THE FUTURE OF THE EUROPEAN COURT OF JUSTICE – A BRITISH PERSPECTIVE

by

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Any new and necessary framework for Europe will be accomplished in large part through technical means – institutional, political and diplomatic as was intended in the Constitutional Treaty. However in the words of Vaclav Havel "... such efforts are doomed to failure if they do not grow out of something deeper, out of generally held values". He is right. The democratic strength of the new and enlarged Europe will rest not only on its institutions, but perhaps more so on the values that it holds. If citizens are to feel that they have a stake, they must have trust – trust in the values and objectives of European integration; trust in the procedures of European institutions; trust in the people responsible for carrying them out, and trust above all, in the system of judicial protection provided within the Union. In the words of Abraham Lincoln, there must be "government of the people, by the people, for the people". The "of" and the "by" are self evident, it is the "for" which is vital.

The present governmental structure of Europe has recently been described pungently, but perhaps accurately, as a combination of an unaccountable Commission – an undemocratic Council majority – a weaker European Parliament (neither of the first two being directly elected, and the third only by a modest number of voters) – and a Court of Justice with restricted powers. With this structure the European Union has no clear and distinct philosophy of checks and balances between Council and Commission, Parliament and the Court of Justice. The preamble to the European Convention on Human Rights declares that human rights are "best maintained by an effective political democracy". That means in particular a system for adequate protection under the law as between its citizens and European institutions and legislation, and adequate access to the Court of Justice.

Concerns about these questions led the EU Committee of the House of Lords, through its Sub-committee E, to investigate, take evidence about, and consider the future role of the ECJ and it published its Report in May 2004. It is a definitive analysis of the issues which merits careful study. It was the product of oral and written evidence from a distinguished range of lawyers, academics and others from ten European countries. The trigger for it was the Convention on the Constitutional Treaty. The constitutional changes that were proposed, and may yet be introduced in

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part have a consequential effect. Citizens or citizens' groups within the EU will look to the ECJ for any necessary protection.

The historical position of the ECJ is clear in that it is the final arbiter of the validity of European law. It is its judgments, not those of national courts, that are determinative of European law. While national courts may refer questions on European law to the ECJ, it is the ECJ that will then finally decide. This prevails after the revisions to the judicial architecture created by the Nice Treaty. The future therefore will involve principle more than mechanisms. Let us consider three issues of principle.

First, the existing Treaty provisions under Article 230(4) severely restrict access to the Court. The matter was considered recently in the UPA case and the Court maintained a conservative interpretation. The logic was that national courts could give necessary protections. But that cannot be so in respect of the definitive interpretation of European legislation. It is the Court itself that has declared that it is the only institution able to determine the validity of European law. The circularity of this argument about the availability of national courts is compounded by the time it takes for some national courts to decide, often at Supreme Court level, what its interpretation is and/or whether to make a reference to the ECJ. Even with a reference the practical issue arises as to whether the national court has in fact asked the right question. The present strict requirement of standing limited to those "directly and individually" affected should be changed to a test of "sufficient interest" with an appropriate filtering mechanism to ensure only appropriate cases are dealt with by the Court. This was broadly speaking the approach of Advocate General Jacobs in the UPA case. It certainly was the view of the CCBE in its submissions to the Convention. This goes beyond the proposal on access in the Constitutional Treaty. Issues will continue to arise both as to legislative challenge and competences under the Treaty. The final word on both will be with the ECJ. For countries with written Constitutions there may be a conflict between their Constitution and European law. But it is likely that the Constitutional Courts of such countries would, if they had to, ultimately rely on their own Constitution. However thus far significant problems have not arisen. It is very likely that the ECJ and national courts would seek to work together as the Report puts it "in a spirit of mutual respect and co-operation". Let us hope that that will be so, otherwise the political argument may become acute, namely "If the Court is the ultimate arbiter on the extent of the Union's competence it follows that the Court also has the final say in defining the extent of Member States' powers. It is this side of the coin that some find unacceptable from a political and in some cases constitutional standpoint".

The second issue for the future relates to sensitive areas of foreign and security policy, the security and growth pact and justice and home affairs. On the first, as it figured in the Constitutional Treaty, Professor Craig told the House of Lords Committee "I think it is a fantasy problem to imagine that it is suddenly going to start substituting judgments on delicate issues of foreign policy for those taken by the

European Council or the Council in its decisions on the CFSP. It would exercise very low intensity review over those issues and would review with a very light touch". It is more likely that problems will arise in the future in relation to human rights. As the Report highlights:

"Recent events, including the detention of individuals in Guantanamo Bay, show that the rights of the individual may be seriously affected in the execution of foreign policy. The Union is becoming increasingly involved in peace-keeping operations and the possibility cannot be ruled out that challenges may be brought on human rights grounds in relation to the particular conduct of those acting in the name of the Union".

The ECJ involvement in 2004 in the dispute between the Commission and the Council on the Stability and Growth Pact illustrates that its role in such an area is of necessity limited to technical issues of rules and their application.

Justice and home affairs will be a most sensitive area for the ECJ if the idea to collapse the pillar system into a first pillar approach is implemented. Crime, terrorism and immigration will require delicate handling..

The last area of concern is the Charter of Fundamental Rights. Proclaimed at Nice, it formed a separate section of the Constitutional Treaty. The Charter concepts of equality and solidarity in relation to labour law and industrial relations are at present unacceptable to the UK. Hence the proposed horizontal provisions of Article II – 51/53 of the Constitutional Treaty seeking to limit the effect of the Charter. Charter rights are enforceable vis a vis European institutions. Yet the same rights may not be enforceable within the national courts of the EU. This may lead to an inconsistency of standards as between the Union and member countries. However the Explanation to the Charter produced by the Convention emphasised "the inclusion of ... the Charter has not been intended to change the system of judicial review laid down by the Treaty, and particularly the rules relating to admissibility for direct actions before the Court". In the future the ECJ may well face a challenge to its restrictive approach to standing and access where there may be an arguable conflict between that approach and rights of access to a court under the European Convention and under the Charter. Charter rights may raise, perhaps in a profound form, the scope of access to Community courts.

The key issue is access to the ECJ. Hence the conclusion of the Report was particularly directed at Article 230(4) which it said was "a serious obstacle to the individual seeking to challenge a Union measure directly". It concluded "There is, we believe, a clear need for change".

It is inevitable that within its constitutional function as evidenced in the Austrian case of Schmiedenberg the ECJ has a most sensitive role to perform. That role should reflect adequate access to that Court by European citizens. Resolving that issue is a real challenge to the Court in the future.

Any system of judicial protection must involve and safeguard the citizen. In the words of Thomas Jefferson "That government is the strongest of which every man feels himself a part". It would be a tragedy for Europe if a democratic deficit were to be compounded in the long term by a justice deficit.