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The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?

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The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?

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The purpose of this paper is twofold. First, it examines selectively the provisions of the draft Constitution pertaining to the Court of Justice and assesses the ways in which the draft Constitution is likely to affect the jurisdiction and the function of the Court. Secondly, it discusses the challenges faced by the Court in relation to the protection of human rights by reference to the recent judgment in *Schmidberger*.¹ Both aspects of the discussion serve to underlie that the Court is assuming the function of the Supreme Court of the Union whose jurisdiction is fundamentally constitutional in character. It has a central role to play not only in relation to matters of economic integration but also in deciding issues of political governance, defining democracy at European and national level, and contributing through the process of judicial harmonisation to the emergence of a European demos. This constitutional jurisdiction of the ECJ is not new but has acquired more importance in recent years and is set to be enhanced under the provisions of the new Constitution. The paper is divided as follows: The first section provides an overview of the way the new Constitution affects the ECJ. The subsequent sections examine respectively Article 28(1) of the draft Constitution, the appointment and tenure of the judiciary, *locus standi* for private individuals, sanctions against Member States, jurisdiction under the CFSP and the Chapter on freedom, security and justice, preliminary references, other provisions of the Constitution pertaining to the Court, the principle of subsidiarity, and the judgment in *Schmidberger*. The final section contains some concluding remarks.

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¹ Case C-112/00 *Schmidberger*, *Internationale Transporte und Planzüge*, judgment of 12 June 2003.

The draft Constitution and the Court

The role of the judiciary and the future of the ECJ did not feature prominently in the workings of the European Convention. It is indicative that, in outlining the responses of the Constitutional Convention to the Laeken declaration, the preface to Parts I and II of the draft Constitution states that the Constitution “establishes the necessary measures to improve the structure and enhance the role of each of the Union’s *three institutions*, taking account, in particular, of the consequences of enlargement”.² The reason for the absence of any reference to the Court is that the Laeken declaration identified themes and challenges which were *par excellence* political in nature and, consequently, focussed on the political institutions of the EU. Also, the workings of the ECJ and the future of the judicial architecture had received extensive consideration in the inter-governmental conference leading to the Treaty of Nice. It might have been thought, therefore, that it was not necessary to revisit issues of judicial architecture.

In February 2003, the Praesidium of the Convention set up a “Discussion Circle” on the operation of the Court of Justice, with a view to examining possible changes to be made in the system of judicial protection as part of the new Constitution.³ The Circle was asked to consider five specific questions: (a) the appointment of the members of the ECJ and the CFI; (b) the procedure for changing the rules of procedure of the ECJ and the CFI; (c) the names of the ECJ and the CFI; (d) *locus standi* for private individuals under Article 230(4); and (e) the penalties for non-compliance with judgments in enforcement proceedings. It is clear that, although some of these questions are of considerable constitutional importance, the mandate given to the Circle was in fact limited. It was not asked to rethink or recast the judicial architecture but rather to make limited proposals in well-circumscribed issues. It was not, for

² See Draft Treaty establishing a Constitution for Europe as submitted to the President of the European Council in Rome on 18 July 2003, CONV 850/03 (emphasis added).

³ For the terms of reference and the framework of proceedings of the Discussion Circle, see CONV 543/03, 7 February 2003. The Circle was chaired by Mr Antonio Vitorino. The Circle published its Final Report on 25 March 2003: CONV 636/03.

example, asked to look at the division of jurisdiction between the ECJ and the CFI or the future of the preliminary reference procedure. Even in relation to the questions that it was asked to examine, the Circle's role was not to promote a wide-ranging discussion but consider policy alternatives within a short period of time.⁴

The fact that the Court of Justice was not one of the central themes of the Convention does not mean that the draft Constitution leaves the ECJ unaffected. Far from it. Its provisions enhance the Court's jurisdiction in a number of ways and lead it to acquire a central role in matters of governance. The ECJ will have a defining role to play in interpreting the new provisions of Part I of the draft Constitution and ascertaining, *inter alia*, the division of competence between the Union and the Member States, inter-institutional relations, and the application of the principle of subsidiarity. Furthermore, the incorporation of the Charter on Fundamental Rights into the Constitution will add a new parameter to the judicial enforcement of human rights at Union level. The Charter may be seen as a noble endeavour to provide an epigrammatic definition of European ideology but, as a product of political compromise, it contains principles and aspirations which are insufficiently concrete and suffers from drafting deficiencies. Title VII in particular, which contains provisions governing the interpretation and application of the Charter, is rife of uncertainties as to the scope of its application and even the enforceability of its provisions.⁵ It will be left to the Court to untangle these problems and ultimately determine the relevance of the Charter.

⁴ The Circle had its first meeting on 17 February and produced its final Report on 25 March 2003. In addition to the work of the Circle, the jurisdiction of the Court was discussed in various contexts by the Praesidium and touched upon also by other working groups.

⁵ Note that Article II-51 and II-52 of the Constitution which correspond to Articles 51 and 52 of the Charter as it currently stands contain some important changes which appear to restrict the autonomous nature and enforceability of the Charter. See especially Article II-52(4)-(6). For a discussion of the current provisions of the Charter, see Lenaerts and de Smijter, A "bill of rights" for the European Union, (2001) 38 CMLRev 273; P. Eeckhout, The EU Charter of Fundamental Rights and the Federal Question, (2002) 39 CMLRev. 945. See further A. Arnulf, Protecting Fundamental Rights in Europe's New Constitutional Order.

Further, as Craig points out elsewhere in this volume,⁶ the proposed Constitution enhances review of constitutionality of legislation. This is because it grants to the ECJ jurisdiction to annul legislative acts. Although the Court always had the power to annul measures of general application, such as regulations and directives, there is a qualitative difference in that the Constitution provides, for the first time, for a more cogent hierarchy of norms and draws an express distinction between legislative and non-legislative acts. Legislative acts remain subject to review by the ECJ despite the fact that the democratic input in their adoption is significantly increased through the co-decision procedure.⁷

The following sections discuss selectively provisions of the Constitution pertaining to the Court.

Article 28(1)

A welcome change of the draft Constitution is that it provides for the essential features of the institutions in Part I. This contrasts with the current Treaty arrangement in which, apart from a rudimentary reference in Article 7 EC, the powers of the institutions are found deep into the body of the Treaty. The Court of Justice is dealt with in Article 28 which provides for its function, composition and jurisdiction and is supplemented by the detailed provisions of Part III (Articles 258 - 289).

⁶ See above.

⁷ The co-decision procedure is extended to some new areas and elevated to the ordinary legislative procedure.

Article 28(1) formally recognises the emergence of a separate tier of Union courts, alongside the national judiciaries, by declaring that the Court of Justice “shall include the European Court of Justice, the High Court and specialised courts”. Thus, the CFI is re-named to “High Court” and the judicial panels whose introduction is envisaged by Article 225a EC to “specialised courts”. The renaming of the CFI stems from the recognition that, with the introduction of judicial panels, the CFI will not always judge cases at first instance whilst in some cases it might act as the final court.⁸ The name Court of First Instance would therefore be a misnomer.⁹

Article 28(1) states that the Court of Justice “shall ensure respect for the law in the interpretation and application of the Constitution”. This provision is intended to replace Article 220 EC. Curiously, the English language text of Article 28(1) departs from the elegant formulation of Article 220 EC¹⁰ whereas the French language text is identical.¹¹ This suggests that the variation in the English language text is a mistake in translation and should be rectified before the Constitution is adopted. As it currently stands, the English text appears to downgrade the importance of the ECJ. In terms of language, “respect” for the law is weaker than the peremptory disposition of Article 220 that the law must be “observed”.¹² The overall result is that the function of the ECJ is attributed by terms which are less imperative and less categorical. Article 220 is, arguably, the most important provision of the Treaty. Although seemingly innocuous,

⁸ So far, no panels have been set up but there are plans for the introduction of one panel to hear staff cases and another to hear disputes pertaining to European patents.

⁹ The Circle had proposed the name “Common Court of the European Union”. The term High Court is more elegant and succeeds in expressing the intention of the Circle which was to adopt a name that would accurately convey the future role of the CFI as the basic, general court of the Union.

¹⁰ Article 220 EC, as amended by the Treaty of Nice states 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”.

¹¹ The material terms of Article 220 EC and Article 28(1) of the Constitution in French are as follows: La Cour assure “le respect du droit dans l'interprétation et l'application de la Constitution.”

¹² The linguistic difference is subtle but, nonetheless, important: the term “observance” is stronger than “respect”. It signifies the action or practice of adhering to a law or principle and is associated with following an ordinance, especially rules and regulations of a religious order. See The Shorter Oxford English Dictionary, Third Ed., Oxford, 1993.

it lays down the rule of law and the principle of separation of powers as fundamental pillars. Its inclusion in the nascent European Economic Community back in 1957 facilitated the transition from inter-governmentalism to supra-nationalism and enabled the ECJ to build the European law edifice. One could hardly think of a more fitting tribute to the *acquis communautaire* than preserving intact the original provision of Article 220 in the new Constitution.

Despite these criticisms, it is submitted that the current formulation of Article 28(1), in case that it survives the technical revision of the text, is not sufficiently different so as to mandate the Court to interpret it more restrictively than Article 220 EC or lead the Court to understand its own function differently.

Article 28(1), second sub-paragraph, states as follows:

“Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law”.

This is a new provision whose inclusion in Article 28 appears, at first sight, odd. It imposes a substantive obligation on Member States whilst all other dispositions of Article 28 define the role and composition of the Court of Justice. The purpose of this provision is, in fact, twofold. It serves to underlie that national courts play an important part in the application and enforcement of Union rights. It also seeks to counter-balance the restrictive *locus standi* under Article 230(4). It mandates Member States to fill the remedial gap left by the strict interpretation of direct and individual concern. Whether this is a good alternative is a different matter. Suffice it to point out here that Article 28(1) formalises the pattern of de-centralised judicial review, favoured by the Commission and endorsed by the ECJ in its case law.¹³

It is submitted that the obligation imposed on Member States by Article 28(1) may be improved in two ways. First, as it currently stands, the provision appears to be concerned only with access to national courts. In its case law, the Court has laid

¹³ See below.

down the principle of effectiveness which has a wider scope and means that national courts must provide full and effective protection of Community rights. Article 28(1) should reflect that principle and refer not only to rights of appeal but more broadly to the obligation of Member States to provide the judicial means, including remedies, which are sufficient to ensure effective protection of Community rights. This wider meaning is, arguably, already conveyed by the French text of Article 28(1).¹⁴ It is further submitted that this provision should not be included in Article 28(1), where it currently stands, but as a new third paragraph of Article 10 of the Constitution. It will there complement the principles of primacy and loyal cooperation which provide the normative basis of the judge-made principle of effectiveness.

The Union judiciary: composition and tenure

The draft Constitution maintains the strong prerogative powers of Member States in the appointment of members of the ECJ and the CFI, whilst introducing some timid steps to control their discretion. Thus, the principle of one judge per Member State is firmly retained in relation to the ECJ.¹⁵ The members of the ECJ and the CFI continue to be appointed by common accord of the Member States, and there is no change in the terms of their tenure.¹⁶ The European Parliament is also kept at safe distance. To counterbalance the nation-state's firm grip on the appointment of the judiciary, a new process safeguard is provided through the introduction of an advisory panel. The pattern that emerges owes more to the intergovernmental rather than the federalist model and is clearly different from that governing the appointment and tenure of the members of the US Supreme Court.

¹⁴ The French text is as follows: "Les États membres établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans le domaine du droit de l'Union."

¹⁵ See Article 28(2).

¹⁶ See Article 28(2), Article III-260 and Article III-261. Although the majority of the members of the Circle were in favour of maintaining the current system for the appointment of judges, i.e. common accord of the governments of the Member States, notably some members felt that appointment should be by act of the Council and several of those members considered that the Council should act by a qualified majority: See Final Report of the Discussion Circle on the Court of Justice, CONV 636/03, op.cit., para 5.

Article III-262 provides for the establishment of a Panel whose function is to give an opinion on candidates' suitability to perform the duties of Judge and Advocate General of the ECJ and the High Court before the governments of the Member States take the decision to make the appointment. The function of the Panel is to offer an opinion on whether a candidate fulfils the requirements of appointment on the basis of objective criteria relating to professional qualifications.¹⁷ The Panel has a consultative role and its opinion is not binding on the Member States. It is however a process safeguard which is designed to influence the appointment in two ways: first, it has a preventive role in that Member States would be more reluctant to propose a candidate whom the panel might be less likely to find suitable. Secondly, an adverse opinion by the Panel on a candidate may lead Member States to refuse to give their common accord on his/her appointment.¹⁸ Notably, the Circle took the view that the Panel should not hold any hearings and its deliberations should not be made public.¹⁹ Article III-262 however remains silent on the issue of publicity. Clearly, the interests of the principle of transparency, which was one of the cardinal themes of the Laeken declaration, and the preventive effect of the consultation requirement would be served much better if the recommendation of the Panel was reasoned and made available to the public.

Under Article III-262(2), the Panel comprises seven persons chosen from among former members of the ECJ and the High Court, members of national supreme courts and lawyers of recognised competence, one of whom must be appointed by the

¹⁷ See CONV 636/03, op.cit., para 6.

¹⁸ It will be noted that, so far, on no occasion have Member States refused to give their accord to a candidate proposed by a national government. The preventive value of the panel was highlighted by the Circle which stated that the setting up of a Panel of this kind "might make Member States more demanding in the choice of candidates put forward": CONV 636/03, op.cit., para 6.

¹⁹ See CONV 636/03, op.cit., para 6.

European Parliament.²⁰ It is notable that this provision finds for the first time a role for the European Parliament in the appointment of the judiciary although that role is so indirect as to be marginal. The reason why the Parliament has been kept at arm's length is a justifiable fear that, if Parliament was granted more input on the appointment process, that would risk the politicisation of the judiciary. There is also a cultural barrier. There is little tradition in the Member States of direct parliamentary participation in the selection of the judiciary.

Another issue that was addressed by the Circle was the length of the terms of office of the members of the ECJ and the CFI. Whilst the Circle considered that the existing system of appointing members for a renewable six year term should be retained for members of the CFI, it took the view that the term of office of members of the ECJ should be changed. A recommendation which gained ground was to prolong the term of office of ECJ members to a non-renewable twelve year term.²¹ This proposal however was not adopted by the Convention which retained the current system of renewable six year term both for members of the ECJ and the CFI.

The perceived advantage of a non renewable term is that it enhances the independence of the judiciary. Since the possibility of re-appointment is excluded a

²⁰ Under Article III-262, the members of the Panel are appointed by the Council which also has the responsibility to establish the Panel's operating rules pursuant to a European decision adopted on a proposal from the President of the ECJ. The text of the provision suggests that the Panel will be appointed on an ad hoc basis each time the membership of the ECJ or the CFI falls to be renewed although the Council could reappoint the same Panel members. It also appears from Article III-262 that a Panel set up to provide an opinion for the appointment of members of the ECJ may comprise former members of the CFI. In other words, Article III-262 does not restrict former members of the CFI only to panels for the appointment of members of the CFI.

²¹ Note that the idea of appointing members for a longer non-renewable period is not new. It had been suggested, for example, by the European Parliament which in the Draft EU Treaty which it prepared in 1990 proposed appointment for a period of 12 years. In its Report of 6 July 1993, the Parliament's Committee on Institutional Affairs suggested a period of 9 years. The President of the ECJ and the President of the CFI, who gave evidence to the Circle, suggested a twelve rather than a nine year term for practical reasons. If the term of office was fixed at nine years, that would require the partial renewal of members every four and a half years which would give rise to major practical difficulties.

priori, judges are not in a continuous agency relationship with the Member States who appointed them and the possibility is excluded that their judgments might be influenced by their wish to be re-appointed. Notably, the ECJ itself has seen a longer, non-renewable, term of office as an added guarantee of independence.²² This is not to say however that a fixed term tenure is without drawbacks. A fixed term tenure means that judges with a proven track record are not eligible for reappointment. Also, it is liable to break continuity and consistency more than the current system which allows renewal. Finally, proponents of a fixed term mandate overestimate the extent to which members of a judicial body allow their decisions to be influenced by considerations of their re-appointment.

Locus standi of individuals before the ECJ

The ECJ has persistently resisted calls to liberalise *locus standi* under Article 230(4). In its judgment in *UPA*,²³ it rejected the liberal test proposed by Advocate General Jacobs and reiterated the strict definition of individual concern applicable under the previous case law. In relation to *locus standi*, the Circle was divided into two groups. The first group was in favour of maintaining the classical “decentralised model of justice” approach. It considered that the current wording of Article 230(4) complies with the essential requirements of providing effective judicial protection for private litigants since, in accordance with the principle of subsidiarity, it is mainly for national courts to protect their rights and make, where necessary, references to the ECJ.²⁴ A second group of the Circle considered that the conditions of admissibility were too restrictive and proposed various solutions to liberalise them. A majority of the members of that group were in favour of allowing individuals to challenge at least some acts which are of direct concern to them and which do not entail any

²² See Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, Luxembourg, May 1995, reproduced in Court of Justice Annual Report 1995, pp. 19-30 at 25.

²³ Case C-50/00 P *Unión de Pequeños Agricultores v Council*, judgment of 25 July 2002.

²⁴ The members of that group considered that it would be appropriate for the Constitution to make express reference to the fact that the onus is on the national courts to interpret and apply, as far as possible, national procedural rules so as to enable individuals to assert their Community rights. This view appears to be reflected in Article 28(1) of the draft Constitution, see *supra*...

implementing measures without the need to prove individual concern. This view prevailed.

Article III-270(4) of the draft Constitution reads as follows:

“Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures”.

Thus, Article III-270(4) makes it clear, in line with the case law, that an individual may challenge a truly legislative act. In effect, it leaves unchanged the current position on *locus standi* in relation to legislative acts and liberalises, to a limited extent, *locus standi* in relation to regulatory acts. In particular, it provides that an individual may challenge:

(a) both legislative and regulatory acts if he is able to prove direct and individual concern, and

(b) regulatory acts which require no further implementation if he is able to prove direct concern.

It follows that, in relation to legislative acts, the applicant has to overcome the high hurdle of proving individual concern. As reiterated recently in the Court's judgment in *UPA*²⁵, this will depend on the satisfaction of the strict criteria laid down in *Plaumann*²⁶ subject to the limited exception of *Codorniu*.²⁷

Individual concern is no longer required where the following conditions are fulfilled:

²⁵ Op.cit.

²⁶ Case 25/62 *Plaumann* [1963] ECR 95.

²⁷ Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853.

- (a) the contested measure is “a regulatory act”;
- (b) it is of direct concern to the applicant; and
- (c) it does not entail implementing measures.

The requirement of direct concern is defined by the existing case law and is relatively straightforward.²⁸ The other two conditions require further discussion.

The draft Constitution does not define the notion of a regulatory act. Title V of the first Part, which defines the legal acts of the Union, provides for legislative, non-legislative, and implementing acts.²⁹ It seems that a regulatory act is any binding measure which is not a legislative act within the meaning of Article 33.³⁰ This therefore encompasses European regulations as defined in Article 32 of the draft Constitution.³¹ These include delegated and other regulations adopted by the Council, the Commission, and the ECB under Articles 34 and 35. It also includes Union implementing regulations under Article 36(4). It further encompasses any form or administrative rule-making or subordinate legislation, i.e. any act of general application which is adopted by a Union institution or body and which is for the implementation, broadly understood, of other measures. Finally, it includes decisions. It may be thought that decisions should not be classified as regulatory acts since the latter term is better reserved to non-legislative acts of general application whereas

²⁸ In general, direct concern is established where the addressee of the measure has no discretion on how to exercise it or where, even if the addressee has discretion, it is clear how it will apply it: see Case 62/70 *Bock v Commission* [1971] ECR 897; Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207; Case C-403/96 P *Glencore Grain Ltd v Commission* [1998] ECR I-2405. For a discussion, see A. Arnull, *Private Applicants and the Action for Annulment since Codorniu*, (2001) 38 CMLRev 7.

²⁹ For a discussion, P. Craig, *The Hierarchy of Norms*, supra...

³⁰ This is the interpretation given to the term by the Praesidium commentary: see CONV 734/03, p. 20.

³¹ Under Article 32(1), fourth sub-paragraph, a European regulation is a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It can be binding in its entirety and directly applicable to the Member States or it can be binding only as to the result to be achieved leaving the national authorities free to choose the form and means of achieving the result.

decisions are individual in character. In the Community legal order, however, the term decision does not signify only acts addressed to specific persons but may also acts of wider application which lay down rules in a specific field. This is recognised by Article 32(1).³²

Under Article III-270(4), a regulatory act can be challenged by an applicant without the need to prove individual concern, only where the act requires no further implementing measures. The aim of this proviso is to avoid a denial of justice in a *Jégo*-type situation³³, i.e. the case where a Community measure of general application is legally complete and affects adversely the legal position of an individual without the need for any implementing measures to be taken at national level. The classic example is a Commission regulation which prohibits fishing by the use of certain nets or in certain waters. In such a case, the application of the prohibition is not dependent on any prior measures by the Member States. As *Jégo* shows, the individual would be unable to prove individual concern and would also be unable to protect himself in the national courts since there is no implementing measure to challenge. The only way for the individual in such a case to have access to the court would be by violating the regulation and then asserting its illegality by way of defence in proceedings brought against him. This solution however would be unacceptable. As the CFI and the Strasbourg Court have stressed, individuals cannot be required to breach the law in order to gain access to justice.³⁴

In some cases, it may not be clear whether a Union act requires implementing measures. The test, presumably, is whether the act is legally complete and leaves no discretion to the Member States. The issue whether an act requires further implementing measures is an issue to be determined by EU law and not by national law, i.e. it does not depend on national constitutional requirements. An interesting question is what happens if an act does not require any implementing measures but a

³² See Craig, *op.cit.* Article 32(1) states: "A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

³³ Case T-177/01 *Jégo-Quéré v Commission*, judgment of 3 May 2002.

³⁴ See *Jégo-Quéré*, *op.cit.*, para 45 and see the judgment of the ECtHR in *Posti and Rahko v Finland*, 24 September 2002, para 64.

Member State chooses to implement it. Would the national initiative in such a case deprive the individual from direct access to the ECJ? The answer should be in the negative. Insofar as a Union regulatory act does not require national implementing measures, the individual whose legal position is directly affected may challenge it before the CFI. If that solution was not accepted, the availability of an action before the CFI would depend on considerations of national law, an approach which the ECJ has consistently rejected.

Critique

Consistently with the existing case law, Article III-270(4) views access of individuals to Luxembourg as exceptional. It endorses a decentralised model of access to justice under which, from the point of view of the individual, national courts remain the primary fora for challenging Community acts. The limited liberalisation of *locus standi* introduced by Article III-270(4) does not signal a desire to engage in wholesale reform but an attempt to redress some of the inequities of the case law as evinced, in particular, by *Jégo-Quéré*.

It is submitted that Article 230(4), as it currently stands, does not provide sufficient legal protection for the individual. The requirement of individual concern has been interpreted particularly restrictively by the ECJ and the CFI leading in some cases to injustice. Ideally, in accordance with the test proposed by Advocate General Jacobs in *UPA*, an individual should have *locus standi* to challenge the validity of a Community measure, whether legislative or administrative in nature, if he can establish that “by reason of the particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests”.³⁵ This view, however, has not prevailed. The arguments which are usually put forward against liberalisation of *locus standi* are the following:

³⁵ See Case C-50/00 P, op.cit., at para 60 of the Advocate General's Opinion. Arnulf in his contribution to this volume regrets that the drafters of the Constitution did not take the opportunity to abolish the requirement of individual concern, see.

1) The ECJ and the CFI are already overburdened by a heavy workload. If *locus standi* was liberalised, that would open the floodgates and the judicial system would be unable to cope. This is particularly so in view of the impending enlargement of the Union.

2) A class of litigants which would benefit particularly from liberalisation of standing would be large corporations or associations of undertakings. These would be likely to challenge Community legislative measures which affected adversely their interests even if they had little chances of success on the merits, simply in order delay the coming into effect of a measure.³⁶ This would still benefit them financially because it would postpone for a period the regulatory costs of compliance. This further stresses the danger of the proliferation of cases.

3) Apart from those arguments which are costs-based, there is a majoritarian argument. Community legislative measures tend to have a long period of gestation and be the product of painstaking negotiations conducted by political actors who are directly or indirectly accountable to their electorates. The jurisdiction of the courts to annul such measures at the instigation of individuals should therefore be restricted.

4) The limited standing of individuals to challenge legislative acts is in conformity with the constitutional traditions of most Member States.

5) Every system of law has mechanisms which seek to restrict undesirable litigation. Common law systems tend to have more liberal rules of standing but this is counter weighed by the fact that, traditionally, they exercise less rigorous review on the merits. In this light, a restrictive *locus standi* requirement can be seen as a *quid pro quo* for maintaining comparatively strict standards of substantive judicial review.

6) In any event, the system as it currently stands has its own internal economy and works satisfactorily. The right to judicial protection is safeguarded since individuals

³⁶ For an example of a challenge before a national court, see Case C-491/01 *The Queen v Secretary of State for Health ex parte British American Tobacco Ltd*, judgment of 10 December 2002.

may challenge the validity of Community acts indirectly before national courts.

These arguments are potent but none of them is without a counter-argument. Suffice it to say here that arguments of costs appear particularly important and one assumes that they must have weighed specially in the policy of the ECJ and the CFI not to liberalise standing for individuals.

The tide is clearly against broadening the rules of standing as suggested by Advocate General Jacobs in *UPA*. Still, one could propose a more limited liberalisation of *locus standi*.

It would be preferable if Article III-270(4) enabled an individual to challenge any act, whether legislative or regulatory in nature, which affects him directly and which does not require implementing measures. Such a rule has the following advantages. First, it is simpler and promotes legal certainty. It avoids, in particular, arguments as to whether an act is, or should be, regulatory rather than legislative in nature. As Article 270(4) currently stands, it encourages argument that an act which has been adopted in the form of a legislative act is, in fact, a regulatory one. The new formulation re-introduces uncertainties similar to those which marred the case law in the 1960s when the distinction between a legislative and administrative acts was perceived important for the purposes of *locus standi*.

Secondly, the proposed solution enhances access to justice and the protection of the individual. The fundamental right to judicial protection requires that *locus standi* should not depend on the nature of the contested measure but on whether it affects adversely the interests of the individual.

Before leaving *locus standi*, attention should be brought to the new provision of Article III-270(5) which states as follows: "Acts setting up bodies and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies or agencies intended to produce legal effects." This was included as an umbrella provision to cover the

cases where means of redress are provided for by Union measures. Currently, EC measures which set up agencies or bodies may provide for one of the following.³⁷ They may grant to the ECJ jurisdiction to hear actions for judicial review against acts adopted by those agencies or bodies under the terms of Article 230(4).³⁸ They may provide that acts of such bodies are referable to the Commission for verification of their legality, in which case the Commission's decision can be challenged under Article 230(4).³⁹ Finally, they may be silent as to the possible means of redress.⁴⁰ Article 270(5) does not restrict those options. It makes it clear, however, that acts of such agencies or bodies which produce legal effects are amenable to judicial review in accordance with the fundamental principle of judicial protection provided for in Article 47 of the Charter. Two points may be made in relation to Article III-270(5). First, acts setting up agencies or bodies may specify the means of redress but, in any event, they cannot make access to justice subject to stricter conditions than those specified in Article III-270. Secondly, the provision does not necessarily apply to agencies or bodies established by Union acts adopted under the CFSP, since these have special characteristics.⁴¹

Sanctions against Member States

Under Article 228 EC, where a Member State has failed to comply with a judgment delivered under Article 226, the Commission must initiate a second enforcement procedure in order to achieve the imposition of pecuniary sanctions. It must, in particular, give to the State concerned a formal notice and submit a reasoned opinion before being able to take the matter to the Court. This system, which was introduced by the Treaty of Maastricht, was clearly an improvement over the previous one which

³⁷ See Circle, *op.cit.*, para 24.

³⁸ See e.g. Council Regulation No 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ 1997 L 151/1.

³⁹ See Council Regulation No 2062/94 establishing a European Agency for Safety and Health at Work, OJ 1994 L216/1.

⁴⁰ See Regulation No 1406/2002 of the European Parliament and the Council establishing a European Maritime Safety Agency, OJ 2002, L 208/1.

⁴¹ See also here the comments of the Circle, *op.cit.*, p. 10.

did not provide at all for penalties against recalcitrant Member States. The imposition of penalties was, obviously, a politically sensitive issue and the burdensome procedural safeguards of Article 228 were seen as a *quid pro quo* for Member States agreeing to be subjected to sanctions. Whilst, at the beginning, the Commission threatened the use of the Article 228 procedure only in the most blatant cases, in recent years it seems willing to have recourse to it more frequently.⁴²

The sanctions procedure is inefficient and cumbersome. It may take several years from the time that an infringement has been committed until the ECJ imposes a sanction. The Circle considered three suggestions for improving the effectiveness of enforcement. The first suggestion was to simplify the machinery of Article 228 by abolishing the two administrative stages prior to referral to the ECJ, i.e. the stage of formal notice and the stage of reasoned opinion, or at least one of those stages. The granting of direct access to the Court would not be an innovation since this is already provided in relation to enforcement in other areas of the Treaty.⁴³ The second suggestion was to merge the procedures of Articles 226 and 228, i.e. empower the Commission to initiate before the ECJ in the same action both proceedings for failure to fulfil an obligation and for the imposition of sanctions. The third suggestion was to transpose to the EU the procedure provided for in Article 88 of the ECSC Treaty,

⁴² So far, only one case has reached judgment in which the Court imposed penalties on Greece for failure to comply with obligations in the environmental field: Case C-387/97 *Commission v Greece* [2000] ECR I-5047. In recent years, however, the Commission has initiated the sanctions procedure in a number of cases in diverse areas of Community law, and demand for sanctions is no longer limited to the fields of environmental and social law as it was initially: see the Commission's Nineteenth Annual Report on Monitoring the Application of Community Law 2001 COM(2002)324, p. 6.

⁴³ See Article 88(2), Article 100(9), and Article 298 EC.

namely empower the Commission to take a decision that a Member State has failed to fulfil its obligations after giving the State the opportunity to submit its observations. The State would then be able to seek annulment of the Commission's decision.

The Constitutional Convention opted for a combination of the first and the second solutions mentioned above, leading to a procedure which strengthens significantly the enforcement mechanism.

Article III-267(2) of the draft Constitution (currently Article 228(2) EC) states that, if the Commission considers that a Member State has not taken the necessary steps to comply with a judgment delivered in enforcement proceedings, it may bring the case before the ECJ "after giving the State the opportunity to submit its observations." The Commission must also specify the amount of lump sum or penalty payment which it considers appropriate in the circumstances. Thus, the new provision does away with the requirement to issue a reasoned opinion. The decision whether to impose a penalty continues to rest with the Court.

Further, the draft Constitution envisages an expedited procedure for the imposition of sanctions in cases of "non-communication", namely where a Member State has not taken any measures to implement a Community directive. Article III-267(3) provides that, when the Commission brings an action under Article III-265 (currently 226 EC) on the ground that the State concerned has failed to fulfil its obligations to notify measures transposing a framework law,⁴⁴ the Commission may, if it deems appropriate, request that, in the course of the same proceedings, the Court impose the payment of a lump sum or penalty if the Court finds that there has been a failure. If the Court accepts the Commission's request, the payment in question takes effect within the time limit laid down in the judgment.

⁴⁴ Article 32(1) defines a framework law in terms similar to those of a directive.

Thus, in cases of non-transposition, Article III-267(3) enables the Commission to merge the enforcement and the sanctions procedure. By contrast, in case where a Member State implements a directive but the Commission brings an enforcement action because it considers that the State has done so incorrectly, the Commission may not seek in the same procedure the imposition of penalties. In such a case, the dual safeguard of Articles 226 and 228 continue to operate as they do where the enforcement proceedings relate not to a State's failure to transpose a directive but to any other type of infringement.⁴⁵

All in all, the provisions of Article III-267 make the imposition of sanctions more efficient and cost-effective. By strengthening the powers of the central authority to impose sanctions, they enhance the federal aspects of the enforcement procedure but are carefully crafted to accommodate national sensitivities and obtain political consensus. In practical terms, the most important and welcome innovation is the power of the Commission to seek immediately the imposition of penalties in the case of non-transposition of directives.

CFSP and Freedom, Security and Justice

The proposed Constitution abolishes the three pillar structure and brings under the same roof the EC and the EU. As a result, there is no equivalent provision to that of Article 46 TEU which imposes limitations on the jurisdiction of the ECJ in relation to matters covered by the TEU. The special preliminary reference procedures provided for by Article 68 EC for matters falling into Title IV and by Article 35 TEU for the Third Pillar are abolished, and the jurisdiction of the Court becomes unified. This is to be welcomed as the fragmentation of the preliminary reference procedure gives rise to

⁴⁵ It may be thought paradoxical that the Commission may seek the immediate imposition of penalties in the case of non-transposition of a directive but not where a Member State acts in manifest breach of a fundamental Treaty provision. The two cases however can be distinguished on practical grounds. Complete failure to implement a directive is an easily definable class of breach. It constitutes a manifest violation which leaves virtually no margin of defence for the Member State concerned. It is therefore justifiable that penalties ensue automatically. By contrast, what is a flagrant violation of the Treaty may be more difficult to define.

problems and compromises the right to judicial protection.⁴⁶

This is not to say that under the new Constitution the ECJ acquires full jurisdiction. Under Article III-282(1), the Court's jurisdiction continues to be excluded from matters concerning the CFSP.⁴⁷ The ECJ, however, is given competence in certain respects at the margins of foreign policy.

First, pursuant to Article III-282(2), it has jurisdiction to review the legality of restrictive measures adopted by the Council under Article III-224 against natural or legal persons.⁴⁸ Article III-224 is a new provision which expressly enables the Council to adopt economic sanctions against individuals and non-State groups where a measure adopted in accordance with CFSP provides for the interruption or reduction of economic and financial relations with a third country. Article III-282(2) safeguards the right to judicial protection in relation to "restrictive measures" adopted under Article III-224. It does not provide for challenges against other CFSP measures which might impose non-economic sanctions on individuals (e.g. visa bans) . Also, it enables individuals to make a challenge by direct action under Article III-270(4). The possibility of an incidental challenge in preliminary reference proceedings is not expressly provided but that does not necessarily mean that it is excluded. Once it is accepted that such measures are subject to the jurisdiction of the Court, there is no reason why challenge should be restricted to a direct action.

The ECJ also retains jurisdiction to ensure that the implementation of the CFSP does not affect the other competences of the Union, in particular, its exclusive competences, the coordination of economic and employment policies, and the

⁴⁶ For a discussion, see Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, (2003) 40 CMLRev 9 at 14 et seq.

⁴⁷ Notably, as it currently stands, Article III-282(1) excludes from judicial control Articles I-39 and I-40 but not Article I-15. Thus, it could be argued that the Commission could bring an enforcement action against a Member State for failure to comply with the obligation of solidarity provided for in Article I-15(2).

⁴⁸ See Article III-282(2). Such proceedings may be brought under Article III-270(4).

complementary policies.⁴⁹

The Discussion Circle on the Court of Justice discussed the issue whether the jurisdiction of the Court to deliver opinions in relation to international agreements provided for in Article 300(6) EC⁵⁰ should be extended to cover also agreements falling within the sphere of the CFSP.⁵¹ Most members of the Circle were in favour of that view.⁵² Article III-204 does not provide a clear answer: It simply states that the Union may conclude agreements with third states or international organisations in the field of the CFSP "in accordance with the procedure described in Article III-227". It could be argued that "procedure" should be strictly understood to include only the procedural steps for the conclusion of an international agreement stated in that article and does not include recourse to the Court under Article III-227(12). Where however an interested party, such as a Member State, has doubts about the compatibility of an agreement, referring the matter to the ECJ is also a procedural step. It is submitted that this broader interpretation should prevail.

The Constitution extends the presence of the ECJ in the field of freedom, security and justice. The jurisdictional restriction imposed by Article 68(2) EC in the fields of visas, asylum and immigration is not maintained.⁵³ By contrast in the areas of judicial cooperation in criminal matters and police cooperation, judicial powers are restricted. Article III-283 provides that, in those areas, the ECJ has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law. Thus, Article III-283 maintains the restriction on the jurisdiction of the Court currently

⁴⁹ See Article III-209.

⁵⁰ The equivalent provision is contained in Article III-227 of the Constitution.

⁵¹ See CONV 689/1/03, 16 April 2003.

⁵² See Article III-204.

⁵³ Under Article 68(2), the ECJ does not have jurisdiction to rule on any measure or decision taken by the Council under Article 62 relating to the maintenance of law and order and the safeguarding of internal security.

provided by Article 35(5) TEU in relation to Third Pillar matters.⁵⁴

Preliminary references

Article III-274 of the proposed Constitution corresponds to Article 234 EC and introduces some minor changes to the current system of preliminary references.

Article 234, as it currently stands, grants to the Court of Justice jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB and (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Article III-274(1) states that the Court of Justice shall have jurisdiction to give preliminary references concerning:

- “(a) the interpretation of the Constitution;
- (b) the validity and interpretation of acts of the Institutions of the Union.”

The language of Article III-274(1) (b) may give rise to doubts as to whether acts of the ECB are included. This is because, under Article 18 of the draft Constitution, the ECB is not included as one of the “Union’s Institutions” although Article 29(3) proclaims that the ECB “is an Institution which has legal personality”. It would be very odd, however, if Article III-274 intended to exclude the ECB from the preliminary reference procedure and thus restrict the scope of Article 234 EC. Such an exclusion would create a gap in the right to judicial protection and would be incompatible with Article 47 of the Charter. The absence of express reference to the ECB in Article III-

⁵⁴ Note however that, under Article III-283, the jurisdiction of the ECJ on those matters is excluded only “where such action is a matter of national law”. This is a rider which does not exist in Article 35(5) TEU.

274 may be owing to the fact that, in a previous draft of the Constitution, the ECB was included in the list of the Union Institutions in Article 18. It was later decided, however, to restrict the list of Union institutions and provide separately for the ECB and the Court of Auditors under the heading "Other Institutions and Bodies". The current formulation of Article III-274(1)(b) should be changed in the final text of the Constitution to make clear that the ECB is included.

Article III-274, however, does differ from Article 234 EC in that it does not contain a paragraph similar to paragraph (c) of Article 234. This omission, in fact, broadens the jurisdiction of the Court. This is because paragraph (c), as it currently stands, restricts the scope of paragraph (b). Under paragraph (c), the ECJ has jurisdiction to hear preliminary references in relation to the statutes of bodies established by an act of the Council only with regard to their interpretation, not with regard to their validity, and only where those statutes so provide. In the absence of paragraph (c), the jurisdiction of the ECJ in relation to such statutes is determined by paragraph (b) which applies to all acts of the institutions. This change is a tidying up exercise and is, in fact, of little practical importance.

Finally, Article III-274 contains a new paragraph four which states that where a preliminary reference is made "in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice shall act with the minimum of delay". This provision was included to take account of the fact that under the Constitution the ECJ will have much broader jurisdiction to hear preliminary references on issues which fall within the current Title IV of the EC Treaty. The provision is an illustration of the fundamental right to judicial protection and makes supreme sense. Where a reference is made in criminal proceedings and pertains to a person in custody, the Court should deliver its ruling with the minimum of delay since the freedom of the individual is at stake. The fact that this provision was included in the Constitution itself rather than the Statute of the Court or the Rules of Procedure illustrates that the Praesidium saw this guarantee as closely linked to the underlying

themes of the Convention, i.e. liberty, democracy and justice.⁵⁵ Currently, the Rules of Procedure of the ECJ provide that in exceptional cases the ECJ may give priority to a preliminary reference and hear it under an accelerated procedure.⁵⁶ Presumably, when the Constitution is adopted, and in the absence of any new provision implementing Article III-274(4), the use of the accelerated procedure for such cases will be compulsory and no longer a matter in the Court's discretion.⁵⁷

Other provisions pertaining to the Court

The draft Constitution amends Articles 225a and 229a EC. These concern respectively the setting up of judicial panels and the conferral on Union courts of jurisdiction to hear disputes pertaining to intellectual property rights created by EU acts. Under the existing articles, the Council may adopt the measures provided therein by unanimity whereas, under the draft Constitution, the measures must be adopted by the ordinary legislative procedure, namely jointly by the Council and the European Parliament, the former acting by qualified majority.⁵⁸ The draft Constitution also amends Article 245 which enables the Council, acting unanimously, to amend the Statute of the ECJ, save for Title I of the Statute which may be amended only by Treaty revision. Article III-289 enables the Statute to be amended by the ordinary legislative procedure, save for Title I and Article 64 of the Statute which provides for language arrangements. These provisions may be amended only by Treaty revision. This appears to be a regressive step with regard to language arrangements since, as it currently stands, Article 64 can arguably be amended by a unanimous Council

⁵⁵ See V. Skouris, *Proposals for Reform of the System of Judicial Protection* (in Greek), 2003 *Nomiko Vima* (forthcoming).

⁵⁶ See Rules of Procedure of the ECJ, Article 104a. See also Article 62a and, for comments, Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, (2003) 40 *CMLRev* 9 at 20.

⁵⁷ See Skouris, *op.cit.*

⁵⁸ See Articles III- 264(1) [existing Article 225a] and III-269 [existing Article 229a] in combination with Article I-33. Note also the special provision of Article III-302(15) which applies in relation to measures adopted at the request of the ECJ.

decision and does not require Treaty revision.⁵⁹

Subsidiarity

A novel feature of the draft Constitution is that it strengthens the role of national Parliaments in monitoring compliance with the principle of subsidiarity.⁶⁰ This accords with one of the key objectives of the Constitutional Convention which was to increase democracy by enhancing “the contribution of national Parliaments to the legitimacy of the European design”.⁶¹ The Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution gives to national Parliaments both political and judicial means to challenge Commission legislative proposals.

Political control is exercised collectively by all national Parliaments acting through a novel voting system. Any national Parliament, or any Parliamentary chamber in the case of countries which have a bicameral system, may object to a Commission legislative proposal by submitting a reasoned opinion stating why it considers that the proposal does not comply with subsidiarity.⁶² National Parliaments of Member States with unicameral parliamentary systems are allocated two votes whilst each of the chambers of a bicameral parliamentary system has one vote.⁶³ Where reasoned opinions against a Commission proposal represent at least one third of all the votes allocated to the Member States’ national Parliaments and their chambers, the

⁵⁹ Note that Article 64 of the Statute does not make crystal clear the procedure by which it can be revised. Some members of the Circle suggested that the Court should change its current practice of not giving judgment in a case until the judgment has been translated into all languages and that it should, instead, deliver judgment in the language of the case, the other language versions being made available within a period of six months. This change would not require any amendment of the Treaty. See CONV 636/03, op.cit., para 11.

⁶⁰ See Article 9(3) of the draft Constitution.

⁶¹ See the Preface to the Constitution.

⁶² Protocol, para 5. Under the Protocol, the Commission must transmit all its legislative proposals to the national Parliaments at the same time as it transmits them to the Union legislator. National Parliaments may submit their reasoned opinions within six weeks from the date of transmission by sending them to the Presidents of the EP, the Council of Ministers and the Commission.

⁶³ Para. 6.

Commission is required to review its proposal.⁶⁴ After such review, the Commission may decide to maintain, amend or withdraw its proposal, giving reasons for its decision.⁶⁵

This system of political control works, in effect, to the advantage of Member States with a bicameral system since they have proportionately more votes. This may appear discriminatory but the authors of the Protocol would argue that the difference in treatment between Member States is justifiable because the system of political control does not seek to juxtapose the Member States *vis-à-vis* the Union institutions but to empower national representative assemblies to act independently of their national governments. The Protocol does not specify the way by which the national Parliaments may take the decision to object to a Commission proposal. The majority required is for the national laws to determine as is the involvement of regional assemblies. On the latter issue, the Protocol merely states that it is for each national Parliament or each chamber to consult, where appropriate, regional Parliaments with legislative powers.⁶⁶

Judicial control is provided in paragraph 7 of the Protocol. This provision grants the Court jurisdiction to hear actions for judicial review on grounds of infringement of the principle of subsidiarity brought “by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber if it.” Such actions can be brought against legislative acts of the Union in accordance with the rules of Article III-270 (currently Article 230). A similar right of action is also granted to

⁶⁴ Ibid. The threshold of one third is lowered to a quarter in the case of a Commission proposal or an initiative emanating from a group of Member States under the provisions of Article III-165 of the Constitution on the area of freedom, security and justice.

⁶⁵ Ibid.

⁶⁶ Protocol, para 5.

the Committee of the Regions as regards legislative acts for the adoption of which it must be consulted.

Although the language of paragraph 7 does not make it clear, the intention of the provision is to require Member States to make available the right of action to national Parliaments and not simply to allow them to do so. The Praesidium notes attached to the Protocol suggest that the national Parliaments are given the right to challenge measures before the ECJ.⁶⁷ What is left to the Member States is to determine the arrangements for the exercise of that right, including the question whether it will be granted to each Parliamentary chamber in States with a bicameral system. These arrangements can be made by ordinary law and need not have the status of constitutional rules.⁶⁸

Thus, it is for each Member State to decide the proportion of votes by which the Parliament needs to act to authorise the initiation of litigation before the ECJ. Many models are here conceivable. A Member State may, for example, require the Parliament to act by majority in which case the democratic value of the right of action is considerably reduced. Where the government controls the majority, it is unlikely that the Parliament will vote for the initiation of litigation if the government itself does not consider it appropriate.⁶⁹ In such a case, the Parliament's right of action is tantamount to the right of action of Member States which is already granted under Article 230 EC. At the other extreme, national law may enable, say, a certain cross-party minority of parliamentarians to authorise litigation. Such an arrangement would enhance the power of the Parliament to question Union legislation, acting

⁶⁷ CONV 724/1/03 REV 1, p. 144

⁶⁸ *Ibid.*

⁶⁹ Unless the government allows the issue to be put in Parliament on a free vote or a sufficient majority of the ruling party considers the issue to be worth a rebellion.

independently of the government's interests.

Granting to national parliaments their own political and judicial means to monitor compliance with subsidiarity may be seen as an indication of respect to representative democracy. The Protocol seeks to promote national Parliaments as centres of political power with a say in the exercise of Community competence independently of their national governments. These newly founded rights may in some cases bring national Parliaments in a collision course with their respective governments. But they also juxtapose the national Parliaments with the European Parliament. Now that the latter is elevated, at least in most areas, to a co-legislator with the Council, an action on grounds of subsidiarity initiated by a national Parliament is as much a denial of Community competence as a refusal to heed to the supremacy of the European Parliament. These new provisions of the draft Constitution may be seen as enhancing dialogue, democracy, and decentralisation. They view Community competence not as a bi-polar exchange between the Union institutions, on the one hand, and the Member States, on the other hand, but as a pluralistic dialogue among various political actors at national and Union level. It should be noted however that these rights are very likely to have more impact in Member States with weak majorities or coalition governments where it is easier for parliamentarians to assert themselves as a political force independent from the government.

What is the likely impact of the Parliament's new right of action? So far, the impact of subsidiarity on judicial review has been benign and indirect. In no case has the Court annulled a measure on the ground that it contravenes the principle. Where the Court has annulled measures, it has preferred to do so on grounds of competence or proportionality rather than on grounds of subsidiarity even though the principle may have influenced the judgment.⁷⁰ By increasing the number of potential plaintiffs, the Protocol increases the justiciability of subsidiarity. Clearly the Protocol brings the Court of Justice closer to the political game. By transferring to the courtroom what are essentially political issues, it risks the politicisation of the judiciary, not in the sense of

⁷⁰ See e.g. C-376/98 *Germany v Parliament and Council (Tobacco case)* [2000] ECR I-8419.

making the Court a partisan institution but of involving it more directly in issues of European governance. Judicial control of subsidiarity is bound to become more complicated and possibly also more intense as the Court will have available at its disposal a lot more material from the Commission and national central and regional authorities on the basis of which to assess whether a measure meets the requisite test.⁷¹

A final point relates to the scope of the action. It appears that, where an application for judicial review is made pursuant to the Protocol, the only ground that can be invoked is breach of the principle of subsidiarity. A national Parliament may not ask its Member State to challenge a Community measure on any other ground. This may give rise to problems since, in practice, some grounds of review may be closely intertwined. In the *Tobacco Directive case*⁷² the Court annulled the contested directive on ground of lack of competence and formally, at least, did not address the argument of the German Government based on subsidiarity. Would the Court have reached the same result if it examined the issue on the basis of subsidiarity? Also, since the existence of Community competence is a condition precedent to its valid exercise, and therefore to the application of the principle of subsidiarity, can the ECJ examine arguments based on competence in actions brought under the Protocol? Such problems will not arise where a Member State brings an action not only on behalf of its Parliament but also on its own behalf under Article III-270 of the Constitution, in which case all grounds of review are invocable.

⁷¹ The Protocol views subsidiarity as a cost effectiveness exercise carried out on the basis of a detailed substantive and financial assessment of the Union-wide, national and regional implications of each proposal: see Protocol, para 4.

⁷² Op.cit.

Human rights versus fundamental freedoms

The tendency towards the constitutionalisation of the ECJ is not only brought forward by the new Constitution, but also reinforced by the ECJ itself through developments in the case law. This is particularly so in the area of human rights. A number of factors have contributed to the increase in the importance of human rights in the European Union. Fundamental rights have acquired greater prominence in all western societies. In an era where there is heightened zeal for the accountability of public authorities and the empowerment of the individual, respect for human rights is viewed not only as a *sine qua non* of legality but as the most important yardstick in assessing a polity's democratic credentials. In the EU, the observance of human rights by the Union institutions and by the Member States is part of the renewed calls for accountability, transparency and legitimacy. There is a shared belief that democracy is not exhausted in the majoritarian rule but encompasses respect for the individual, tolerance and pluralism.⁷³ There appears to be a consensus among the political elites that Europe is a society which elevates liberalism to its highest value, and where respect for human rights defines the limits of tolerance to political and cultural diversity. What challenges are there for the Court? At the danger of oversimplification, it can be said that the Court faces three challenges: its relationship with the Court of Human Rights, the interpretation of the Charter, and conflicts between human rights and fundamental freedoms. This paper concentrates on the third in the light of the recent judgment in *Schmidberger v Austria*.⁷⁴

In most cases, respect for human rights and the fundamental freedoms guaranteed by the EC Treaty operate as complementary and converging forces. Thus, according to established case law, a national measure which restricts the free movement of goods or services cannot take advantage of an express derogation provided in the

⁷³ Article 2 of the Constitution, headed "The Union's values", refers to "a society of pluralism, tolerance, justice, solidarity and non-discrimination".

⁷⁴ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge*, judgment of 12 June 2003.

Treaty or a mandatory requirement unless it respects fundamental rights.⁷⁵ But in other cases, human rights and fundamental freedoms may find each other in a collision course. Although there are some examples in previous case law,⁷⁶ this conflict has never been so eminently illustrated as in the recent case of *Schmidberger v Austria*.⁷⁷ The Austrian authorities allowed an environmental group to organise a demonstration on the Brenner motorway, the effect of which was to close the motorway to traffic for almost 30 hours. The Brenner artery is the main transit route linking Germany to Italy. The applicant was an international transport undertaking based in Germany whose main activity was to transport goods to Italy. It brought an action seeking damages against the Austrian authorities claiming that their failure to prevent the motorway from being closed amounted to a restriction on the free movement of goods.

The Court started by pointing out that Article 28 EC applies both to acts and omissions. Referring to its previous judgment in *Commission v France*,⁷⁸ it held that Article 28 does not prohibit only measures emanating from the State which, in themselves, create restrictions on inter-state trade but applies also where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are caused by private parties. Thus, the fact that the Austrian authorities had failed to ban the demonstration thereby resulting in the complete closure of a major transit route was a measure having equivalent effect to a quantitative restriction.⁷⁹ The Court then turned to examine whether the restriction was justified.

After pointing out that fundamental rights form an integral part of the general principles of Community law and referring to Article 6(2) TEU, the Court stated that

⁷⁵ For a recent confirmation, see Case C-60/00 *Carpenter v Secretary of State for the Home Department*, judgment of 11 July 2002, para 40.

⁷⁶ See e.g. Case C-62/90 *Commission v Germany* [1992] ECR I-2575. See also *R v Chief Constable of Sussex ex parte International Trader's Ferry Ltd* [1999] 2 AC 418.

⁷⁷ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge*, judgment of 12 June 2003.

⁷⁸ Case C-265/95 *Commission v France* [1997] ECR I-6959.

⁷⁹ *Schmidberger*, op.cit., para 64.

the protection of fundamental rights “is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods”.⁸⁰ It then proceeded to examine how the conflicting principles should be reconciled.

The Court viewed the free movement of goods and the freedom of assembly and association as being of equal constitutional ranking. It pointed out that neither of the competing values was absolute. Under the EC Treaty, the free movement of goods may be subject to restrictions for the reasons laid down in Article 36 (now Article 30) or for overriding requirements relating to the public interest. Similarly, whilst freedom of association and freedom of assembly form fundamental pillars of a democratic society, it follows from Articles 10 and 11 of the ECHR that, unlike other fundamental rights enshrined in the Convention, they are subject to certain limitations justified by objectives in the public interest.

The Court then proceeded to weigh the interests involved in order to determine whether a fair balance was struck between them. It came to the conclusion that, having regard to their wide discretion, the Austrian authorities were reasonable in considering that the legitimate aim of the demonstration could not be achieved by less restrictive measures. The ECJ took into account the following considerations.⁸¹

First, it distinguished the case from *Commission v France*. In *Schmidberger*, the demonstration took place following a request for authorisation presented on the basis of national law and after the competent authorities had taken a decision not to ban it. Also, traffic by road was obstructed on a single route, on a single occasion, and during a period of almost 30 hours. The obstacle to the free movement was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in *Commission v France*. The Court attributed particular importance to the fact that, in contrast to the latter case, the objective of the Austrian

⁸⁰ Para 74.

⁸¹ Paras 84-93.

demonstrators was not to restrict trade in goods but to manifest in public their opinion.

The Court also pointed out that the competent authorities had taken various administrative and supporting measures in order to limit as far as possible disruption. An extensive publicity campaign had been launched by the media and the motoring organisations in Austria and neighbouring countries and various alternative routes had been designed.

The Court then considered in some detail the argument of the less restrictive alternatives. It held that, taking account of the Member States' wide margin of discretion, the authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with their fundamental right to gather and express peacefully their opinion in public.⁸² It also dismissed the argument that the authorities could have taken stricter measures to control the demonstration. In a statement revealing the way the Court prioritised the competing values, it held that the imposition of stricter conditions concerning both the site, for example requiring the demonstrators to stay by the side of the motorway, and the duration of the protest "could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope".⁸³ It then continued: "An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion".⁸⁴ The Court accepted the argument of the Austrian Government that, in any event, all the alternative solutions that could be countenanced could have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation or acts of violence on the part of the demonstrators.

⁸² Para 89.

⁸³ Para 90.

⁸⁴ Para 91.

Schmidberger gives the clearer sign yet that the Court takes human rights seriously and conducts itself not as the Court of an economic union but as the Supreme Court of a constitutional order. The reasoning of the Court contrasts with that in previous cases where it readily gave the benefit of the doubt to free movement. In *Commission v Germany*⁸⁵ the Court had rejected the argument that respect for private life and the protection of medical confidentiality justified restrictions on the importation of medicinal products. Also, in previous cases,⁸⁶ it had dismissed the view that public disturbances and the risk of violence by protestors could justify protective measures. Although these cases can be distinguished on the facts, the methodology followed by the Court in *Schmidberger* is clearly different. The Court attached as much importance to the freedoms of assembly and expression as to the free movement of goods viewing the two as being of equal ranking.

The ECJ attributed particular importance to the European Convention. It also paid homage to national laws. The judgment contains subtle but repeated references to the constitutional values of the Member States.⁸⁷ By acknowledging that fundamental freedoms are conditioned by human rights and giving priority to the latter, the ECJ honoured the constitutional expectations of the Member States. Seen in the background of rebellious judgments by national Supreme Courts, *Schmidberger* is a gesture of reconciliation, and an attempt to embrace the national constitutional courts. Notably, the ECJ went all the way offering a ready made solution to the national court rather than giving only general guidelines and leaving it to the latter to resolve the conflict.⁸⁸

The ECJ declared in general terms that the protection of human rights may justify

⁸⁵ Op.cit.,

⁸⁶ See C-52/95 *Commission v France* [1995] ECR I-4443, para 38; *Commission v France*, op.cit., para 55; See also Case 231/83 *Cullet v Leclerc* [1985] ECR 305, para 35.

⁸⁷ See e.g. paras 70, 71, 72, 74, 76 of the judgment.

⁸⁸ Preliminary rulings of the ECJ concerning the compatibility of national laws with the Treaty provisions on free movement and involving human rights are of varied specificity. See and contrast Case C-260/89 *ERT* [1991] ECR I-2925; Case C-368/95 *Familiapress* [1997] ECR I-3689; *Carpenter*, op.cit.

restrictions on free movement but did not place them in either of the established categories of limitations, i.e. it did not state whether they should be viewed as part of the express derogations of the Treaty (Article 30 EC) or as legitimate objectives in the public interest. The classification is important because, if human rights are viewed as part of the express derogations, they can justify even discriminatory restrictions on trade whilst if they are considered as mandatory requirements they can only justify indistinctly applicable restrictions. In principle, since human rights are viewed as being of equal ranking to the Treaty there is nothing to restrict them from justifying also discriminatory measures. This also follows from the fact that the protection of human rights may justify restrictions not only on the import but also on the export of goods which, if they fall within the scope of Article 29, are *ex hypothesi* discriminatory.⁸⁹

Finally, a distinct feature of *Schmidberger* is that the Court applied a comparatively lax standard of proportionality. Traditionally, interference with the fundamental freedoms resulting from national measures is viewed by the Court as suspect and is subjected to rigorous scrutiny. In *Schmidberger*, the ECJ stressed that the competent authorities had wide discretion and made reference to the criterion of reasonableness, thus applying to national authorities a standard of scrutiny which is usually reserved to the Community institutions themselves.

Conclusion

The draft Constitution enhances the position of the ECJ as the supreme court of the Union. The increase in the constitutional jurisdiction of the Court is the consequential

⁸⁹ See *Schmidberger*, passim, and also *R v Chief Constable of Sussex ex parte International Trader's Ferry Ltd*, op.cit.

effect of a number of developments. The Constitution provides for a clearer hierarchy of norms and grants to the ECJ jurisdiction to review the constitutionality of legislation. It formally incorporates the principle of primacy and contains a number of provisions which govern the division of competence between the Union and the Member States and the allocation of powers among the Union institutions. It is ultimately for the Court to interpret these provisions and determine their meaning. It brings the Court closer to the political game by encouraging judicial control of subsidiarity. The incorporation of the Charter of Fundamental Rights further increases the set of constitutional norms *vis-à-vis* which the Court may test the legality of Community action. Finally, the Constitution is imbued by a number of principles, such as democracy, transparency, subsidiarity, and equality, which can be expected to feature more prominently in judicial reasoning and assist in articulating standards of legality for Community and Member State action.

The draft Constitution contains both elements of the federalist model and of the inter-governmental model. Pro-federalist steps are measured and cautious. Thus, the system of sanctions against Member States for failing to comply with Union law is enhanced. Following the abolition of the pillar structure, the preliminary reference procedure becomes unified and the jurisdiction of the Court on Title IV matters is extended. The draft Constitution also provides for the setting up of a panel which must be consulted in relation to judicial appointments although Member States remain firmly in control.

Locus standi of individuals before the CFI is somewhat extended but, from the point of view of the individual, national courts remain firmly the primary venue for challenging Community acts. The proposed Article III-270(4) can be seen as an endorsement of the restrictive interpretation of individual concern given by the case law of the ECJ, which in turn has been prompted, first and foremost, by cost considerations.

The judgment in *Schmidberger* illustrates that, responding to the challenges of the times, the Court takes human rights seriously and assumes the position of the

Supreme Court of the Union. What, then, are the main challenges that the Court is likely to face in the coming years? Although any attempt to look into the crystal ball is, by its nature, dangerous and marred by methodological difficulties, one could identify the following issues as being among those which are likely to give rise to problems or be of particular importance in the coming years.

First is what can be called the human rights challenge. As already stated, this includes the relationship between the ECJ and the ECtHR, the future interpretation of the Charter, and the resolution of conflicts between human rights and fundamental freedoms. As we saw in *Schmidberger*, the ECJ pre-empted Strasbourg by giving priority to human rights.

Secondly, there is the possibility of challenges to the primacy of Community law. The success of the ECJ in constructing the edifice of European law and attaining the constitutionalisation of the Treaties owes much to the approval, encouragement and cooperation of national courts. As the Maastricht decisions of the German Constitutional Court⁹⁰ and the Danish Supreme Court⁹¹ show, however, such cooperation cannot be equated with submission. Primacy means different things to different courts.⁹² The ECJ has the delicate task of embracing the national legal orders and addressing the sensitivities of the national supreme courts without endangering the fundamental principles of Union law.

A third area of concern is the division of competence between the Union and the Member States. The draft Constitution seeks to clarify the allocation of competences and enhance subsidiarity but, in terms of its practical application, the notion of competence remains elusive.

The assimilation of the acceding Member States poses a further challenge. The latest accession differs both in quantitative and qualitative terms from previous ones. It will

⁹⁰ *Brunner* [1994] 1 CMLR 57.

⁹¹ *Hanne Norup Carlsen and Others v the Prime Minister* [1999] 3 CMLRev 854.

⁹² For a detailed analysis, see Tridimas, *op.cit.*, at 37 et seq.

fall upon the Court to interpret the myriads of derogations provided for in the Treaty of Accession but also, more importantly, to ensure respect for the *acquis communautaire* and forge a common set of pan-European constitutional values in the interpretation and application of the Treaty.

There is no doubt that the Court has acquired the role of the Supreme Court of the Union. The greatest challenge that will face in the coming years is how to ensure uniformity and functional adjustment of the *acquis communautaire* in an era where diversity is the prevailing pattern of integration.



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