the High Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. They shall be adopted either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission. 2. The European law establishing a specialised court shall lay down the

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tion for Europe[5] allows for the creation of specialised courts and chambers,[6] raising the question: which tasks would such courts and chambers have. On one hand, it is suggested that more specialised courts could lead to an increase in plausibility and transparency for Europe's judiciary; but Prof. Dr. Thilo Marauhn, M.Phil. (Wales), in his opening speech querried whether expectations for the "European Judicial Culture" might still be too high. Article III-359 of the future EU-Constitution was to be the normative starting point for the discussions during the workshop, which otherwise has not received much attention in the general public's discussion of the Constitution. This provision of the draft Constitution also must be seen in the context of the entire legal process of European integration, which represents a continued development including, but not limited to the Treaty of Nice.[7]

B. Germany's Specialised Judiciary in the Process of European Integration

I. Legal Protection Against EU Acts Through Specialised Courts

The first round of presentations focused on the "service-function" Germany's specialised courts might have for European Law and was opened by Sebastian Heselhaus. Prof. Dr. Rüdiger Rubel, judge at the *Bundesverwaltungsgericht* (German Federal Administrative Court) and honorary professor at the faculty of law of Justus-Liebig-University, spoke on the role of legal protection before specialised German courts as a contribution to the effectuation of community law. The fact that the

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rules on the organisation of the court and the extent of the jurisdiction conferred upon it. 3. Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the European law establishing the specialised court, a right of appeal also on matters of fact, before the High Court. 4. The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council of Ministers, acting unanimously. 5. The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council of Ministers. 6. Unless the European law establishing the specialised court provides otherwise, the provisions of the Constitution relating to the Court of Justice and the provisions of the Statute of the Court of Justice shall apply to the specialised courts."

[5] The text used for the purposes of this article is the *Treaty establishing a Constitution for Europe*, 6 August 2004, CIG 87/04, available online at http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf (Please note that at the time of the conference the latest version available was the *Provisional consolidated version of the draft Treaty establishing a Constitution for Europe* as amended by the 17 / 18 June 2004 Intergovernmental Conference.)

[6] According to Marauhn, the fact that the draft Treaty for the creation of a Constitution of the European Union differs in some parts from the text adopted in late June 2004 shows that substantial work had been done during the 17 / 18 June 2004 intergovernmental conference.

[7] O.J. 2001 C 80, pp. 1 et seq.

Bundesverfassungsgericht (German Federal Constitutional Court) in Solange II[8] decided not to measure European law against the human rights standards of Germany's *Grundgesetz* is, in the words of Rubel, the best service German courts could have done for the project of European integration. Yet, in order to compensate for the loss of control, the domestic courts' duty to bring a case before the European Court of Justice if necessary has been widened substantially: the *Bundesverfassungsgericht* will no longer examine the material correlation between European law and German fundamental rights, but will more closely examine whether or not the German courts have complied with their duty to bring a case to the European Court of Justice pursuant to Art. 234 (3) EC Treaty. Rubel noted that the specialised courts, such as the *Bundesverwaltungsgericht*, tend to give a lot of effect to European norms.

Rubel continued by emphasizing the effectuation of community law through procedural rules. While European law relativizes the member states' autonomy in creating procedural rules, enough flexibility remains for the courts to be effective. While German courts will provide legal protection against national acts based on community law, Rubel explained, they will also have to address community law questions.

As an example Rubel explained that European Law will often go beyond national legislation when it comes to serving the interests of individuals. In this context he raised the question whether the German *Schutznormtheorie* is still feasible, or if the door has already been opened by European Law for a form of *actio popularis*. Rubel offered as an example the Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water.[9] The *Schutznormtheorie* is used to identify norms which confer subjective rights upon individuals. This is the case if the norm serves the interests of the individual who wants to bring his or her case before the administrative courts.[10] Yet, the directive concerning the quality of bathing water does not mention such subjective rights in its core text but merely refers to them in its preamble. Although strict European limits might give the impression that subjective rights have been widened, not everybody who might have subjective rights deriving from the norm in question is able to bring a case for a violation of those rights. The fact that a European Directive regulates the quality of bathing water for the benefit of individuals does not lead to the introduction of an *actio popularis* due to the procedural requirements established by Germany's courts: the *Bundesverwal-*

[8] BVerfGE 73, 339.

[9] O.J. 1976 L 31, pp. 1 et seq.

[10] BVerwGE 92, 313 (317).

tungsgericht no longer defines the potential plaintiffs through the norm,[11] but includes in the *Schutznormtheorie* the requirement that individuals have to be closely and individually affected ("*qualifiziert betroffen*") in order to be able to bring a case.[12] In Rubel's example, a person living in Northern Germany would not be able to bring a claim based on alleged violations of the bathing water quality directive in a lake in Bavaria, while, for example, local residents affected by the violations in question would be able to do so.

Although it is accepted that European law might broaden the understanding of what constitutes a subjective right, such a subjective right, according to Rubel, is not, in itself, sufficient to allow for any form of *actio popularis*. Rubel concluded that fears that the *actio popularis* might find its way into the German legal system through European law are unfounded.

Another issue addressed by Rubel was the consequence of errors committed in the process of issuing any form of official act, e.g. an act of administration or *Verwaltungsakt*.[13] If, for example, the formal requirements for the creation of a *Verwaltungsakt* - such as the requirement that the person against whom the act is directed first have the opportunity to be heard [14] - are not met, the *Verwaltungsakt* is only void if the result was affected by the error in question. This idea of *Ergebnisrelevanz* is also applied by German courts to cases dealing with matters of European Law; although Rubel noted that some opposition has been voiced against this practice. Recently this idea had been widened beyond the required *Ergebnisrelevanz*. It is now also the case that, in order for a *Verwaltungsakt* to be deemed void, *Offensichtlichkeit* is also required. *Offensichtlichkeit* means that the error, which has been found to be relevant, must now also be obvious. This creates an even greater hurdle for those seeking legal protection against administrative acts. Furthermore, such errors can be "cured" at a later stage, for example when the person against whom the administrative act is addressed complains about it.[15] Also rules on the "curing" of such errors, Rubel explained, can be transferred to cases dealing with European law. But even if European law is being enforced on a national level through means other than an act of administration, there usually will be no significant differences with respect to the

[11] This approach was taken prior to the Bundesverwaltungsgericht's decision reported in NVwZ 1987, pp. 409 et seq.

[12] BVerwGE 101, 157 (165).

[13] For a definition of an act of administration under German Law, see § 35 Verwaltungsverfahrensgesetz (VwVfG).

[14] § 28 Verwaltungsverfahrensgesetz (VwVfG).

[15] This initial complaint or *Widerspruch* is a requirement for further legal action before the courts.

enforcement of German law. The courts in Germany's specialised court structure, therefore, are fit to examine cases in which the outcome depends on European rules. European law has already gained a substantial degree of importance before German courts, but the education of students, clerks and practitioners still lags behind the needs of everyday legal practice.

II. The Importance of Reference Procedures for Germany's Specialised Courts

Prof. Dr. Carl-Otto Lenz, currently of Baker & McKenzie and formerly an Attorney-General at the European Court of Justice, addressed the importance for Germany's specialised courts of the reference procedure of Art. 234 EC-Treaty. According to Lenz, the lack of specialisation of the European Court of Justice remains a core problem. Lenz noted that neither the President of the Court nor the rapporteur or the Attorney Generals, both of whom are involved in the proceedings, will typically be familiar enough with the legal questions relevant to the case in question, which at times can be very detailed and require a high degree of specialized knowledge.

The treaty of Nice addressed this problem by giving the Court of First Instance the competence to hear cases brought purusnat to Art. 234 EC-Treaty. This lead Lenz to question whether the European Court of Justice is sufficiently informed to decide on cases which require highly specialized legal knowledge. If this were not the case, the reference procedures should fall into the realm of the future European specialized courts. Lenz further noted that the European Court of Justice also has a number of sources from which to acquire the specific information required to decide the case. Among these sources are the domestic court's questions as well as the statements made by the parties in the original case before the national court now before the european Court of Justice by reference. These sources, when combined with the Court's possibility to request information from national authorities, led Lenz to conclude that the European Court of Justice will be able collect enough information to reach a conclusion in cases brought under Art. 234 EC-Treaty. After all, according to Lenz, the primary goal of the reference procedures is to ensure one unified interpretation of the community law. Specialized courts, could not achieve this, no matter how qualified they are.

III. European Influences on Legal Protection in Germany's Specialized Court Structure

Dr. Volker Röben of the Max-Planck-Institute for Foreign and International Public Law in Heidelberg (Germany) then examined the impact of European Law on Germany's specialized courts. Röben explained that, due to a lack in competence, it would be impossible to achieve a unified system of legal protection on the European level. To the contrary, the member states are tasked with ensuring the avail-

ability of such procedures.[16] Yet, Röben explained, Art. 47 of the Charter also allows European institutions to concern themselves with procedural rules on the national level, provided that the impact of European legislation on national procedural rules is made clear and that the national autonomy on procedural issues is not infringed upon. On the other hand, European influences on procedural rules could help enforce European law. In essence, Röben suggested that these problems are best being solved in a form of practical concordance.

C. The Introduction of Specialised Courts in the European Judicial System

I. The Future of the European Court of Justice - Supreme Court or Constitutional Court?

Dr. Christoph Sobotta, legal referent in the cabinet of Attorney-General Prof. Dr. Juliane Kokott at the European Court of Justice, started the next session with a presentation on the future of the European Court of Justice and the future functions of the Court. He particularly focussed on the following question: whether the Court will be more like a Supreme Court or a Constitutional Court. Sobotta sought to transfer German legal concepts, here the specific functions of the *Bundesgerichtshof* and the *Bundesverfassungsgericht*, to the European level.

The distinction between a Supreme Court and a Constitutional Court raises questions about which competencies the European Court of Justice should have; which tasks should it be charged with fulfilling and which matters should be brought before the European Court of Justice rather than the Court of First Instance? While a Supreme Court would be competent to hear cases on all legal issues and would be charged with the task of maintaining legal unity, a Constitutional Court would address a limited number of cases on questions of fundamental importance.

Given the recent discussions on the creation of more chambers of the Court of First Instance (which might in the long term lead to the development of a structure resembling the specialised court systems in Germany) and suggestions in the Council earlier this year to allow for more direct complaints to the Court of First Instance, Sobotta urged that ensuring legal unity and maintaining one comprehensive legal order on a European level should be paramount. This, in turn, would require one court to be in charge of all matters regarding European law. This solution, Sobatta noted, also raises the question, whether one general court could acquire and maintain the specific knowledge required in many fields of law. Sobatta especially highlighted questions of patent law as an example of cases giving rise to the necessity of specialised knowledge.

[16] Art. 10 EC-Treaty.

II. The Court of First Instance: An Interim Balance

Professor Dr. Werner Schroeder, LL.M. (Leopold-Franzens-University, Innsbruck, Austria), gave an overview of the activities of the Court of First Instance, which is becoming more and more important. Among the tasks of the Court of First Instance are, apart from the improvement of legal protection and the quality of the jurisprudence, the support of the European Court of Justice, enabling the latter to concentrate on preserving and developing a unified European legal order. [17] Yet, the Court of First Instance has time and again been concerned with issues of a much more fundamental nature. Schroeder referred to the decision in *Jégo Quéré*,[18] in which the Court of First Instance, acting pursuant to the right to effective legal protection, implemented a wider understanding of the requirement that a plaintiff be directly affected by the act against which legal recourse is taken. It was also the Court of First Instance, which, in *max.mobil*,[19] first referred to the Charter on Fundamental Rights. The European Court of Justice on the other hand, has so far failed to take the - albeit non-binding - Charter, which will be incorporated into the future Constitution, into account. The Court of First Instance therefore is more than merely a(ny) first instance court, and the European Court of Justice is not the only judicial body dealing with constitutional issues. Schroeder accordingly suggested widening the tasks of the Court of First Instance while restricting the European Court of Justice to the role of a Court of last-instance as well as a Constitutional Court. Although he didn't mention the U.S. Supreme Court *expressis verbis*, such a change might make European law more accessible abroad.

III. The European Judicial System after the Treaty of Nice

Prof. Dr. Stefan Kadelbach of the University of Münster continued by elaborating on the European judicial system after the Treaty of Nice, which entered into force in early 2003. Although the Treaty of Nice was intended to prepare the Union for the 1 May 2004 enlargement, according to Kadelbach, the system as it is right now, still required further reforms. This need is chiefly caused by the lack of relief provided to the European Court of Justice through the Court of First Instance, which in turn is not to be blamed on the CFI but rather on a dramatic increase of the caseload, due to the increased legislative activity on the European plane, in particular after the 1986 and 1995 enlargements. The 2004 enlargement will most likely aggravate the situation even more. Furthermore, Kadelbach noted that the caseload of the Euro-

[17] *See* 88/591/ECSC, EEC, Euratom, O. J. 1988 L 319, pp. 1 et seq.

[18] Case T-177/01 (*Jégo Quéré et Cie S.A. v. Commission*).

[19] Case T-54/99 (*max.mobil Telekommunikation Service GmbH v. Commission*).

pean Court of Justice was enlarged by the Treaty of Amsterdam, in particular Art. 68 (1) EC-Treaty and Art. 35 EU-Treaty.

The Treaty of Nice initiated a reform of the European judicial system, which is to lead to a three-level-structure, consisting of the European Court of Justice, the Court of First Instance as well as the future specialized courts.[20] Against a decision of the specialised courts, or the "chambers" as they are still referred to in this pre-constitutional era, an appeal is possible to the Court of First Instance.[21] In the extraordinary case that the unity of community law is at stake, the case may be brought before the European Court of Justice, as the final instance.[22]

While the workload for the courts might be eased by these structural changes, Kadelbach pointed out that the possibilities for the individual citizen to bring a case before a European court have not been improved by the Treaty of Nice. Even the European Parliament will not feel a significant improvement when it wants to bring a case before the European courts.[23] At the same time, Kadelbach pointed out the risk that an increasing number of specialised European courts could threaten the unity of the jurisprudence of the European courts, which in turn will increase the responsibility of domestic courts regarding effective legal protection.

D. Specialised Courts as an Integral Part of Germany's Judicial Culture

I. Judicial Organisation and the Self-perception of Judges in Germany in its Historic Context

During the third part of the workshop, which was moderated by Prof. Dr. Christoph Benicke (Giessen), the specialized court system was examined in its function as an integral part of Germany's legal, and in particular judicial, culture. Former presiding Judge at the *Oberlandesgericht* (Higher Regional Court) Bonn, Dr. Theo Rasehorn, addressed how judges perceived themselves, while taking into account the historic perspective in the 1933-1945 NS-era. Although judges then, as well as today, considered themselves to be largely independent, they remain bound within an entire apparatus which today consists, according to Rasehorn, in the hierarchical

[20] Art. 220 (2) and Art. 225a EC-Treaty Luxembourg, the seat of the European Court of Justice and Court of First Instance, added a separate declaration to the Treaty of Nice to the effect that the functions currently assigned to Alicante are to remain there even after the creation of the third level of courts. This suggestion is now being followed by Art. III-359 of the future constitution.

[21] Art. 225 (2) and Art. 225 a, subpara. 3 EC-Treaty

[22] Art. 225 (2) subpara. 2 EC-Treaty

[23] The only exception being Art. 230 subpara. 2 EC-Treaty

organisation within the judiciary. Following the thesis of the best-selling author and law professor Bernhard Schlink, Rasehorn claims that guilt can also occur by not clearly separating oneself from the crimes of the past.[24] The perceived independence of Germany's judiciary, according to Rasehorn, was shaky and, in his words "built on sand," especially given the fact that current German judges fail to distance themselves from some 50,000 death penalties imposed by German judges between 1933 and 1945.

II. Conflicts Between Specialized Courts and Constitutional Courts from a Legal Psychologist's Point of View

Prof. Dr. Karsten-Michael Ortloff, a presiding judge at Berlin's Administrative Court who works as Berlin's Court Mediator, then addressed the conflicts between specialized courts and constitutional courts from a legal-psychological perspective. Ortloff also stated that a judge could never be completely free of influence in his or her decision-making process. Such influence does not necessarily have to come from the outside; neither do they have to be recognized by the judge in question. Decision-making processes, according to Ortloff, are often voluntary in nature, which is reflected in the fact that some courts are more (or less) likely to refer a case to the *Bundesverfassungsgericht* or to the European Court of Justice. In this voluntary process, the judges' view of themselves indeed plays a great role. Yet, Ortloff disagreed with Rasehorn's claim that the judge's self-perception has not changed since 1945. In particular, Ortloff referred to the fact that the social sciences so far have paid attention to witnesses, victims and delinquents but have not taken into account the judges' behavior. As an indicator for judicial conflicts, Ortloff identified the degree to which decisions by other judges are accepted. At the specialised courts in particular, the decisions by the constitutional courts are not necessarily respected. As an example Ortloff cited the disputes regarding Art. 14 GG in the wake of the Federal Constitutional Court's aforementioned *Nassauskiesungsentscheidung*.[25] One reason for such conflicts is to be seen, according to Ortloff, in the tension between the dogmatics of normative interpretation on one hand, and a more voluntary decision-making process on the other. If the latter elements are marginal, which usually is the case when it comes to dogmatically compulsory interpretations of legal norms, a judge is more likely to be persuaded by another judge's decision and hence more likely to accept it. Yet judges in specialized courts are aware of the fact that the decision-making process at constitutional courts is also not free of voluntary elements, making it harder for judges at more specialized courts to accept judgements rendered by constitutional courts. However, if a judge

[24] SCHLINK, VERGANGENHEIT, SCHULD UND GEGENWÄRTIGES RECHT 29 (2002).

[25] *Supra* note 3.

is aware of his or her own voluntary decision-making process, problems of acceptance are more likely to diminish.

Ortloff concluded by asking legal psychologists and social scientists to examine the jurisprudence of courts beyond their mere legal importance, but to consider these phenomena more closely by means of empirical analysis and by analysing the jurisprudence more closely.

III. Specialised Courts and the Relation Between Europe's Citizens and the Judicial System

Afterwards Prof. Dr. Jörg Pirrung, judge at the Court of First Instance, addressed the question if and how a more specialized court structure could bring Europe's judicial system closer to its citizens. The starting point for Prof. Pirrung's examination of the issue was the fact that, in principle, citizens can only seek legal protection before European courts indirectly. Yet the number of cases has risen dramatically, which indicates a high degree of acceptance of the European judicial system by Europe's citizens. Still, the distance - both geographically and perceived - between the courts and the citizens could remain an obstacle to a wider acceptance of Europe's courts by its now 450 million citizens.

This physical distance could however be limited with the introduction of a third level of courts, which in turn leads to the question of where the specialized European courts are to be located and how they are to be staffed. Even if the physical distance could be bridged, there is no guarantee, Pirrung concluded, that the overall distance to the European judiciary, which is still felt by many Europeans, can be bridged quickly. From the point of view of the Court of First Instance, however, Pirrung concluded that recent developments are promising.

E. Concluding Remarks

This year's conference was co-sponsored by the Faculty's Alumni Organisation, represented by its head, Prof. Dr. Walter Gropp, as well as the law firms Baker & McKenzie and Freshfields Bruckhaus Deringer. The conference was concluded with a round-table discussion including Prof. Dr. Marauhn, Dr. Thomas Wagner (Freshfields Bruckhaus Deringer) and Prof. Dr. Richard Giesen (Universität Giessen), in which a look into the future of Europe's judicial system was attempted. The conference proceedings of this year's Jean Monnet workshop will be published by the Tübingen-based legal publisher Mohr Siebeck in the following months.