CONSTITUTIONAL JURISDICTION AND THE ROLE OF THE EUROPEAN COURT OF JUSTICE

ANTONIO LA PERGOLA

The present legal system of the European Union is the outcome of various case decisions over a long period of time. The evolution of European law has over the years been characterised by the pronouncements of the European Court of Justice. Hence the legal system, as it was gradually formed by the Court of Justice, has required that the role of the European judge be more akin to that of a judge of a national legal order. This article aims to clarify and discuss this point.

1. My starting point is a well-known fact. The E.U. legal system is what it is today precisely because, to a large extent, it is the result of court decisions. Both the Treaty, which is the supreme source of E.U. law, and the huge volume of secondary legislation which derives from it, concern us as legal functionaries because they are translated into reality via the case-law of the Court of Justice. The judicial pronouncements of this court are generally and effectively observed throughout the E.U. member states. Without the regulatory role of case law, the legal system of the European Union would still be based on conventional international law. The Court of Justice, however, distinguished European law from international law and thus severed the bonds which tied E.U. law to the founding treaty of the European Union and has defined its essential characteristics in conformity with the aims and needs of the integration process. The E.U. legal system, has, in fact, evolved in the manner and for the purposes that the Court has largely determined. Its jurisprudence has become, from the crucial phase of the inception of the common market, an indispensable and – I would say – an institutional leverage point for the establishment, even before the successive development, of the plan that can be said to date back to the authors of the Treaty.

The subject matter would require a deeper and more detailed discussion than it is possible for me to undertake in this forum. I will limit my discussion to just one – decisive – jurisprudential contribution to the construction of a Europe which unites us. The legal system as it was gradually formed by the Court of Justice has allowed, or rather, required, that the role of the E.U. judge be more akin to that of the judge who is the interpreter and the guarantor of the constitution of the legal system of a State. It is important to consider the constitutional judge who is a well-known figure in our democracies. The observations which follow aim to clarify and justify this point of view.

2. I wish to start by making reference to Art. 220 of the Treaty: "*the Court of Justice shall guarantee the respect of the Law in the interpretation and application of the present Treaty.*" This is a formula which does not only give a jurisdictional role to the Court, but it also gives the Court the specific competence of guaranteeing observance of the Treaty as the primary source of the European legal order. One may also add – as was also noted by certain commentators – that the law which the ECJ seeks to protect includes, in its deepest strata, a law which is subjected to the Treaty itself; a law from which general rules and fundamental principles originate. What remains to be seen is which procedures are in place so that the Court would be in a position to guarantee the observance of the Treaty in the same way as the competent internal judge is called to protect fundamental law. Hence Article 220 ought to be read in conjunction with all the others, which are linked to its general provisions outlining the competencies of the Court. I'll here simplify the discussion as much as possible. E.U. jurisdiction embraces three areas:

a. The Court takes cognisance of the illicit behaviour of Member States that fail to fulfil the obligations arising – directly or indirectly – from the Treaty (Art. 226-228). Hence the E.U. judge's role as an international judge is defined in this manner. Even if the procedures prescribed to allow him to verify the existence of illicit acts committed by the Member States have been regulated through the organs of the European Union, it is in reality the Commission and not another Member state which sets such decisions in motion.

b. Another competence of the Court involves the determination of the lawfulness of E.U. acts and their conformity to the Treaty. This competence is exercisable through the procedures introduced according to: (i) Articles 230-231; together with (ii) the application to annul, in Article 232, (which states that should the European Parliament, the Council or the Commission, fail to act and hence infringe the Treaty, the Member States and the other E.U. institutions may bring an action before the Court of Justice to have the infringement ascertained); (iii) Article 241, which establishes the incidental plea of illegality; and (iv) Article 300, through requests to the Court to vet, in a preliminary way, the compatibility between the Treaty establishing the E.U. and any agreement which the E.U. intends to conclude with third party states or other subjects of International Law (Art. 300). The power to certify the conformity of the act which has to be judged by the Court to the principles which have to be observed including the consequences, as the case may be, which follow from the pronouncements of the Court, (starting with the annulment of an act which has been judged invalid) – correspond to those of a constitutional jurisdiction. As is the case in these jurisdictions, the E.U. judge protects the hierarchy of the normative sources, the order of the competencies and the balance between the institutions. And it is significant that even the individual has been empowered to impugn, under the conditions established in Article 230, acts which interfere with the sphere of his legally protected interests, or to invoke, with the plea of unlawfulness, their inapplicability to the case in question. This is a concrete remedy originating from the founding fathers who conceived the European Community – and the same can be said of the Union by which it has been recently superceded – as composing the Member States, their peoples and their citizens, whose rights and interests not only deserve to be taken into consideration in the political field but also to be judicially protected. They believed that a factor which would promote the development of the process of European integration would be the recognition of the rights and expectations of the individual, apart from and in addition to the recognition of the reciprocal duties of co-existence of the Member States. Jurisprudence has developed the theory that

this aspect of the system conceived by the founding fathers operates beyond the cases in which the individual appears as a party in the judgement on the legality and validity of E.U. acts. To achieve these results, the Court has resorted to another power to resolve the preliminary matters which would have been submitted by the national judges according to the provisions of Article 234 of the Treaty.

c. Let's focus on this last competence. The Court has the monopoly on the binding interpretation of the Treaty and the E.U. law. Thanks to the machinery of Article 234, the Court can favourably apply a wide and objective jurisdiction for the purpose of ascertaining whether E.U. law has been unfairly applied vis-à-vis the national subject. The Court acts as a general interpreter of the whole E.U. Law, identifying the principles on which it has to base its interpretation, and when it decides upon them, it has at its disposal the wide resources of teleological and systematic interpretation, a natural prerogative of constitutional judges. Two very well-known core principles come to mind: the supremacy of E.U. law and its direct effect in the national legal system. The Court has developed these principles as corollaries from the characteristics and the indispensable requisites of the legal system of which it is the interpreter. I would attribute the basic principles of this jurisprudence to the same category as the famous pronouncements which have determined the course of the legal and constitutional history of some nations, such as that pronounced in *Marbury v Madison* by the North-American Supreme Court; in which the power to oversee the ordinary laws, not expressly recognised to the judge, is derived from a rigid constitution, such as the American one. In certain respects, the case of the European jurisdiction is analogous. The logical consequence of the two fundamental principles enunciated by the Court is, in fact, the following: the jurisdictional system of the E.U. is adapted to the relationship which is forged between the legal orders of the member States. More precisely, the powers of the Court are interlinked between themselves and with those recognised to the internal judge to achieve the aims, which, I would say, belong to constitutional justice. Let's see how.

The Treaty and E.U. law prevail over an incompatible internal law. E.U. law can be immediately and necessarily directly applicable in the national legal orders to the extent permitted by E.U. law itself. The internal judge will have to refrain from applying any norm, regardless of its status, which could impede the attainment of this result. In other words in every Member State, internal norms which involve the non-observance of the E.U. duties cannot be upheld in judgement. The legislator of that state would, on his part, be bound to remove or modify these rules so as to ensure that these duties are no longer violated. This system has stood the test of time, satisfies the needs of actuality and it is no coincidence that it has managed to escape the stringent scrutiny of the Constitutional Courts of the Member States. The judgements of these courts have also specified that the judgements pronounced by the Court – as the judge of the legality or illegality of actions or of the interpretation to give the law – become, in the field of the State, directly applicable E.U. law and should hence be immediately applied in preference to any opposing internal norm. In this manner, it has been possible to remedy the limit inherent in the competence attributed to the E.U. judge, who, unlike the constitutional judges of federal States, can neither challenge the laws of the member States nor declare them invalid. It has been said across the Channel that this is '*judge-made federalism*'. In any case, we find in the European Union a legal system which has been enriched, not to say completed, and made to function by jurisprudence which corresponds, at least in practice, to the institutes of constitutional justice within States. Another aspect will now be considered.

3. E.U. law also effects inter-subjective relations. The internal judge is the *lunga manus* of the European Union, ensuring the capillary observance and application of this law in every Member State. From centralised jurisdiction because it is reserved, decentralised jurisdiction derives. Decentralised jurisdiction is exercised by all the national judges and finds its expression in the diffuse and incidental protection of the subjective rights arising from the E.U. legal system. The internal judge would have to consider all these rights as fundamental and as equally entitled to protection. These are subjective rights deriving from an E.U. legal system, which has become dominant and omnipresent, thanks to the jurisprudence of the Court. The national judge protects these rights, it bears repeating,

even if they are incompatible with the provisions of the internal legal order. Added to all this, there is the recognition of the individual's right to compensation for damages. This right also emerged from a Court decision (the Francovic Case) and applies in the case of an omission or other illicit practice on the part of State legislation, consequent to which subjective rights guaranteed by the Treaty or the E.U. legislation are violated. This specific remedy for the violation of a right is fundamental in the context I specified, in that it offers the individual a protection which is immediate and more advanced, even when compared to the protection afforded by the legal systems of those states in which an appeal to the constitutional judge is permitted. The interested subject is thus enabled to resort to such measures, to obtain the annulment of the act – whether legislative or of another nature – which he perceives as a violation of his *Grunrecht*.

4. What has just been said requires clarification. When I state that the rights of individuals under European law are all equally fundamental from the point of view of the national legal system and the national judge, I do not mean to ignore the level of protection which surrounds them in their state of origin, arising out of the hierarchy of the normative sources from which they derive. The rights emanating from E.U. sources are subjected to the Treaty – regulations, directives and so on – and co-exist with those rights which are afforded the highest level of protection and which are at the basis of the Union – the freedom of movement, the rights of citizenship of the EU – without, of course, being able to take their stead.

Co-existence between these differently qualified rights is not always easy. How do the following come together – free movement of services, and hence also of medical services, sanctioned by the Treaty and its liberal view of the market and also the social right to health care and to the reimbursement of medical expenses, for example – rights which the E.U. regulations leave to national regulation, where these arise, being founded on the criteria of a beneficial but fiscally efficient "welfare state"? Moreover, what about the right to freedom of movement and residence in all the European Union? This right is established in Article 18 of the Treaty as a right belonging to all the citizens of the Union and it is a prerequisite for the enjoyment of other rights related to the European citizenship

(both participative and electoral rights), which are recognised to the residents in other Member States, different from their state of origin. To which extent, however, is the exercise of such a fundamental freedom limited by the provision which restricts subsidiary law, established in the same article of the Treaty which establishes this freedom?

Hence the most important freedoms are not hierarchical. One can interfere with another, but each freedom, has, after all, its own protected area of application and the judge has to allocate it rationally in the system. The problem becomes complicated when the Treaty refers to a whole series of protected freedoms. Let's consider Article 6.2 of the Treaty of the European Union:

> *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of E.U. law."*

The Court exercised, even before the entry into force of the TEU – and today it goes on to carry out, with the comfort of Article 6 – a supervisory role over the enforcement of all the fundamental rights since they were recognised and guaranteed through those provisions. The parameters of those supervisory powers are those derived from the Rome Convention or from the constitutional traditions of Member States. The protection afforded by the Court operates with regard to not only to the Institutions of the European Union but also vis-à-vis the Member States in the cases in which they are called upon to apply E.U. Law. This is another and very important function of protection of individual subjects. However, in fulfilling this function, the Court tries, as much as possible, to avoid the difficulties which may derive from what could be termed the "heteroprotection" which falls on the fundamental rights in question. In fact, human rights, and fundamental liberties are also guaranteed in the respective legal systems, the Strasbourg Courts and by the national judges. Article 6 gives the Court a wide discretion and hence it does not prevent it from basing its judgements, on a case-by-case basis, on other case-law emanating from institutions which protect human rights. It also does not prevent it from finding "neutral" solutions which are suited to highly controversial constitutional matters, which are the subject

of lively debate in the Member states when the controversy concerns their possible violation in the field of E.U. justice. Hence, for example, the decision in the Crogan case (1991) portrays abortion as being the performance of a service which could be held to be legitimate in some national legal orders whilst not in others, which however, in no case is considered as a fundamental freedom guaranteed in the Treaty. On the other hand, it is also significant that certain constitutional courts, such as the German Court of Karlsruhe, have asserted on the their scales the "essential equivalence" of the protection reserved to the fundamental rights in the E.U. and state legal systems, even if, for a moment, it had accepted the opposite solution.

5. It is important to mention regarding this last point that issues concerning liberties and fundamental rights are central in the European Union, as in the States. The internal judge may protect the E.U. rights of individuals by basing his decision on that of the Court. He will always find Article 234 which deals with preliminary pleas of interpretation within reach, or even that concerning the validity of the acts adopted by the institutions of the European Union. Let's remember that the institute of the preliminary ruling is inspired by corresponding schemes of the internal legal systems. In our countries, it has been the preliminary reference of ordinary judges which has endowed constitutional justice with the merits of concrete justice and justice which is close to the citizen. The same thing happens in the E.U. legal system. The preliminary matters which have a bearing on the re-conciliation of the causes and values at stake in the protection of rights and fundamental liberties are frequently the result of the application of the law, in the ordinary flow of controversies which arise between the national courts. It is in this area of juridical experience of integration that one can find the actual raw material which leads to the development of E.U. law and also those of its characteristics which establish it as a higher law; a fundamental law which directly protects the individuals whilst going beyond the States. And it is here that the jurisprudence dictated by the Court at the heart of the system – a jurisprudence of interests, values or principles, – undoubtedly becomes a form of constitutional justice, always ready to protect what we all recognise as this 'Union which is ever so close'.