



Justice, only justice shalt thou pursue...(Deut.XVI:20)

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### Altneuland: The EU Constitution in a Contextual Perspective

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Damian Chalmers

The Dynamics of Judicial Authority and the Constitutional Treaty

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# The Dynamics of Judicial Authority and the Constitutional Treaty

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## *I. Introduction*

The Court of Justice was one of the big ‘winners’ in the Constitutional Treaty. It received new powers of review over both the EU Institutions and the Member States. The authority of both Union law and its judgments were formalized and extended. The reach of the preliminary reference procedure was expanded. It was unmentioned, however, in the mandates set out for the Convention, and was not formally discussed until the latter part of the Convention with no formal documents before lodged on it until 3 months before the end of the Convention.<sup>1</sup> The reason for this incongruity lay in both the Convention and the Intergovernmental Conference buying the doctrine of judicial supremacy. This states that government by law requires non-judicial officials to carry out their legal powers and duties in the manner set out by the judiciary, and in particular the constitutional court.<sup>2</sup> As judicial supremacy has been a central seam of the EC legal order, it would seem uncontroversial for it to occupy a similar role within the unified framework of the Constitutional Treaty. Yet, whilst a very broad interpretation of the legal powers of judges has been taken in EC law, institutional practice suggests that the impact of both the central Courts and the national courts on the application of EC law is actually extremely limited. Indeed, it is precisely the limited impact of judicial application of EC law that has allowed it to develop, over time, such radical claims about the powers of the judge and the authority of EC law.

The Constitutional Treaty changes this by putting, in a variety of ways, the judicial application of EU law at the forefront of EU government. Union and national courts will both be applying EU law in fields that constitute the very heartlands of domestic litigation and acting more regularly, intensively and extensively to gainsay legislative and administrative practices. Such a transfer to bodies that are, in the end, non-majoritarian institutions and change in the nature of EU government is not only radical, but can only be justified on the grounds that these are better able to realize certain public goods than other actors. In this regard, whilst not uncontested, both institutional practice and the general academic literature suggest that the judiciary may enjoy a comparative institutional advantage in the provision of a number of public goods. These include the provision of legal autonomy; securing legal certainty; the protection and development of central fundamental values; curbing concentrations

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<sup>1</sup> Only on 5 and 6 December 2002, did the Praesidium to the Convention decide that the operation of the Court of Justice should be examined. To this end, it established a ‘discussion circle’, which met 4 times and was asked to concentrate on five matters – the procedure for appointing judges and Advocates-General; the use of qualified majority voting for establishing specialised courts or amending the Statute of the Court; the titles of the Court of Justice and Court of First Instance; the locus standi for individuals under Article 230 EC and the extension of judicial review procedures to cover acts of other Union agencies and bodies; and the system of central penalties for non-compliance with a judgment of the Court of Justice. *Final Report of the Discussion Circle on the Court of Justice*, CONV 636/03. The Praesidium adopted most of the amendments proposed, CONV 734/03.

<sup>2</sup> Most famously stated in *Cooper v Aaron* 358 1 US (1958).

of institutional power and providing conditions for institutional cooperation; and, finally, dispute settlement. Unfortunately, the current, highly centralised judicial structures, which were left untouched by the Constitutional Treaty, prevent the European Union judiciary from realizing any of these goods satisfactorily. Indeed, the increase in the judicial role is likely to exacerbate these current systemic difficulties but to make it a far more central problem of EU government and of the EU legal system.

The final section of this article argues that this can only be rectified if judicial practice reconstructs itself accordingly. This would involve a reallocation of tasks and a recasting of cooperation between the central Union courts and local courts, the detailed provision of which is set out later, but which is structured along three principles. First, judicial practice must be explicitly organized and exercised in such a manner that a central constitutional responsibility of all courts within the Union is realization of the five goods outlined in the preceding paragraph. Responsibilities should be allocated in the most efficient manner possible to discharge these duties. Second, courts should be bound by duties of constitutional pluralism. Any part of the territory of the Union is governed simultaneously by the Constitutional Treaty and the respective national constitution. This should place much stronger duties of institutional cooperation between the national courts and between the Union courts and national courts than currently exist. Each should be required not merely not to impede the formal operations of the other constitutional order, but to contribute actively to secure the other's effectiveness, and effectively coordinate in the management and protection of both. The problems of judicial organization are not merely those of managerialism. Finally, there is a duty of constitutional tolerance. In a territory where no constitution enjoys a monopoly over institutional choices or determination of the meaning of fundamental values. Judicial mechanisms of cooperation must be put in place to minimize the conflicts that might arise from this by heightening the reflexivity and receptivity of each settlement to the claims of the other, and to ensure no that single constitutional settlement can erase the authority or fundamental choices of the other.

## II. The Claims and Practice of Judicial Supremacy in European Union Law

If judicial supremacy is now endemic across Europe, its tradition is a short one. In the period prior to the Second World War, only the Austrian Constitutional Court had powers of legislative review. In the 1950's these powers began to be granted more widely. The German Constitutional Court became operative in 1951; the Italian in 1956 and the French Conseil Constitutionnel in 1958.<sup>3</sup> The claims in *Van Gend en Loos* and *Costa* that national courts should disapply national legislation where it conflicted with directly effective EC legal rights were, thus, both a radical act of legal creation and a fashionable, if politically undeveloped, claim about the remit of judicial power. The central expression of the sovereignty of this new legal order and the central vehicle for the development of its architecture was to be through the judicial review of legislative and administrative measures.<sup>4</sup> The operationability and authority of the EU legal order, time and again, became equated with the assertion of EC individual rights before a court and the precedence of judicial authority over other administrative actors. The transformation of the EEC Treaty into a legal system with its own detail, logic and guiding structures was accompanied with a parallel expansion in judicial powers. The judge becomes responsible for developing an operational logic for the Union; policing and defining the limits of administrative power; amplifying the core individual rights and duties, and securing legal stability. EU law has consequently developed the parameters of judicial supremacy in extremely broad terms.

- A strong power of judicial review has been granted to the Court of Justice over the legislative and administrative institutions of both the European Union and the Member States.<sup>5</sup> It can fine both sets of institutions,<sup>6</sup> determine the legal effects of their acts,<sup>7</sup> and compel them to take all necessary measures to comply with its judgments.<sup>8</sup>
- Through the power to apply EC law, powers of judicial review have been granted to national courts who did not previously hold that power.<sup>9</sup> In addition, judicial

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<sup>3</sup> P. Pasquino, 'Constitutional Adjudication and Democracy: Comparative Perspectives – United States, France and Italy' 131, 137 in C. Gould & P. Pasquino (eds) *Cultural Identity and the Nation-State* (2001, Rowman & Littlefield, Boulder).

<sup>4</sup> Case 26/62 *Van Gend en Loos v Nederlands-Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>5</sup> On the expansion of judicial control, notwithstanding the absence of explicit statement in the Treaty, over the Parliament, the Committees, and the European Central Bank see, respectively Case 294/83 *Parti Ecologiste (Les Verts) v Parlement* [1986] ECR 1339; Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463; Case C-11/00 *Commission v European Central Bank*, Judgment of 10 July 2003.

<sup>6</sup> Articles 235 & 288 EC (EC institutions); Article 228(2) EC (Member States).

<sup>7</sup> Articles 231, 242 & 243 EC (EC Institutions). With regard to Member States, Court judgments are authoritative statements of EC law, which all organs of the State are required to apply. They are consequently required to disapply national law where it conflicts with EC law. Case C-198/01 *Conorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato*, Judgment of 9 September 2003.

<sup>8</sup> Article 233 EC (EC Institution); Article 228(1) EC (Member States).

<sup>9</sup> Case 106/77 *Amministrazione delle Finanze v Simmenthal* [1978] ECR 629.

status, and, with it the corollary power of review over other officials, has been given to a wide number of quasi-judicial institutions, who were not traditionally considered as courts.<sup>10</sup>

- Extremely broad grounds of judicial review are provided. EU Institutions and national governments acting within the field of EC law are bound not simply by the Treaty, and the doctrines of general principles of law and fundamental rights, but also by the corpus of 80,000 pages of EC secondary legislation.<sup>11</sup>
- National courts can strike down an administrative or legislative act even where an action is not brought against the administration. In actions between private parties the assertion of the primacy of EC law over an existing legal or administrative practice gives the court the opportunity to strike down the latter as an impediment to the effective enjoyment of EC individual rights.<sup>12</sup>

This is a dramatic tale, but leaves unexplained why national governments would accept such a loss of power. The answer lies in the bifurcated nature of judicial supremacy. Judicial supremacy is, on the one hand, a *claim* by judges to have ultimate authority over interpretation of the law. This claim provides for the grant of a number of formal powers to the judge. It is also, however, a *description* of the actual power of the judge over administrative actors. The extent of this power is gauged, in part, by the centrality of the judge to the application and interpretation of law: the extent and frequency with which she rules on the full panoply of laws that exist. It is also gauged by the level of compliance with her judgments by those institutional actors to whom these are addressed. In this regard, EC law creates three forms of relationship between the judiciary and the administration, which structures this form of power.

**(i) Judicial Review and the Community Courts – Hesitant Legislative Review and Aggressive Administrative Review:** The first form of relation involves the power of legislative and administrative review enjoyed under EC law by the Community courts over the EU Institutions.<sup>13</sup> These relations are marked by few problems with institutional compliance. Notwithstanding this, recent evidence suggests a sharp difference in treatment of

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<sup>10</sup> It is sufficient that a body is established by law; independent, applies inter partes procedures and has compulsory jurisdiction to be considered a court under EC law. Case C-416/96 *El Yassini v Secretary of State for the Home Department* [1999] ECR I-1209.

<sup>11</sup> EC Commission, *Action Plan "Simplifying and Improving the Regulatory Environment"* COM (2002) 278, 14

<sup>12</sup> This occurs either through horizontal direct effect Case 43/75 *Defrenne v Sabena* [1976] ECR 455 or through the doctrine of indirect effect, Case 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891.

Council measures, which are predominantly legislative in nature, and Commission measures, which are predominantly administrative in nature.

Review of Council measures by the Court of Justice is highly limited. In the period 1998-2003,<sup>14</sup> of 296 judgments it gave in actions brought against EU Institutions,<sup>15</sup> the Court of Justice considered 58 challenges to Council or Council and Parliament acts (19.59%). It upheld 9 of these, a success rate of only 15.51%, which is strikingly low given that locus standi is rarely a problem for applicants at this stage in the proceedings. A similar practice is present for the Court of First Instance. Of its docket for the period 1998-2003, which only involves actions brought against EU Institutions, there were 35 challenges to either a Council Regulation or Directive. Of these only 3 challenges, all against Regulations, were successful (8.57%). Equally significant is a break-down of the successful challenges. A total of 4 were brought by individuals – three before the CFI and one before the Court of Justice.<sup>16</sup> All concerned challenges to Regulations imposing countervailing or anti-dumping duties, measures that are, in essence, administrative rather than legislative in nature. There was no successful challenge to by individuals to ‘true’ legislative acts by the Council. Of the remaining 8 successful challenges, three each were brought respectively by the Commission<sup>17</sup> and Parliament.<sup>18</sup> These challenged measures where there were points of principles at stake, but only one could be said to involve a significant piece of legislation, and even here it was only a declaration attached by the Council that was annulled.<sup>19</sup> Only two successful challenges were brought by Member States – one by Spain<sup>20</sup> to Regulation restricting the quotas for anchovy, the other the famous action by Germany successfully challenging the Directive prohibiting tobacco advertising.<sup>21</sup> This was only the case of a Directive being successfully challenged, and the sheer exceptionalism of the Court’s

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<sup>13</sup>The bases are numerous, Article 230, 232, 234, 241, 288 EC.

<sup>14</sup> A limited period was chosen, as practice can vary longitudinally. A period of extensive review in the 1970s, for example, might not be a strong indicator of how the Community courts approach their relations today. The statistics are on file with the author.

<sup>15</sup> This figure includes employment cases but not other forms of contractual dispute.

<sup>16</sup> Case T-7/99 *Medici Grimm v Council* [2000] ECR II- 2671; Case T-58/99 *Mukand et al v Council* [2001] ECR II- 2521; Case T-88/98 *Kundan Industries et al v Council* [2002] ECR II-4897; Case C-76/00P *Petrotub v Council* [2003] ECR I-79.

<sup>17</sup> Case C-29/99 *Commission v Council* [2002] ECR I-11221; Case C-281/01 *Commission v Council* [2002] ECR I-12049 ; Case C-378/00 *Commission v Parliament and Council* [2003] ECR I-937.

<sup>18</sup> Case C-22/96 *Parliament v Council* [1998] ECR I-3321; Joined Cases C-164/97 & C-165/97 *Parliament v Council* [1999] ECR I-1139; Case C-93/00 *Parliament v Council* [2001] ECR I- 10119.

<sup>19</sup> A Council Declaration attached to the 1994 Convention on Nuclear Safety was annulled in Case C-29/99 *Commission v Council* [2002] ECR I-11221.

<sup>20</sup> Case C-61/96 *Spain v Council* [2002] ECR I-3439.

<sup>21</sup> Case C-376/98 *Germany v Parliament & Council* [2000] ECR I-8419.

judgment was illustrated by its giving a judgment a year later, which would have allowed for a quasi-identical piece of legislation to be adopted.<sup>22</sup>

All the above suggests the Court thwarts the collective preferences of the member States to such a limited extent, both qualitatively and quantitatively, that its practical significance as a form of legislative review is marginal to the point of irrelevance. The bulk of both Community courts' work is rather concerned with review of the administrative and quasi-legislative practices of the Commission. They are acting as administrative courts curbing the power of another supranational institution. Of the 296 cases, the Court of Justice considered 194 cases which involved 173 challenges to Commission Decisions and 21 to Commission quasi-legislation, 20 to Commission Regulations and 1 to a Commission Directive. When the *locus standi* requirements are met, there is evidence, furthermore, that these courts act as aggressive administrative courts. 38.01% of the challenges brought before the Court of Justice against Commission quasi-legislation are successful, and 27.25% of those brought against Commission acts. If this is compared against two comparators, it does not compare unfavourably with either the success rate of litigation brought by employees of the EU institutions in a private 'labour law' capacity, which is 34.09%,<sup>23</sup> or the practice of the British courts in judicial review cases, which, in 2002, found in favour of the applicant in 36% of cases.<sup>24</sup>

**(ii) Enforcement Actions and the Marginal Authority of the Court of Justice:** The second scenario is where enforcement actions are brought against a member State before the Court of Justice by either the Commission or another Member States. Enforcement actions cover the full gamut of EC law.<sup>25</sup> There are, however, questions about the substantive authority of these rulings. As most enforcement proceedings concern instruments that do not generate individual rights before national courts, the only immediate costs for non-compliance are extra-legal ones. They may lay in the court of public opinion; retaliation, albeit illegal, from other member States; or a further action for financial penalties brought by the Commission.<sup>26</sup> Every set of indicators associated with the enforcement proceedings suggests that these are considered remote and small by all the institutional players, and that, whilst there is a

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<sup>22</sup> Case C-491/01 *R v Secretary of States for Health ex parte BAT & Imperial Tobacco* [2002] ECR I- where the Court held that a ban on tobacco advertising could be adopted under Article 95 EC provided goods and advertising complying with this would be granted access to other Member State markets.

<sup>23</sup> These were the other 44 cases brought before the Court.

<sup>24</sup> *Judicial Statistics 2002* (2003, Department of Constitutional Affairs, London) 20. The British were chosen as they are the only jurisdiction which publishes success ratios.

<sup>25</sup> For a review of the cases opened and under investigation, EC Commission, *XXth Report on Monitoring the Application of Community Law* COM (2003) 669, Annex 1, 14-16. The reason is that the Commission does not fully control which cases are opened, as it is difficult for it to argue that it will not pursue a complaint brought by an individual if it has formally recorded that there is a prima facie breach of EC law. EC Commission, *Relations with the Complainant in Respect of Infringements of EC Law* COM (2002) 141. In 2002, 60.07% of Commission enforcement actions were begun on the basis of an individual complaint. EC Commission, *XXth Report*, *Ibid.*, Annex 1, Table 1.1

<sup>26</sup> Article 228 EC.



diffuse commitment to the rule of way, this only bolsters the authority of the Court in a highly qualified manner.

The Commission, first, exercises its discretion over the pace of proceedings and which matters to seek judgment in a highly timid manner. Its own statistics show that, at the end of 2002, an astonishing 13.36% were at least 4 years old.<sup>27</sup> They also show that over 89% were settled before the matter was formally referred to the Court.<sup>28</sup> As many proceedings are settled after formal notice, the actual figure is much higher. Whilst no Commission statistics are given on this, a rough idea of the level of settlement can be gauged from comparing the number of enforcement proceedings begun with the number of actual judgments given. Between 1998 and 2002 the number of enforcement proceedings commenced was fairly constant, between 2,134 (1998) and 2,434 (2000),<sup>29</sup> whilst the number of judgments given in 2001 were 79 and, in 2002, 93. Of the enforcement proceedings begun, between 3.5-4.5% reach judgment. Of the 93 judgments given by the Court in 2002, it found for the Commission in 90, an astonishing 96.77%.<sup>30</sup> A similar profile is apparent in 2001, where the Court held for the Commission in 75 out of 79 cases. This suggests the Commission only goes to Court where there is a flagrant abuse and it knows it is going to win. Inversely, in difficult or legally arguable cases, the Court is simply not used. The most telling statistic is national government compliance with judgments of the Court. In 2001, the Court gave 75 rulings against Member States in enforcement actions brought by the Commission. By the end of 2002, for these cases, the Commission claimed 28 instances of failure to comply with the rulings of the Court. In 37.33% of cases Member States had not complied with rulings of the Court within 12 months of the judgment.<sup>31</sup> The predominant logic is one of administrative negotiation with control of the Court's docket by the Commission limiting the types of judgment it can give. It is confined to easy declarations ratifying the Commission's position rather than radical restatements of EC law. Even in this role, the authority given to it by national governments appears highly limited. In terms of the time for settlement and the level of compliance, its position is analogous to rulings from WTO Dispute Settlement Panels.<sup>32</sup>

The position changes dramatically where Member States are subjected to the possibility of the Commission bringing enforcement proceedings for sanctions under Article 228 EC. These act not only as a financial deterrent, but also open national governments up to considerable adverse domestic publicity, with fines being seen as an unnecessary waste of taxpayers' money. One sees this both indirectly and directly. At the end of 2002, the Commission records only 18 instances of non-compliance with *all* judgments given prior to 2000.<sup>33</sup> There is strong compliance with judgments

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<sup>27</sup> EC Commission, *Twentieth Report on Monitoring the Application of Community Law*, COM (2003) 669, Annex I, Table 1.2. Actually, the position is far worse as this is the percentage of 'cases in motion' which are where a file has been opened, but no decision has been taken whether to start infringement proceedings.

<sup>28</sup> *Ibid.*, 8.

<sup>29</sup> *Ibid.*, Annex I, Table 1.1.

<sup>30</sup> *Statistics of Judicial Activity of the Court of Justice 2002*, 9 <http://www.curia.eu.int/en/instit/presentationfr/index.htm>

<sup>31</sup> *Supra* n.27, Annex V.

<sup>32</sup> The dispute concerning the siting of the Kouroupitos waste dump in Crete in breach of EC environmental law is a case in point. The original Commission proceedings were brought in 1989. The case was not terminated until 2001, and involved 2 Court rulings. The initial one was in 1992 in Case C-45/91 *Commission v Greece* [1992] ECR I-2509. A second action fining Greece was brought in 2000, Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

<sup>33</sup> *Supra* n.27, Annex V.

at least 24 months old. To be sure, this might be because national governments have acceded to Commission demands. These are, however, also the judgments to which they are most exposed to Article 228 EC proceedings. With regard to the actual proceedings, at the end of 2002, the Commission had instigated 28 Article 228 EC procedures. In two cases fines have been levied by the Court.<sup>34</sup> Two cases were withdrawn and 21 cases terminated. Three cases are ongoing. Once again, it is difficult to know the reasons for such a high level of settlement, but the timeframes would suggest that the Commission enjoys stronger bargaining power in this instance. Of the three ongoing cases, the earliest action was launched on 20 December 2001, 12 months before the statistics were compiled. The two cases brought to judgment were both brought to judgment within 3 years of the initial action being launched. All these suggest that there is less negotiation and equivocation on the part of the Commission than with Article 226 EC proceedings.

**(iii) The Limited Significance of National Judicial Authority:** The final set of relations involve those EC legal provisions which are, either directly or indirectly, invoked before national courts.<sup>35</sup> Authority is vested here in local courts. References to the Court of Justice are the exception, and, even where they occur, the local court is responsible for applying the ruling, as well as for resolving facts and questions of national law.<sup>36</sup> The authority of EC law and, thus, judicial supremacy as a principle of EC law, is contingent on its acceptance by national judges. These could thwart this, formally, by refusing to recognise the validity of EC law or, substantively, by avoiding its responsibilities in more covert ways.<sup>37</sup> Neither form of resistance has happened on a grand scale. There is a high degree of formal acceptance of the authority of both EC law and the Court of Justice in the ‘grands arrêts’ of senior national courts. Whilst, in some instances, the right to challenge the supremacy of EC law has been left open, its day-to-day validity and precedence over national law has been left unchallenged.<sup>38</sup> Studies measuring the application of EC law are necessarily less clear-cut. All agree, however, on relatively high levels of substantive compliance, but not insignificant levels of non-compliance. Studies in the United Kingdom found that in only 9% of cases

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<sup>34</sup> Case C-387/97 *Commission v Greece* [2000] ECR I- 5045; Case C-278/01 *Commission v Spain*, Judgment of 25 November 2003.

<sup>35</sup> It would thus include cases of indirect effect where, formally, it is the national provision which grants the individual rights, but this provision is interpreted in the light of EC legal norms.

<sup>36</sup> Research suggests that between 1.47% and 30.08% of *reported* cases are referred to the Court of Justice. The lowest figure is 1.47% for Spain. F. Ramos, ‘Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behaviour’ (2002) 2(1) *Global Jurist Frontiers* p.14. The figure for the United Kingdom is 27%, D. Chalmers, ‘The Much Ado About Judicial Politics’ *Jean Monnet Working Paper No 1/2000*. The other State researched, Austria, found a figure of 30.07% for the higher courts. B. Bapuly & G. Kohlegger, *Die Implementierung des EG-Rechts in Österreich* (2003, Manzsche Verlag, Wien) 27-28.

<sup>37</sup> These include narrow constructions of EC legal norms, arguing that it does not apply to the facts in hand; offering weak remedies; refusals to refer; *a contrario* reasoning and application of domestic legal norms rather than EC one’s if it would lead to the same result. B. Bepuly, ‘The Application of EC Law in Austria’ *IWE Working Paper No 39*. <<http://www.iwe.oew.ac.at>>

<sup>38</sup> The broadest study is A-M. Slaughter, A. Stone Sweet & J. Weiler (eds) *The European Courts and National Courts: Doctrine and Jurisprudence* (1998, Hart, Oxford-Portland).

could any form of restrictive application be found.<sup>39</sup> A study of senior Austrian courts found a similar pattern, with restrictive rulings accounting for 6.6% of case law.<sup>40</sup> A study of Spanish courts found that they complied with ECJ precedent between 74.57% (higher courts) and 84.61% (lower courts) of the time.<sup>41</sup>

The field within which this judicial authority reigns is, however, very narrow. This narrowness manifests itself in the range of instruments, the types of litigant and the material remit of EC law invoked before national courts.<sup>42</sup> In a study of all cases reported in the United Kingdom in which EC law was invoked, notwithstanding the 80,000 pages of secondary legislation, EC Treaty provisions were the most heavily invoked of all the different types of instrument. The original core of law of 1957 was still the predominant tool of litigation. Just 5 Directives accounted for 73% of the instances in which Directives were invoked before British courts. Litigation was focussed, furthermore, in a very narrow area of EC law. Five sectors accounted for 61% of all the cases, and large policy areas, such as the single market, financial services, company law, consumer law, environmental law were marked by little or no litigation. Finally, contrary to domestic practice, very little EC litigation, only 32.6%, involved disputes between private parties, with two instruments, the Sex Discrimination and the TUPE Directives, accounting for 64.5% of these instances.

The involvement of the Court of Justice in steering national courts is similarly very limited. In the period 1998-2003, the Court of Justice gave 763 judgments in answer to preliminary references from national courts.<sup>43</sup>

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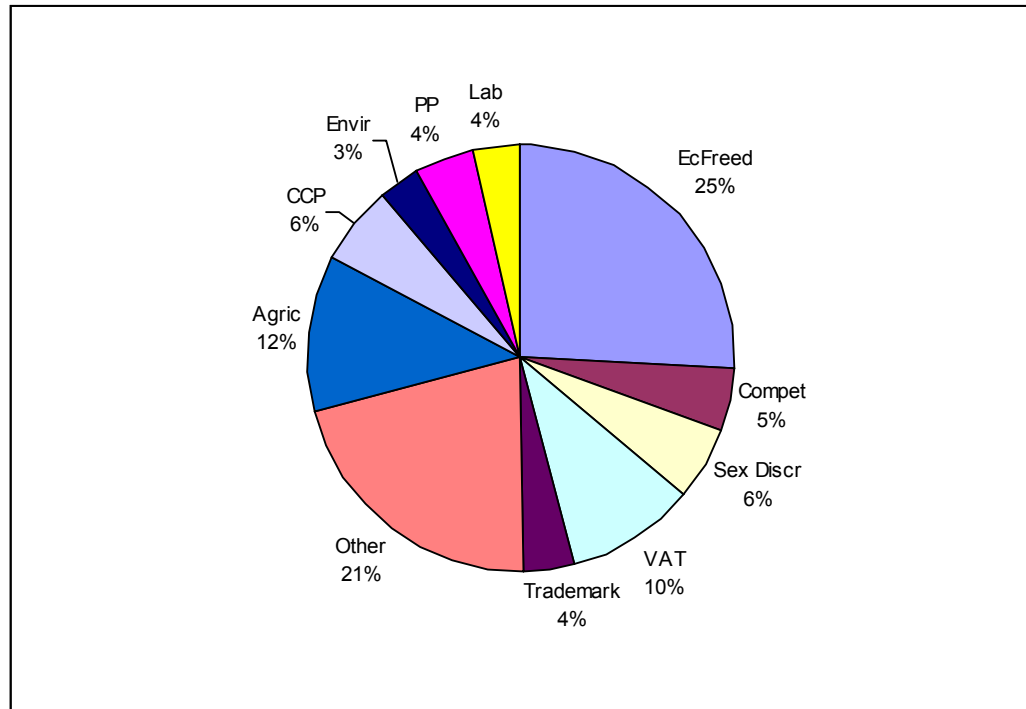
<sup>39</sup> D. Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom' (2000) 23 *West European Politics* 169, 182.

<sup>40</sup> B. Bapuly & G. Kohlegger, *Die Implementierung des EG-Rechts in Österreich* (2003, Manzsche Verlag, Wien) 27.

<sup>41</sup> F. Ramos, 'Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behaviour' (2002) 2(1) *Global Jurist Frontiers* 43-44.

<sup>42</sup> D. Chalmers, *supra* n. 39, 178-183.

<sup>43</sup> The headings involve the following areas - Economic Freedoms (EcFreed)(191 cases); Competition including public undertakings and State aids (Compet)(36 cases); Sex Discrimination (Sex Discr)(43 cases); VAT (VAT)(74 cases); Trademark (Trademark)(28 cases); Other (all other sectors)(161 cases); Agriculture (Agric)(92 cases); Commercial Policy and Customs Union (CCP)(47 cases); Environment (Envir)(23 cases); Public Procurement (PP)(33 cases); Labour Law other than Sex Discrimination (Lab)(28 cases). These are the author's classification rather than the Court's and are available on request.



The graph above shows that three areas – the economic freedoms, VAT and agriculture - accounted for 47% of all the Court’s judgments. The first of these is anchored around EC Treaty provisions,<sup>44</sup> which have been largely unchanged since 1957. The second concerns litigation, centred around a single instrument, the Sixth VAT Directive,<sup>45</sup> and the final one concerns a sector, which is significant but not predominant in the European Union political economy. In neither agriculture nor VAT do you find judgments of broad principle being given by the Court. Instead, it is confined to giving rulings on highly specific if, for the parties, financially important points. Whilst the Court has articulated broad principles in the arena of the economic freedoms it has frequently been trapped by the density of the case law, with the consequence that few commentators would argue that the legal position is clearer or more coherent than 20 years ago. By contrast, the ‘other’ sector, accounting for 21% of all the Court’s case law, included all consumer and health protection law, migration of non-EU nationals, transport, financial services, regulations of the professions; company law; all intellectual and industrial property law except trademarks; company law; broadcasting and advertising; and data and protection law. As environmental law and labour law, two huge legal fields largely dominated by EC law, account for a further 7%, the actual guiding hand of the Court of Justice in most policy areas is extremely limited. Another way of arriving at the

<sup>44</sup> The author merely looked at Treaty provisions, except for free movement of workers, where Article 39 EC has been difficult to dissociate from the secondary legislation listed below.

<sup>45</sup> Directive 77/388/EEC, OJ 1977, L 145/1.

conclusion is to note that interpretation of 22 EC Treaty provisions,<sup>46</sup> 7 Directives<sup>47</sup> and 3 Regulations<sup>48</sup> accounted for 50% of the case law during this period. For these were the legal instruments that were almost the exclusive subject-matter of litigation in the fields of the economic freedoms, competition, sex discrimination, public procurement, VAT and trademarks. With the exception of the Trademark and Public Procurement Directives, all this legislation is also at least 25 years old. To be sure, individual judgments vary enormously in their symbolic and practical effects. Yet if one combines this latter case law, which is narrow in legal focus, with the case law on agriculture and commercial policy/customs union, which involves case law with little general visioning effects or significant effects for the wider economy, one reaches a position, where, over two thirds of its time, the Court is either revisiting well-worn debates or deciding cases, which are of interest only for very narrow constituencies

Judicial power in this area resembles that of the old High Authority of the European Coal and Steel Community - intense, but narrowly focussed. Moreover, it is precisely this narrow focus that allows this intensity. It softens resistance by national administrations, who encounter only limited judicial transgression over exercise of their traditional prerogatives. More integrally, these limits have been the basis on which many national courts have accepted the authority of EC law. The German,<sup>49</sup> Belgian,<sup>50</sup> Danish,<sup>51</sup> British<sup>52</sup> and Hungarian courts<sup>53</sup> have all stated that they will accept only a materially limited sovereignty for EC law. The confined remit of EC before domestic courts has, therefore, important normative dimensions. For in all cases, national courts have made clear that it is not a second order qualification that conditions a general presumption of the sovereignty of EC law, but rather provides the *very* justification that allows the authority of EC law to be applied in the first place.

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<sup>46</sup> The following provisions of the EC Treaty were invoked as economic freedoms Articles 25, 28-30, 39, 43, 45, 46, 48, 49, 50, 55, 56, 58, 90 EC. In addition, Articles 17-18 EC are invoked as interpretative aids. The following provisions were invoked in the field of competition, Articles 81, 82, 86 & 87 EC. Article 141 EC, the equal pay provision was invoked in the field of sex discrimination.

<sup>47</sup> Directive 77/388, OJ 1977, L 145/1 (VAT); Directive 76/207, OJ 1976, L 39/40 (sex discrimination); Directive 89/104, OJ 1989, L 40/1 (trade marks); Directive 89/665, OJ 1989, L 395/33 and Directive 93/36, OJ 1993, L 199/1 (Public Procurement); Directive 64/22, OJ Sp. Ed. 1964, 850/64, 117 and Directive 68/360, OJ Sp Ed. 1968, L 257/13, 485 (free movement of workers)

<sup>48</sup> Regulation 1612/68, OJ Sp.Ed. 1968, L 275/2, 475; Regulation 1251/70, OJ Sp. Ed. 1970, No L 142/24, 402; Regulation 1408/71, OJ 1997, L 28/1 (free movement of workers).

<sup>49</sup> *Brunner v European Union Treaty* [1994] 1 CMLR 57.

<sup>50</sup> CA, 3 February 1994, *Ecole Européenne*, Case No 12/94, B6.

<sup>51</sup> *Carlsen v Rasmussen* [1999] 3 CMLR 854.

<sup>52</sup> *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250; *Marks & Spencer v CCE* [1999] 1 CMLR 1152.

<sup>53</sup> See Judgment 30 invalidating Article 62 of the 1994 Europe Agreement between Hungary and the European Union, Judgment of 25 June 1998. J. Volkai, *The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions*, Harvard Jean Monnet Working Paper 8/99.

### III. The Constitutional Treaty and Judicial Supremacy

A dualism existed, therefore, in the practice of judicial supremacy in EU law. This dualism was marked, on the one hand, by the presence of a rhetorical gap between the formal claims and legal norms set out for judicial power by the Court of Justice and the much more limited judicial presence on the development of EU law and policy. On the other, it was precisely this gap, which created the delicate institutional balance that allowed judicial supremacy to develop within EC law in the first place. For it limited the political impacts and allowed local judiciaries to accept and enforce a doctrine which had, otherwise, been developed in a radical manner. Despite this, an undifferentiated and absolutist interpretation of judicial supremacy became the central dynamic shaping discussion about the position of the Union Courts in the Constitutional Treaty. Implicit in much of the discussions and in the CT itself, it was left to the President of the Court of Justice in his submission to the ‘discussion circle’ on the Court to spell it out:

‘The rule of law is an essential part of any constitutional system and it is the Court’s responsibility to ensure that it is observed ..... In this regard, the current situation is not entirely satisfactory. One can point to the fact the transition from the European Communities to the European Union did not entail a corresponding extension of the guarantees of the observance of the law. Instead, it resulted in a situation in which the mechanisms for judicial protection vary....’<sup>54</sup>

The consequence has been an earthquake which has destroyed the delicate balance between the strong normative claims made for judicial supremacy made by the Union judiciary and its limited actual presence in Union law. In all areas of jurisdiction, the Constitutional Treaty has removed the previous qualifications on the authority of the Court of Justice and the Union judiciary .

**(i) The Constitutional Treaty and a Constitutional Court for Europe? Strengthening of the Grounds of Judicial Reason.** Under the EC Treaty, the Court is currently responsible for ensuring that the ‘law is observed’ in its application and interpretation of the Treaty and secondary legislation.<sup>55</sup> The CT modifies this to require it to:

‘ensure respect for the law in the interpretation and the application of the Constitution’.<sup>56</sup>

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<sup>54</sup> Oral presentation by Gil Carlos Rodriguez Iglesias to the ‘discussion circle’ on the Court of Justice, CONV 572/03, 1-2.

<sup>55</sup> Article 220 EC

<sup>56</sup> Article I-29 CT.

On its face, this seems to do no more than reflect the altered designation of the founding document, and would seem a trivial alteration. The new provision does, however, explicitly mandate the Court to engage in constitutional reason for the first time. To be sure, the Court's future interpretation of this is a matter of conjecture, but other developments in the CT and the reaction to these suggest this might provide a far more extensive basis for legislative review.

One is the incorporation of the Charter of Fundamental Rights into Part II of the CT. This provides a more settled basis for more intensive review of EU institutional activity by setting out, for the first time, an explicit and detailed catalogue of the rights against which activity is to be reviewed. It shifts the task of the Court away from having to imply and 'create' the existence of fundamental rights within the Union legal order to developing and fleshing out the meaning of 'taken for granted' provisions. The Charter also provides a basis for a more extensive review, as it includes many rights whose basis as a standard of review was previously unclear. This reform must be placed alongside developments in Court practice which suggest an existing willingness upon the part of the Court to extend its horizons of review beyond those of traditional first generation rights. In the last 3 years, it has, therefore, established norms of review in the fields of data protection,<sup>57</sup> sexual orientation<sup>58</sup> and bioethics.<sup>59</sup>

The other development is the new delimitation of competencies set out in the Constitutional Treaty. The Nice Declaration provides that the aim of the CT should 'be to establish and monitor a more precise delimitation of competencies .. reflecting the principle of subsidiarity.'<sup>60</sup> To what extent, this has occurred is open to debate, but, perhaps more important than the linguistic detail of particular provisions, is the institutional backdrop against which this takes place. As the Nice Declaration and new reinforced provisions on subsidiarity make clear, it is certainly intended that the CT be interpreted as something which not only justifies but also constrains EU action in equal measure.<sup>61</sup> If this teleology of containment is to be taken seriously, a consequence will be far more active constitutional review of EU legislation by the Court in its policing the limits of EU law.

**(ii) The Transformation of EU Administrative Law:** Changes have been made to the *locus standi* requirements governing the circumstances in which non-privileged applicants can seek

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<sup>57</sup> Case C-101/01 *Lindqvist*, Judgment of 6 November 2003; Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichisches Rundfunk* [2003] ECR I-4919.

<sup>58</sup> Case C-117/01 *KB v National Health Service Pensions Agency*, Judgment of 7 January 2004.

<sup>59</sup> Case C-377/98 *Netherlands v Parliament & Council* [2001] ECR I-7079.

<sup>60</sup> Declaration No. 23.

<sup>61</sup> The Protocol on the Application of the Principles of Proportionality and Subsidiarity includes a number of *ex ante* and *ex post* controls on Union measures to secure that they

judicial review of acts of the Union Institutions. At present, natural or legal persons can only challenge an EC act where it is either addressed to them or is of direct and individual concern to them.<sup>62</sup> Direct concern occurs wherever an act directly affects the legal situation of the applicant so that she is denied certain lawful rights that would otherwise be hers'.<sup>63</sup> Traditionally, the bigger hurdle has been the establishment of individual concern. Individuals were required to establish the measure affected them either by reason of certain attributes peculiar to them or by reason of a factual situation which differentiated them from all other persons and distinguished them individually in the same way as the addressee.<sup>64</sup> Even where parties' interests were significantly compromised, this requirement made review possible only in exceptional circumstances.

The requirement of individual concern is lifted for regulatory acts by the CT, which an individual can now challenge if they are merely of direct concern to her.<sup>65</sup> Regulatory acts are a new form of legal act created by the CT. They are general, but 'non legislative', measures which implement EC legislation or certain provisions of the Constitution.<sup>66</sup> This represents a considerable relaxation of the *locus standi* requirements, with a corresponding shift in the balance of power between administration and judiciary. Whole areas of Commission activity previously immune from judicial oversight are now likely to be subject to perpetual challenge by a large number of parties. The increased volume of case law will, by itself, lead to a significant increase in the judicial over-ruling of Commission acts. The CT, however, also sends an implicit message that the Union courts are to take a more active role favoring the applicant. For the traditional argument for comitology and quasi-legislation has been that the nature of these fields depended heavily on specialized expertise, decisional efficiency and long-term planning, all of which could only be secured by administrative autonomy. The extension of judicial oversight for these fields alone suggests a significant ideological realignment in which these values are to have less weight and the Union administration is to be increasingly constrained by other values of liberal democracy.

**(iii) Increased Policing Powers Over National Governments.** The CT introduces a single-track procedure for enforcement procedures against Member States where proceedings are brought for failure to transpose a Framework Law (the CT replacement for a directive). The Commission can ask in the initial proceedings for the Court to impose a penalty.<sup>67</sup> This is

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are only taken where Member States cannot realise the objectives unilaterally, most notably by giving national parliaments and the Committee of the Regions new policing powers.

<sup>62</sup> Article 230(4) EC.

<sup>63</sup> Case C-486/01P *Front National v Parliament*, Judgment of 29 June 2004.

<sup>64</sup> C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

<sup>65</sup> Article III-365(4) CT.

<sup>66</sup> Article I-33(1) CT.

<sup>67</sup> Article III-362(3) CT.



significant as it was only when the threat of financial sanction was imminent that national governments began to take the authority of the Court of Justice seriously. For other breaches of EC law, the authority of the Court is likely to remain diffuse. The two-tier process remains, whereby the Court of Justice must make a prior ruling finding a breach of EC law, and only then, can a second set of proceedings for sanctions be instigated by the Commission. Even here, its authority has been augmented, as these have been simplified. If a Member State fails to comply with an initial judgment of the Court, the Commission can go back to Court pressing for sanctions after issuing a formal notice and giving the member State the opportunity to submit its observations.<sup>68</sup> It does not have to also issue a reasoned opinion and await Member State compliance with that opinion before proceeding, as is currently the case.

**(iv) The Expansion of National Judicial Power and of the Preliminary Reference**

**Procedure:** The most significant increase in judicial authority is its extension by the CT in the area of freedom, security and justice. This exceptionalism currently prevents legislative measures adopted under the third pillar of the TEU generating rights which can be directly invoked before national courts. It also limits, *inter alia*, national courts' powers of referral to the Court of Justice. For measures falling under Title IV of the EC Treaty, namely visas, asylum and immigration, the Court can only receive references from courts against whose decision there is no judicial remedy.<sup>69</sup> In policing and judicial cooperation in criminal matters, the reference procedure is even more compromised, as it is an 'optional' one where Member States can choose whether their national courts have the power of reference and, if so, which courts are to have that power.<sup>70</sup> Finally, the docket of the Court is subject to greater control by the political institutions of the Union in that these have more possibilities to bring cases before the Court than in other fields.<sup>71</sup> With one caveat,<sup>72</sup> this exceptionalism has been swept away. EU legislation governing immigration, asylum, crime and policing will not only be able to be invoked freely and generate rights in national courts, but also to be referred as freely as any other area of Union law to the Court of Justice. This constitutional amendment takes place against a legislative backdrop in which a veritable avalanche of EU legislation has

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<sup>68</sup> Article III-362(2) CT.

<sup>69</sup> Article 68(1) EC.

<sup>70</sup> Article 35(1)-(4) TEU. Austria, Belgium, Germany, Luxembourg and the Netherlands have granted all their courts the power of reference. Greece has accepted jurisdiction for courts of last resort, OJ 1997, C 340/308.

<sup>71</sup> The Commission, Council or a Member State may seek a reference on any legal question relating to Title IV (or measures adopted under it) of the EC Treaty, Article 68(3) EC. With regard to third pillar measures, national governments may bring any dispute to the Court over the interpretation or application of an act which has not been resolved within 6 months by the Council, Article 35 (7) TEU.

<sup>72</sup> The Court is still prohibited from reviewing the proportionality or validity of operations carried out by the police or law-enforcement agencies or how Member States exercise their responsibilities for law and order and the protection of internal security, Article III-377 CT. This caveat is fairly meaningless

been adopted in these fields in the last 4 years to enable the realization of the area of freedom, security and justice. Most asylum and extradition law within the Union is now governed by EC legislation, as is a large part of immigration law. EU legal instruments also now set out minimum requirements for most kind of significant criminal offence, which are likely to be used increasingly to guide interpretation of national law. Alongside these developments in the area of freedom, security and justice, significant EC equal opportunities legislation in the fields of race, religion, age, disability and sexual orientation has been adopted, which is likely to come ‘on-line’ in national courts in the next couple of years.

The consequence is revolutionary. The application of EC law by national courts and the preliminary reference procedure will no longer cover narrow fields of law, which rarely generate matters of headline-generating sensitivity. It will now dominate the heartlands of domestic judicial activity and intrude regularly into areas of acute national sensitivity. Statistics give some idea of this. In the United Kingdom 81,725 cases were heard by Immigration Adjudicators, the judicial body of first instance for asylum in the United Kingdom, in 2003 alone.<sup>73</sup> In 2002, Immigration Adjudicators considered 84, 148 cases.<sup>74</sup> The Crown Court, which deals with the most significant offences in the United Kingdom, committed 81,766 people for trial.<sup>75</sup> Whilst no broken down statistics are available for Employment Tribunals, the tribunal of first instance for hearings involving discrimination in the work place, the first appellate court, the Employment Appeals Tribunal heard 159 cases involving race discrimination and 78 alleging disability discrimination in 2002.<sup>76</sup> To be sure, not all these cases are going to be referred to the Court of Justice or even to involve consideration of EC law, but the sheer scale of what is about to take place can be gauged by placing these statistics alongside those for the 2 areas of EC law currently most litigated in United Kingdom courts, VAT and sex discrimination. The VAT and Duties Tribunals considered 2,613 cases in 2002<sup>77</sup> and the Employment Appeals Tribunal considered 91 cases alleging sex discrimination.<sup>78</sup> There are over sixty times more immigration and asylum cases than VAT cases in the United Kingdom, and about two and a half times as many disability and race cases as sex discrimination cases.

This heralds not only an expansion of judicial power, but also a transformation of the Court of Justice. A substantial part of its docket will involve cases that form the bread and butter of civil liberties litigation – equal opportunities, abuse of the criminal or policing

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as there is nothing to stop it giving a ruling on Union law, which allows a national court to do these things.

<sup>73</sup> Home Office, *First Quarterly Statistics 2004* (2004, London) Table 5.

<sup>74</sup> *Judicial Statistics 2002* (2003, Department of Constitutional Affairs, London) 77.

<sup>75</sup> *Judicial Statistics 2002* (2003, Department of Constitutional Affairs, London) 65.

<sup>76</sup> *Ibid.*, Table 7.9.

<sup>77</sup> *Ibid.*, 77.

<sup>78</sup> *Supra* n.76.

system, asylum and immigration. In part, this will occur because of the volume of litigation in these fields, in part because the CT requires prioritization of cases in which a person is in custody.<sup>79</sup> The Court is, therefore, likely to be transformed from a body whose central work is trade and tax law into a Human Rights court. This change will affect not just the quality and demands of its daily work, but more, fundamentally, its saliency and the manner in which it is perceived across Union societies. The decision on a perennial basis of central and controversial human rights questions is likely to move it from being an occasional presence in the central pages of ‘quality’ newspapers to a regular one in the front pages of all newspapers, whose case law will distil theoretical and ethical controversies about the Good Life in Europe into a series of images and tales.

#### *IV Judicial Goods and European Union Law*

This expansion of judicial power makes the justification of judicial supremacy a constitutional question of the first order. In pragmatic terms, it is likely to lead to increased tensions between the judiciary and other arms of government and between Union law and national law. More normatively, a justification must be provided as to why non-majoritarian institutions are accorded such a central role in the new constitutional order. The starting point for such a justification must be a counterfactual one, which assumes courts can provide certain public goods better than other institutional actors. For power has been granted to the judiciary precisely because the authors of the Constitutional Treaty believe this to be so. Critiques denying this point are, thus, largely irrelevant for, by rejecting this point, they can provide no detailed critique of particular judicial arrangements, and can only argue for no or very limited judicial power. These public goods, however, become a point of immanent critique for the judicial arrangements within the Constitutional Treaty. As they provide the reasons judges have been granted powers under the Constitutional Treaty, they also provide a series of normative standards against which the satisfactoriness of these structures can be measured.

**(i) The Autonomy of the EC Legal Order.** The most baldly stated justification is that the Union is an order based upon the rule of law. It has established a complete system of legal remedies and procedures to permit judicial review of the legality of acts taken by government institutions.<sup>80</sup> This is a restatement of the argument that, as exclusively legal institutions, judges secure the autonomy of a legal system by ensuring that it is legal structures rather than

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<sup>79</sup> Article III-369(4) CT.

<sup>80</sup> Case 294/83 *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339. Parallel reasoning has been applied to national measures which fall within the field of EC law. Case 222/84 *Johnston v RUC* [1986] ECR 1651.

any other form of power or reasoning, that determine the operation, ambit and authority of EC law. This legal autonomy is necessary to secure the ‘existence conditions’ of a legal order – namely what counts as a law and what legal effects it has.<sup>81</sup> To this end, the Court of Justice has, therefore, argued that it has the power to determine what is law, by be able to review any measure intended to have legal effects<sup>82</sup> and to determine the limits of EU competencies.<sup>83</sup> Legal autonomy is not a value, *per se*. It is rather valuable because it brings certain other goods. It locks in commitments made by institutions to other institutions and to subjects of EC law. It secures formal equality by requiring legally identically treatment of all those subject to it. It also institutionalizes coherence as a value of the policy process and laws of the EC by providing legal structures, which seek to reconcile or explain laws, which might otherwise conflict.

**(ii) Legal certainty.** Judicial supremacy provides legal certainty by providing a single authoritative statement of the law.<sup>84</sup> The argument for uniformity of EC law is, indeed, a variant of this. Legal certainty requires a single, authoritative view of EC law, which applies equally across the Union. To this end, the Court of Justice has argued that legal certainty and uniformity of EC law require it alone to determine whether a Community act is invalid.<sup>85</sup> It has also argued that its judgments contribute to legal certainty by enabling differences in interpretation to be eliminated,<sup>86</sup> providing authoritative interpretations of ambiguous provisions or prior case law,<sup>87</sup> and by supplying legal expertise to the local judge.<sup>88</sup> As a public good, legal certainty enables law to provide a set of stable expectations about what conduct is permissible. Once again, this is important to securing more deep-seated virtues. Legal ordering is central to preventing a descent into the Hobbesian jungle, where anarchy prevails as nobody has a sense of what is allowed.<sup>89</sup> It is also central to securing individual freedom. An axiom of the liberal society is that everything is permitted, which is not illegal. If it is impossible to know what is the forbidden zone, a shadow of inhibition is cast across all conduct.

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<sup>81</sup> M. Adler & M. Dorf, ‘Constitutional Existence Conditions and Judicial Review’ (2003) 80 *Virginia Law Review* 1105, 1117-1136,

<sup>82</sup> Case 22/70 *Commission v Council* [1971] ECR 263; Case 190/84 *Les Verts* [1988] ECR 1017.

<sup>83</sup> *Opinion 1/91* [1991] ECR I-6079.

<sup>84</sup> Most famously, L. Alexander & F. Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110 *Harvard Law Review* 1359; L. Alexander & F. Schauer, ‘Defending Judicial Supremacy: A Reply’ (2000) 17 *Constitutional Commentary* 1.

<sup>85</sup> Case 314/85 *Firma Fotofrost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>86</sup> Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstelle* [1974] ECR 33.

<sup>87</sup> Joined Cases C-297/88 & C-197/89 *Dzodzi v Belgium* [1990] ECR I-3763.

<sup>88</sup> Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstelle* [1974] ECR 33.

<sup>89</sup> F. Michelman, ‘Living with Judicial Supremacy’ (2003) 38 *Wake Forest Law Review* 579, 583.

**(iii) Protection of the Republican Constitution:** Courts secure the checks and balances that prevent both excessive concentrations of administrative power.<sup>90</sup> Most famously, the Court has stated that there is a principle of institutional balance within EC law, which it must protect, by ensuring that each institution have regard for the powers of the other institutions.<sup>91</sup> More recent literature in the US has noted that this judicial role need not necessarily be exclusively defensive. It has been suggested that courts are arguably the best institutions to coordinate collective problem-solving capacities. The argument runs that courts are not only well-placed to determine the most appropriate allocation of decision-making. They are also well-placed to set out general performance standards and duties of coordination and cooperation that must be met by the relevant institution, whilst leaving the precise manner of this up to the institution concerned.<sup>92</sup>

**(iv) Development of Fundamental Values.** A mantra of the Community Courts has been that one of their central roles is to strength the principle of democracy and respect for fundamental rights.<sup>93</sup> One dimension is the development and protection of immutable values from encroachment by either majoritarian or administrative bodies (constraining rights). Within Member States, this principle has always had to be balanced against that of excessively restricting the power of representative legislative assemblies. There is a case for a different balance in the case of the Union. Many pan-Union measures are not adopted by representative institutions, and the supranational character of the Union means that it is also concerned with identifying and protecting the rights of the foreigner, who, by definition, is excluded from domestic decision-making processes.<sup>94</sup> In all cases, there is an adversarial relationship between the judiciary and the other arms of government. With regard to certain fundamental values, most notably in the field of non-discrimination, the judiciary occupies a different role. It acts in cooperation with the other arms of government, by interpreting legislation that fleshes out these principles. Its role is that of giving fuller meaning to legislative understandings of the Good Life and ensuring these develop in a principled manner which respects a particular vision of Human Freedom and Dignity (tandem rights).

**(v) Dispute Resolution.** Courts are seen as enjoying a comparative advantage over many forms of dispute resolution. They enjoy high levels of expertise in that they are presumed to know the rules of the game. As reactive, independent institutions constrained by the

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<sup>90</sup> D. Grimm, 'Constitutional Adjudication and Democracy' in M. Andenas (ed) *Liber Amicorum Lord Slynn of Hadley Volume II: Judicial Review in International Perspective* (2000, Kluwer, The Hague).

<sup>91</sup> Case C-70/88 *Parliament v Council* [1990] ECR I-2041.

<sup>92</sup> M. Dorf, 'Legal Indeterminacy and Institutional Reason' (2003) 78 *NYULRev* 875.

<sup>93</sup> Cf. Case T-211/00 *Kujer v Council* [2002] ECR II-485.

hermeneutic duties of interpretation, they are seen as relatively dispassionate and impartial. Finally, they enjoy high levels of procedural legitimacy by virtue of their procedures of evidence gathering and taking.

## **V. The Union Judiciary and the Delivery of Judicial Goods**

The Constitutional Treaty leaves untouched the highly centralised pre-existing organisational structures for discharge of these responsibilities. It entrusts to the central Union courts either an exclusive, dominant or active role for delivery of all of these goods within the Union legal system.

Crudely, the central Union courts claim exclusive responsibility for securing the autonomy of the Union legal order, insofar as they claim a monopoly over the determining the legal effects and reach of Union law.<sup>95</sup> They also have exclusive responsibility for protection of the republican constitution, as only they can review the behaviour of the central Union Institutions.<sup>96</sup> This latter monopoly also, in practice, gives them a monopoly over determination of one of Union law's two types of fundamental values, namely constraining values which only enter Union law as principles of judicial review constraining the action of Union institutions and member States implementing Union law.<sup>97</sup> The central Union courts then enjoy a hegemony over provision of two other goods, legal certainty and those fundamental values developed in tandem with the legislature. In principle, responsibility for both these is shared between the Union court and national courts, as both rest upon judicial interpretation of substantive provisions of Union law. Realisation of these goods lies, however, not in the interpretation itself, but in its subsequent authority, namely the extent to which other actors orient themselves around it. In that regard, the expertise, singularity and supranational qualities of the central Union courts give their judgments an authority over the substantive content of Union law, which appears unmatched by any national court. There is, finally, a dispersion of responsibilities for provision of the final good, dispute resolution. In direct actions brought before the central Union courts against either Union Institutions or Member States, the former have exclusive responsibility. By contrast, national courts have exclusive responsibility in those cases brought before them where there is no reference to the Court of Justice. In instances where a reference is made, responsibility is shared. Judgments

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<sup>94</sup> Most recently, Advocate General Poirares Maduro in Case C-327/02 *Panayotova v Minister voor Vreemdelingenzaken en Integratie*, Opinion of 19 February 2004.

<sup>95</sup> The Court of Justice claims a monopoly on determining the limits of the Union legal order, and, *a fortiori*, on what counts as Union law Opinion 1/91

<sup>96</sup> Case 314/85 *Firma Fotofrost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>97</sup> It is, of course, possible for national courts to review national measures implementing Union law against Union principles. There are very few instances of this occurring, however.

of the Court of Justice bind national courts, but it is local judges who frame the factual and legal context, and have final responsibility for adjudication between the parties.<sup>98</sup>

This is a heavy concentration of responsibility in two lightly staffed institutions. The justification given that the autonomy of the legal order, the good that goes to the existence and qualities of Union law, can only be safeguarded through centralized structures.<sup>99</sup> In its submission to the IGC to the Treaty of Amsterdam, the Court stated:

‘ it (the preliminary ruling system) plays a fundamental role in ensuring the law established by the Treaties retains its Community character with a view to guaranteeing that the law has the same effect in all circumstances in all the Member States of the European Union.’<sup>100</sup>

Autonomy of the Community legal order requires, it appears, all Union law to be given identical effect across the Union in all circumstances. This strong notion of uniformity requires detailed micro-management by a single judicial authority. In its submissions to the IGC preceding the Treaty of Nice, the Court stated:

‘ ANY REORGANIZATION OF THE PRELIMINARY RULING PROCEDURE ON A NATIONAL OR REGIONAL BASIS ... INVOLVES A SERIOUS RISK OF SHATTERING THE UNITY OF COMMUNITY LAW, WHICH CONSTITUTES ONE OF THE CORNERSTONES OF THE UNION ... JURISDICTION TO DETERMINE THE FINAL AND BINDING INTERPRETATION OF A COMMUNITY RULE, AS WELL AS THE VALIDITY OF THAT RULE, SHOULD THEREFORE BE VESTED IN A SINGLE COURT COVERING THE WHOLE OF THE UNION’.<sup>101</sup>

The difficulty is that this is both unrealistic and unrealisable. Unity of interpretation does not mean that the highest court should provide rulings on every provision. Within most

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<sup>98</sup> Case C-300/01 *Re Salzmann* [2003] ECR I-4899.

<sup>99</sup> This argument lies at the heart of the consistent refusal by the Community courts to countenance any decentralization of judicial duties, be this through the establishment of new regional courts or the devolution of responsibilities onto national courts. Court of First Instance, ‘Reflections on the Future Development of the Community Judicial System’ (1991) 16 *ELRev* 175. *Report of the Court of Justice on certain aspects of the application of the Treaty on European Union* (1995, Luxembourg); *Report of the Court of First Instance on certain aspects of the application of the Treaty on European Union* (1995, Luxembourg); *The Future of the Judicial System of the European Union* (1999, Luxembourg).

<sup>100</sup> *Report of the Court of Justice on certain aspects of the application of the Treaty on European Union* (1995, Luxembourg) point 11.

national legal systems, higher national courts, with far more wide-ranging jurisdictions, guarantee the unity and ordered development of their legal systems through setting out a number of steering judgments each year, which define the hallmarks of that legal order and guide other actors in how to apply the law. The British House of Lords, thus, gave 72 judgments in 2002,<sup>102</sup> the French Conseil Constitutionnel 28 substantive judgments in 2003,<sup>103</sup> and the Italian Constitutional Court 51 judgments in 2003.<sup>104</sup> The European Court of Justice, thus, overstates, what is required of a higher court to secure the autonomy of a legal order. It also raises false phantoms of non-compliance to justify its jurisdiction to secure ‘uniformity of application’. The detailed studies of Austria, Spain and the United Kingdom suggest that there is already a substantial unity of application of EC law.<sup>105</sup> It appears also that, in many areas, national courts require relatively few cases from the Court to be able to apply EC law effectively. The TUPE Directive, the Directive on Protection of Employees in the Case of Transfer of Undertakings is a case in point.<sup>106</sup> A relatively complex piece of legislation, the Directive has only been subject to 24 judgments by the Court of Justice since 1990, less than 2 per year. It is, however, one of the most frequently and successfully applied pieces of legislation applied before British courts. In the decade 1988-1998, there were 58 reported cases. Only one was referred, but employees successfully claimed their rights in 57.1% of cases, and there were only 4 cases, which, by any measure, involved narrow or restrictive interpretations.<sup>107</sup>

There are, finally, no centralized procedures available to the Union courts to sanction deviance by local judiciaries or monitor application, even if problems did arise. These are controlled either through national procedures of appeal or through the new action for damages, which individuals may bring against the State where national courts have manifestly misapplied EC law.<sup>108</sup> One has a unique system of control within EC law where higher national courts control the rulings of lower courts through appeal procedures, but lower courts or independent bodies control the rulings of the latter through the possibility of independent actions for damages. It is only where there is a systematic rejection of Union law by a national judiciary – an unprecedented occurrence of seismic proportions – that a problem with the unity of application of Union law occurs.

The balance and centre of gravity of these structures generated by this false reasoning has rendered it impossible for the Union judiciary to realise any of the goods entrusted to

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<sup>101</sup> *The Future of the Judicial System of the European Union* (1999, Luxembourg) 28.

<sup>102</sup> *Judicial Statistics 2002* (2003, Department of Constitutional Affairs, London) Table 1.4.

<sup>103</sup> <http://www.conseil-constitutionnel.fr/tableau/tab03.htm> <accessed 10 June 2004>

<sup>104</sup> <http://www.cortecostituzionale.it/ita/attivitaacorte/novita/novitaold.asp> <accessed 10 June 2004>

<sup>105</sup> *Supra* n 36.

<sup>106</sup> Directive 77/187/EEC, OJ 1977, L 61/26.

<sup>107</sup> D. Chalmers, *supra* n. 39, 180 & 198.

<sup>108</sup> Case C-224/01 *Köbler v Austria*, Judgment of 30 September 2003.



them by the Constitutional Treaty, notwithstanding the qualities and expertise of the personalities involved.

**(i) Legal Certainty and Legal Autonomy.** The utility of the Court is measured in part by its legal coverage. If only a fraction of Union law is subject to extensive case law, the judicial contribution to legal certainty is marginal. The Court's utility will also be judged by the extent to which it enables parties to order their practical everyday lives. Significant case law is unhelpful if it does not provide sufficient detail or clarity. The challenges facing the judiciary are, therefore, to develop a corpus of doctrine based upon universality, clarity and detail.

The two Community courts gave 800 judgments in 2003. Excessive case law concentrated in narrow areas has affected the quality of the law in these areas. Attention to local context becomes fore-grounded at the expense of general principle,<sup>109</sup> as parties seek ever more refinements germane to their particular situation. Areas dominated by high litigation before the Union courts are consequently characterized by case law which is highly contradictory,<sup>110</sup> extremely intricate and detailed,<sup>111</sup> or does not appear to be wise to its wider implications.<sup>112</sup> This concentration of resources leads also to a weakening of the judicial contribution to legal certainty in other areas. The backlog can lead to national courts not referring cases, which would establish important new general principles or orient activities in areas characterised by high uncertainty. Alternately, even where these are referred, they can be stuck in the docket behind other less ground-breaking litigation. The recent *RTL* judgment of the Court is an example.<sup>113</sup> The judgment was the most important yet given by the Court of Justice on Directive 89/552/EC, the Broadcasting Directive, as it concerned the amount of advertising that could be brought on television. It also contained the most detailed examination of the principle of freedom of expression given by the Court, and the first explicit endorsement of the Charter by the Court. It was, however, over 2 years on the Court's docket before it was heard.

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<sup>109</sup> To be sure, some senior courts in some jurisdictions give many more, but the center of gravity of these is dispute settlement with legal certainty being provided by detailed codes, whilst the center of gravity of the Union courts is concerned with visioning the legal order, setting out its general principles and overall orientation.

<sup>110</sup> The case law on Article 49 EC and the regulation of gambling has changed with just about every judgment. For the most recent statement see case C-243/01 *Gambelli*, Judgment of 23 November 2003.

<sup>111</sup> The case law on what constitutes discriminatory internal taxation for the purposes of Article 90 EC

<sup>112</sup> The recent case of Case C-9/02 *de Lasterie*, Judgment of 11 March 2004 is widely seen as having destroyed Member States' capacity to levy corporate taxation, as it renders almost all controls on tax avoidance through transfer of fiscal residence incompatible with Article 43 EC. It was given by a Chamber of 3.

<sup>113</sup> Case C-245/01 *RTL v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, Judgment of 23 October 2003.

As the central problem is the quality of the docket, increasing output exacerbates matters and generates further side-effects, which undermine legal certainty. The most notable is the challenge of internal coordination posed by the growth of Chambers within the Union courts. In 2003, Chambers of 5 accounted for 55.03% of all cases given by the Court, and Chambers of 3 accounted for 20.6%.<sup>114</sup> With so many different bodies giving so many judgments of equal authority, there is a danger of the Court increasingly giving conflicting signals. A premonition of this has occurred in recent months has come over the relative weight to be given to the Charter on Fundamental Rights and the European Convention in Human Rights in the fundamental rights law of the Court. The Court of Justice has given predominant weight to the ECHR in the case law, observing that it has ‘special significance’ as a source of law here.<sup>115</sup> The CFI, the predominant Community administrative court, has moved to a position where it increasingly views the Charter as the predominant source of law in this field.<sup>116</sup>

**(ii) Protection of the Republic Constitution** Whilst the Union courts have many of the formal powers of constitutional courts, they do not have the broader substantive authority vis-à-vis administrative institutions or legitimacy of the latter. Whilst they have shown themselves equipped to engage in the micro-managerial tasks of administrative review, they have not engaged significantly in legislative review, and it is not clear that they have the wider authority to do so. For legislative review involves courts second-guessing measures taken by representative institutions affecting a wider array of actors, and draws courts into legislative politics by requiring them to take politically salient, comprehensive visions about the nature of the polity. If this is a politically challenging task for domestic constitutional courts, the failure of the Union Courts to engage in legislative review suggests that they view it as politically suicidal for a supranational judiciary. The problem is particularly acute with regard to the control of concentration of centralized power. To date, there is not one example of the Court striking down a measure because it violates the subsidiarity principle.<sup>117</sup> More generally, it is not clear that the Union courts have even the formal tools necessary to achieve this should they wish to be more politically courageous. For EU administrative power is increasingly fungible. Institutional innovation has resulted in a variety of procedures and institutional alternatives being available to achieve the same goal, with different procedures being increasingly substitutable for each other. Some of these operate within the formal

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<sup>114</sup> *Statistics of the Judicial Activity of the Court of Justice 2003*, 6. <http://www.curia.eu.int/en/instit/presentationfr/index.htm>

<sup>115</sup> Case C-94/00 *Roquette v Commission* [2002] ECR I-9011.

<sup>116</sup> Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Phillip Morris et al v Commission* [2003] ECR II-1.

<sup>117</sup> eg Case C-103/01 *Germany v Commission* [2003] ECR I-5369.

jurisdiction of Community courts. Others, such as the Open Method of Coordination, do not.<sup>118</sup> A restriction on one procedure merely leads to national governments using means that are less susceptible to judicial review and usually less transparent. In the field of migration, one finds, therefore, a Directive governing the residence and socio-economic rights of long-term resident non EU-nationals,<sup>119</sup> whilst an OMC governs their integration into their respective societies.<sup>120</sup>

**(iii) Judicial Bias and Fundamental Values.** The Community Courts' capacity to anchor themselves as a repository of fundamental values is hindered by a problem of structural bias generated by the dual dynamics which generate fundamental rights within Union law. These dynamics result in the Courts' jurisprudence being very thick in some areas, but much thinner in others.

Not having a general human rights competence,<sup>121</sup> the Court of Justice has a very limited influence over the development and protection of first generation civil liberties. These are not free-standing rights, but can only be invoked as a basis for judicial review of acts of the EU Institutions or member State actions which fall within the field of EC law.<sup>122</sup> In practice, these are rarely invoked against member States, and so the central arena of application for these values has been as grounds of judicial review in direct actions against EU Institutions, with litigation usually being brought by an EU institution or a national government. As administrative actors, neither has a strong interest in systematically arguing for an expansion of values, which invariably restrict administrative action. Challenging cases central to the development of civil liberties are rarely brought before the Community courts, and when they are, the high number of administrative interests pleading the case – be it national governments, the Council or the Commission – provide a prevailing culture of respect for administrative management which makes it difficult for the Court to develop these liberties in an aggressive manner. The one exception to this are rights of defence and due process, where a jurisprudence has developed through large undertakings challenging Commission fines or decisions addressed to them. The latter have found that arguments on procedure rather than substance have offered the best chance of overturning a decision, and so have repeatedly hammered this line of attack. With this exception, the case law is correspondingly weak. In recent times, a further constraint has been the increased authority

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<sup>118</sup> G. de Búrca, 'The constitutional challenge of new governance in the European Union' (2003) 28 *ELRev* 814.

<sup>119</sup> Directive 2003/109/EC concerning the status of third country nationals who are long term residents, OJ 2004, L 16/44.

<sup>120</sup> EC Commission, *Open Method of Coordination for the Community Immigration Policy*, COM (2001) 387.

<sup>121</sup> *Opinion 2/94* [1996] ECR I-1759.

granted to the European Convention on Human Rights by the Charter, through its requirement that nothing in it is to restrict or adversely affect the content of the rights in the Convention.<sup>123</sup> The consequence has been a reticence in the Court's case law here. Its recent judgments do not articulate new principles or values, but are characterised instead by a 'cut-out and paste' reliance on the case law of the European Court on Human Rights.<sup>124</sup> If the latter takes an expansive view of a particular liberty, this will be implemented in Union law. If it takes a restrictive approach, it will still be implemented into Union law.

The institutional context for the development of 'second-generation' rights, socio-economic rights, is very different. In these fields, the Court has been granted full powers to develop and expand these rights, as these form substantive provisions of EC law, either by virtue of the economic freedoms in the EC Treaty or by virtue of EC secondary legislation. These are second or third generation areas of fundamental rights, so are almost untrammelled by case law from either national constitutional courts or international human rights tribunals. Even more fundamentally, the structure of the litigation before the Courts pushes for an expansive interpretation. The delays and contingencies of litigation before the central Courts has resulted in two forms of litigant dominating their docket: those interested in judicial politics, whose central interest in litigation is legal reform, and those interested in regulatory or fiscal politics, large undertakings in enduring relations regulatory or fiscal authorities, who use litigation not for compensation but to reconfigure the terms of the relationship.<sup>125</sup> Litigation of fundamental socio-economic rights is used to overturn national legal, fiscal and regulatory regimes by discontented constituencies, who are, otherwise, too isolated to mobilise change domestically. The challenges are sustained and one-way, with only consequent domestic crises precipitating any kind of occasional contrary pressure. If the Court accedes to only 10% of these challenges (and litigation is a 50:50 business) the result is an expansive and highly ideologised case law on socio-economic rights. Trapped in the confines of the litigation, it is difficult for the Court to give much thought to the wider distributive consequences<sup>126</sup> or local cultural sensitivities beyond those held by the parties to

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<sup>122</sup> Case C-260/89 *ERT v DEP* [1991] ECR I-2925. This was changed by the Constitutional Treaty to national measures implementing Union law. Article II-111(1) CT.

<sup>123</sup> Now Article II-113 CT.

<sup>124</sup> Eg Case C-109/01 *Akrich v Home Office*, Judgment of 23 September 2003; Case C-245/01 *RTL v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, Judgment of 23 October 2003; Case C-117/01 *KB v National Health Service Pensions Agency*, Judgment of 7 January 2004; Case C-71/02 *Karner v Troostwijk*, Judgment of 25 March 2004.

<sup>125</sup> In the period 1994-1998, these categories accounted for 66.35% of total references from the United Kingdom in the period 1994-1998. D. Chalmers, 'The Much Ado About Judicial Politics', *Harvard Jean Monnet Working Paper No 1/2000*, 34.

<sup>126</sup> Most Member States simply had no infrastructure to implement *Geraets-Smits*, for example. Following a Commission Report on this in 2002, a High Level Process Group was established to think how to take matters forward. EC Commission, *High level process of reflection on patient and health care developments in the European Union*, Final Reflections of 9 December 2003, HLPR/2003/16.

the dispute. The consequences are evident in the Court's case law. There is a high level of welfarist interventionism in its equal opportunities case law, so that its sex discrimination case law has been at the vanguard of women's working rights in Europe. By contrast, its case law on economic freedoms sit at the other ideological pole, anchored around expansive principles of market liberalisation and deregulation. In some areas, its case law swings between the two. It has, therefore, recast Article 49 EC, the market liberalisation provision on freedom to provide services, in its judgments on the right to receive public health care in other Member States, into the central vehicle for the development of substantive social rights in Europe, so that it grants all EU citizens a right to free public health care within a reasonable period.<sup>127</sup>

The unbalanced institutional has resulted in the Court of Justice being a giant in the development of socio-economic rights and a pigmy in the development of civil rights. Nothing is more emblematic of the uneven and unstructured manner in which questions of fundamental values come before the Court than their treatment by the Chamber system. By nature of fundamental import, one would thought that central questions would be heard by a Grand Chamber of 11 judges at least. The current practice is that it will be heard by whatever is available. The recent *RTL* judgment gave the most extensive treatment in the Court's history of the principle of freedom of expression. It was given by a Chamber of three judges.<sup>128</sup> Only one Member State, the United Kingdom, made submissions. It is not simply unsatisfactory for such fundamental matters to be treated so trivially. There is also an absence of guarantees against rogue judges, who want to leave their mark on history, and have considerable power to do that in a Chambers of three.

**(iv) Asymmetric Dispute Resolution:** The difficulties posed for dispute resolution by the current centralization of proceedings are well-known. It favours parties, typically better-resourced ones, who are best able to exploit or withstand delay. The 'discussion circle' was well aware of this. In its discussions over enforcement actions against Member State, it put forward a suggestion, which was not adopted, therefore, that the Commission should always be able to bring an action for damages at the same time as it starts an enforcement action against a national government.<sup>129</sup>

## VI. Constitutional Reconstruction of Judicial Capacity

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<sup>127</sup> An individual has a right to receive medical services in another member State paid for by their home State where that State can provide those services within a reasonable period of time. Case C-157/99 *Geraets-Smits* [2001] ECR I-5473.

<sup>128</sup> Case C-245/01 *RTL v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, Judgment of 23 October 2003.

<sup>129</sup> *Final Report of the discussion circle on the Court of Justice*, CONV 636/03, para 28.

### **(i) The Doomed Strategy of Management of Demand**

The Constitutional Treaty did not address the question of the judicial architecture of the Union, because it was assumed that both diagnosis and remedy for its ills had been provided by the Single European Act and the Treaty of Nice. The diagnosis in both cases was that the central problem was the length of the docket.<sup>130</sup> This was to be remedied through the development and reinforcement of the central Union courts. There has first, therefore, been augmentation of capacity through the creation of new Community courts and judicial panels. The Single European Act thus provided for the creation of the Court of First Instance to hear direct actions brought against the EC Institutions by private parties.<sup>131</sup> More recently, the Treaty of Nice provides for the creation of judicial panels to hear at first instance certain classes of action.<sup>132</sup> Secondly, existing judicial structures were to be expanded, most noticeably the competencies and size of the Court of First Instance. From a very limited jurisdiction in a number of specialised areas in 1989 (antidumping, employee cases, competition, coal and steel), there has been a process of accretion, whereby it now has the possibility to hear all kinds of direct action against the EU Institutions<sup>133</sup> and certain classes of preliminary reference.<sup>134</sup> The Treaty of Nice also provided for an increase in personnel to cope with this expansion of competencies, so that the requirement of one judge from each Member State is not a ceiling (as is the case with the Court of Justice) but a minimum. Finally, there has been an attempt to make the internal procedures of the Courts more efficient. This has happened primarily through the expansion of the Chamber system. For the first 20 years of the Court's existence, these would only be used for staff cases or preliminary references of a technical nature. Since 1979, there has been a steady expansion so that, since the entry into force of the Treaty of Nice, almost all cases are heard by either Chambers of 3

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<sup>130</sup> There were 974 cases pending for the Court of Justice in 2003, an increase of 67 on 2002. Supra n. 114, 3. The position is even more dramatic for the Court of First Instance, which completed 333 cases, and has 999 pending. *Statistics of the Judicial Activity of the Court of First Instance 2003*, 3. <http://www.curia.eu.int/en/instit/presentationfr/index.htm>

<sup>131</sup> Article 11 SEA.

<sup>132</sup> Article 225a EC. The Treaty of Nice envisaged that disputes between EU Institutions and their employees would be heard by these panels. To date, there has, however been a formal proposal for only one type of judicial panel, namely one to hear disputes concerning the proposed Community patent. EC Commission, Proposal for a Council Decision Establishing the Community Patent Court and Concerning Appeals Before the Court of First Instance, COM (2003) 828.

<sup>133</sup> The Statute of the Court of Justice was amended in April 2004 so that the CFI hears, in the first instance, all actions against the Commission other than when the latter acts or fails to act under the Enhanced Cooperation provision in Article 11a EC. By contrast, the CFI cannot hear actions brought against the Parliament or Council except in the field of State aids, common commercial policy and where these delegate powers to the Commission, Article 51, Protocol on the Statute of the Court of Justice, OJ 2001, C 80/1 as amended, OJ 2003, L 188/1 and OJ 2004, L 132/1 & 5.

<sup>134</sup> Article 225(3) EC.

or 5 judges in both courts.<sup>135</sup> Accompanying this, there has been a drive to speed up proceedings with hearing times to be halved and certain rights of audience to be curtailed.<sup>136</sup>

Underpinning this strategy is an assumption that there is a finite demand for a particular number of judgments dependent simply on the number of Member States within the Union and the fields of competence of the Union. If the Union courts can raise their game to provide these judgments and ensure that they are of a reasonable quality, the problem disappears. The difficulty with this argument is one faced by transport economists some time ago, who found that if you created a new road to accommodate existing traffic, an effect was to generate new traffic. There is evidence that judgments of the Court have the same effect. Insofar as they open new avenues of litigation or create new ambiguities, they simply generate demand for more judgments. The areas of greatest demand for references are precisely those areas where the Court has given the greatest number of judgments. One finds, furthermore, no decline in the number of cases coming before the Court on any of the central legal provisions litigated. Instead, as the earlier analysis showed, litigation has become trapped around repeated re-interpretations of a very limited number of provisions

A further difficulty with treating the problem as a quantitative one is that it exacerbates the structural imbalances within the docket. The reference procedure unduly attracts a particular class of litigant, namely those who want to enlarge EU legal norms at the expense of domestic law. If the Court increases the output of cases, assuming it gives the same proportion of favourable judgment, it raises its profile as an ally of these constituencies. For it will simply be giving more judgments which require both domestic readjustment and are domestically unpopular. With the expansion of the Court's jurisdiction to politically more mainstream and sensitive areas such as criminal law and asylum, requiring it to place an increasingly expansive role is likely to lead to a full-blown legitimacy crisis. It would be placed in a situation where it would regularly have to address headline issues in cases predominantly brought by 'outsider elites', who would be asking it to make decisions which were often both controversial, domestically, and involved significant political and economic costs.

## **(ii) Reorganisation of the Judiciary Around a Community of Constitutional Principle**

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<sup>135</sup> The Court of Justice may sit as a Grand Chamber of 13 judges if a Member State or EU Institution so requests. It can sit as a full court in cases of 'exceptional importance' or if it is considering the dismissal of an official for breach of their duties under the Treaty. Article 16, Protocol on the Statute of the Court of Justice. There is more flexibility in the case of the CFI. It can sit in plenary session if it considers that the importance of the case or special circumstances warrant it, Article 14, Rules of the Procedure of the Court of First Instance, OJ 1991, L 131/1 as last amended, OJ 2004, L 127/108.

<sup>136</sup> Rules of Procedure of the Court of Justice, OJ 1991, L 196/7 as last amended, OJ 2004, L 127/1.

Although the Constitutional Treaty does not explicitly attempt any reorganization of judicial responsibilities, it leaves open the possibility of reorganization of its responsibilities through reconstruction of judicial practice. In particular, it imposes a number of organizing norms on how judges are to behave, which could be interpreted to reorient the judiciary of the Union around a more stable, principled and organizationally efficient allocation of responsibilities.

First, both the central Union courts and national courts are to act constitutionally. Article 29(1) CT places certain responsibilities exclusively in the lap of the Court of Justice by requiring it to interpret and apply the Constitution. It is responsible for securing the constitutional orientation of the European Union judicial system. It has to ensure that the European Union legal order is provided with those goods traditionally demanded of judiciaries by liberal constitutions. This involves, above all, allocating responsibilities between itself and national courts, within the framework of the preliminary reference procedure, in such a way as to secure the five judicial goods of legal certainty; legal autonomy; development and protection of fundamental rights; protection of the republican constitution and dispute resolution.

Article I-29(2)CT imposes slightly different duties on national courts. Member States are to supply rights of appeal sufficient to secure effective legal protection in the field of Union law. This suggests they are not responsible for overall orientation of the Constitutional Treaty in the same way as the Court of Justice. Instead, it implies a duty to operate with the framework set by the Court of Justice to deliver these judicial goods to the citizens of the European Union. The duty is not an unqualified one, however. It does not impose a duty to follow in an unqualified manner the rulings of the Court of Justice. It imposes rather a duty on national courts to secure effective judicial protection of individuals' legal rights. If procedures are being developed by the Court of Justice which clearly violate this by manifestly failing to deliver any of the five goods set out above, it is open to national courts as 'guardians of the guardian' of these goods to challenge this.

Secondly, the Constitutional Treaty imposes norms of constitutional pluralism. It does not frame the operation of all law and politics within the European Union like State constitutions do with national settlements. Instead, it sits alongside and operates alongside national constitutions, whose constitutional authority is recognized by it. The relationship of formal co-existence is set out in Article I-6 CT:

'The Constitution, and law adopted by the Union's Institutions in exercising competencies conferred upon it, shall have primacy over the law of the Member States.'

Constitutional pluralism is not merely a restatement of the presence of more than one constitutional order within the same territory. It also allocates normative authority between these orders. This allocation of normative authority is determined, in part, by the formal limits of the Constitutional Treaty, but the breadth of these is so



wide that they rarely act as a barrier to action.<sup>137</sup> Instead, a more substantive principle of allocation is done by the principle of subsidiarity.<sup>138</sup> Union Institutions are only to act, and their measures only to have normative precedence over national law, where the objectives cannot be sufficiently achieved by national institutions, and therefore by reason of the scale or effects the action is better taken at Union level.<sup>139</sup> Subsidiarity suggests that constitutional pluralism does not merely divide authority between constitutional orders. It also permeates each constitutional order in such a way as to make the institutional settlement of the Union, at least, responsive at least to the comparative efficiency claims of national institutions. Within the context of judicial organization within Union law, this would mean that central Union courts should only take on responsibilities for securing judicial goods where there is cannot be realized by national courts and there is clearly added value in central Union court judgments.

Thirdly, the Constitutional Treaty sets out obligations of constitutional tolerance. These require national constitutional settlements and the Constitutional Treaty to accept the precepts of the other.<sup>140</sup> One dimension of this is provided in Article II-111(2) CT:

‘The provisions of the Charter are addressed to the Institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles, and promote the application thereof in accordance with their respective powers ...’

National constitutions must see themselves as part of a wider European constitutional settlement, which requires them to accept the central goals of the Constitutional Treaty within their settlements and to interpret national constitutional provisions and values in the light of wider pan-European principles. A counter obligation exists in regard to Union visions of the Good Life in Article II-112(4) CT,

‘Insofar as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.’

The Europe of the Constitutional Treaty, therefore, sits within rather than over a Europe of national constitutional settlements. This involves accepting the cardinality and integrity of national constitutional choices, even if they are choices that would not be made by other national constitutional settlements or by Constitutional Treaty actors. Any decision will sit at

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<sup>137</sup> eg The Flexibility provision which allows legislation wherever the Council achieves it necessary to achieve the Union objectives and other legislative procedures do not provide the respective powers. Article I-18 CT.

<sup>138</sup> Whilst the principle has not worked well as a principle of judicial review, the obligation on all legislative institutions to review proposals and amendments in the light of this principle has had some effect, Protocol to the EC Treaty on the Application of the Principles of Subsidiarity and Proportionality, Article 9. 787 legislative measures were proposed in 1990. The figures were still high after completion of the Single European Market, being 667 in 1993 and 622 in 1995. The figures for 2002 and 2003 have been 316 and 371 respectively. EC Commission, *Better Lawmaking 2003*, COM (2003) 770, 31.

<sup>139</sup> Now Article I-11 CT

the axis of multiple constitutional orders, and must accommodate, therefore, the demands of both the Constitutional Treaty and those of the national constitutional settlements, with each being weighed against the other. This has implications for the pursuit of judicial goods within European Union law. As a constitutional good of the Constitutional Treaty, it has a moral weight in this exercise, but one which must be weighed against competing goods of national constitutional settlements, which might make different institutional choices about how to realize certain goods or may have different visions of the Good Life.

Taken together, these three principles require a reallocation of responsibilities between the Court of Justice and national court in such a way that responsibilities only be transferred to the Court where it can shown be it has a clear comparative advantage in securing within Union law the five judicial goods outlined. Even where this occurs, moreover, this transfer must not be done in a way where it compromises irreducibly national constitutional values or choices.

**(a) Legal Certainty, Legal Autonomy and Management of the Docket:** The Court of Justice has a strong comparative advantage over the supply of both legal certainty and legal autonomy. It alone has the authority to set out how the Union legal system works and to resolve disputes about the meaning of particular provisions. Legal certainty is, however, currently compromised by the central Courts deciding too many cases in too detailed a manner in too concentrated fields of EC law. With regard to the autonomy of Union law, after 47 years the Union legal system is a mature legal system whose central operational principles and legal traits are well-established. These should not need intensive revisiting, and, indeed, there is a danger that the latter may generate instability and prove counterproductive.

The mission is a clear one. It is do what many higher courts, whose central mission is not dispute resolution, do: to provide judgments that set out clear principles rather than excessive detail, and which govern a wide range of activities. There is a quantitative dimension to this. The central Union Courts should decide less. There is also a qualitative dimension. They should seek to have an even pattern of judgments across a wide spectrum of activities.

There is, thus, a strong case for filtering references from all courts against whose decision there is the possibility of appeal within the national legal system. There would seem to be only two circumstances where a reference is justified. The first is where the case raises both important and novel points of Union law. This is a cumulative test in that there is little sense the Court revisiting matters just because a national court thinks it important. By contrast, the Court should not be required to offer views on arcane points of law simply because these have not been raised before. The combined requirements of novelty and importance would lead to the Court of Justice retaining control over a broad umbrella of principles fundamental to the operation of the Union legal system. The second circumstance justifying referral is where the national court, for whatever reason, is dissatisfied with the Court's jurisprudence. This is important for the development of Union law, and to ensure that it retains its dynamism. The national court would be required to explain its dissatisfaction in its reference. It is unclear that there are any other circumstances, which would justify referral. The fact a matter is complex or uncertain is insufficient

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<sup>140</sup> J. Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg' 54, 68 in K. Nicolaidis & R. Howse, *The Federal Vision* (2001, OUP).

for taking it out of the hands of the national court. It is unclear these are less skilled to deal with such matters than the central Union courts, particularly it is often the surrounding factual and national legal context, which introduces uncertainty or complexity. Furthermore,

Prior to the Treaty of Nice, the Court did not dismiss the introduction of some filtering mechanism. It has been unreceptive to concrete suggestions to this effect, however,<sup>141</sup> and has raised a number of reservations, most notably that it would introduce a hierarchical relationship between national courts and the European Court of Justice and might lead to insufficient references to maintain the unity of the Union legal order.<sup>142</sup> Neither of these arguments are persuasive. There is little prospect of insufficient references, and, even if this were the case, the criteria could be relaxed to mitigate this. The difficulties posed by the Court questioning a national court's judgment in sending a reference to it could be avoided through a number of mechanisms. A collaborative way, for example, to establish such a mechanism would be for a judge from the Court of Justice and a senior judge from the national jurisdiction to consider together whether a reference made by a national court is appropriate for a ruling by the Court of Justice.

As the Constitutional Treaty requires national courts against whose decisions there is no judicial remedy to refer any point of EU law necessary to decide the dispute it might be argued that the filtering mechanism cannot be applied to these courts. There are strong policy grounds for this not to be so. Senior appellate courts account for a significant proportion of all references, 28.55% up to the end of 2003 (1,440/5,044).<sup>143</sup> A dual test, moreover, runs the risk of abuses in the litigation process, with parties appealing up the domestic chain simply in order to get a reference. Furthermore, the practice of most national courts is increasingly to refer primarily only in important and novel cases. Between 1999 and 2002, Commission records show that German,<sup>144</sup> Dutch,<sup>145</sup> French,<sup>146</sup> Swedish,<sup>147</sup> Spanish,<sup>148</sup> Portuguese,<sup>149</sup> Finnish,<sup>150</sup> Austrian<sup>151</sup> and Italian<sup>152</sup> courts of last resort failed to refer questions of EC law necessary to decide a dispute. Even a brief perusal of the cases suggest this was not some systematic rejection of the Court of Justice's authority. The

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<sup>141</sup> Case C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495, Opinion of Advocate General Jacobs; *Working Party Report on the Future of the European Communities Court System* (2000, EC Commission, Brussels).

<sup>142</sup> *The Future of the Judicial System of the European Union* (1999, Luxembourg) 25-26.

<sup>143</sup> *Supra* n 114, 19.

<sup>144</sup> Judgment of the Bundesfinanzhof of 21 March 2002, Az VII R 35/01, RIW 2002, p 644; Judgment of the Bundesfinanzhof of 15 May 2002, Az I R 40/01, Der Betrieb 2002, p 1743; Judgment of the Bundesgerichtshof of 11 June 2002, I ZR 273/99 (Sportlernahrung) and I ZR 34/01 (Muskelaufbaupräparate).

<sup>145</sup> RTL/Veronica, Holland Media Group & CLT-UFA SA/Commissariaat voor de Media (2002) Rechtspraak Bestuursrecht 5; Judgment of Hoge Raad of 25 July 2000, Belissingen in belastingzaken, 2000, 307; Judgment of Benelux Gerichtshof of 24 June 2002.

<sup>146</sup> Conseil d'Etat, Judgment of 28 July 2000 Schering-Plough Application No 205710; Lilia Milaja, Judgment of the Cour administrative d'appel de Nancy, Droit Administratif 2000 No. 208

<sup>147</sup> Regeringsrätten, 10 April 2000, RÅ 1999-630

<sup>148</sup> *Gabai Oil v Petronor*, Judgment of Tribunal Supremo of 15 March 2001; Judgment of the Tribunal Supremo of 7 March 2002 (RJA 2002/3525. See also the Judgments of the Tribunal Supremo of 27 March 2002, RJA 2002/3616, 15 July 2002 (RJA 2002/7724) and 16 November 2002 (La Ley 28-I-2003, marginal 599).

<sup>149</sup> Judgment of the Supremo Tribunal Administrativo of 14 October 1999, Case 31355.

<sup>150</sup> Judgment of the Supreme Administrative Court of 20 March 2002.

<sup>151</sup> Case C-224/01 *Köbler v Austria*, Judgment of 30 September 2003.

<sup>152</sup> *Foro Italiano* (2002) I, Col 3090

overwhelming majority of cases involved significant commercial interests where speedy resolution and legal certainty were considered to be particularly important. If a matter was not general and important, national courts of last resort do not refer.

**(b) The Judicial Renegotiation of Fundamental Values:** The current system is beset by two difficulties. Structural bias within the Court's docket has led to an uneven development of fundamental values at a Union level and conflicts between Union and national constitutional values are currently not structured around any principle of constitutional tolerance.

**(aa) Remedying Structural bias in the Development of Fundamental Values.** The differentiated development in fundamental values occurs because of the sharp dichotomy drawn in EU law in the institutional context and the structure of the docket that has been provided for civil liberties and socio-economic rights respectively. This dichotomy has led to the former being narrowly drawn with the Court of Justice following the rulings of other bodies, whilst it has been relatively pioneering with regard to the latter. A recalibration needs to occur in both types of litigation, which provides for more convergent and balanced pressures to bear upon the Court to consider more frequently opposing demands that argue for the direction of particular rights to be moved in a different way.

The imbalance with regard to civil liberties stems from the predominance of powerful administrative institutions in the process. Redress and balance can be provided through granting access to the Court to a powerful, liberal-minded actor, who is independent of national and administrative interests. The most appropriate body would probably be the EU Network of Independent Experts on Fundamental Rights. Established in 2002 by the Commission to provide Annual Reports and specific Reports on Fundamental Rights and to help the Commission develop a human rights policy, the Network is, nonetheless, a collection of independent university professors, all of whom have an expertise in fundamental rights.<sup>153</sup> The Commission could commit itself to receive 25 opinions a year on whether particular EU measures violated fundamental rights. If any of these claimed this to be the case, the Commission could commit itself to seek judicial review of the measure.<sup>154</sup> In this and any other case where a point of fundamental rights is discussed, there could be a commitment to allow the Network to submit a legal opinion as *amicus curiae*. In this manner, not only would a large number of cases reach the Court where the fundamental right point was acting as both the centre point and motivation for litigation, and there would always be an actor present in all fundamental rights case arguing a liberal interpretation of individual fundamental rights provisions.

With regard to socio-economic rights, the main vehicle of counter-balance would be national or regional parliaments. These represent the opposing end of the ideological spectrum in that they embody the domestic hegemony being challenged before the Court. To allow them to bring proceedings would secure the institutional position of the Court as an arbitrator between ideological positions rather than its being captured by one. Any such opening would have to prevent abuse by national parliaments and their flooding the Court's docket. One possibility would be to allow, up to twice a year per Member State, parliamentary committees to adopt a legal act

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<sup>153</sup> For further details see [http://www.europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm#](http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#)

<sup>154</sup> To be sure, there could be a conflict of interest where the measure is itself a Commission measure. There could be a parallel commitment on the part of other Institutions to bring an action in that instance.

which challenges some aspect of EU law. A public prosecutor could then challenge this act before a national court who could then refer. If the national court thinks the matter inappropriate for reference, the national legal provision would contain a sunset clause leading it to lapse. The quantitative limit and the screening by a national court would act to prevent abuse and encourage national parliaments to choose their targets carefully. At the same time, the possibility of the Court deciding up to 50 cases a year in this manner would act as a strong counterweight to the current dynamics.

**(bb) Structuring Constitutional Court Relations Around Constitutional Tolerance.** Introduction of the principle of constitutional tolerance into the Union judicial order involves making the relationship between the Court of Justice and national courts more explicitly dialogic, centring this dialogue, above all, around their respective duties in a community of values. This dialogue would require a national court making a reference which touched on a right recognised as fundamental in its constitutional order to send an accompanying opinion to the Court of Justice. This opinion would set out its understanding of the national law on that right, how that national law ‘fits’ with European legal values, and finally how the case should be resolved. The reason for this is that national courts now form part of a broader process in which they are ‘national courts in Europe’, which demands that they explain the relationship between the national value system and this broader community of values. As they are judges, this opinion cannot merely map out the relationship. It must provide a statement of ‘ought’, a set of principled reasons for how the relationship could evolve.

The second part of the dialogue would involve the Court of Justice giving its judgment. It would be required to address explicitly the points raised by the national court, giving reasons for where it agreed or disagreed with them. For, in a community of values whose constituent elements include national values, there is a duty to explain the relationship between the two and how these are incorporated national values into its European value system. Together, the reference and the judgment form opposing parts of a dialectic in which first a frame of ‘national values in Europe’ is provided by a national court, and then one of ‘Europe of national values’ is provided by the Court of Justice. Each incorporates the standpoint of the other into its institutional viewpoint.

The final part of the process would occur where there is still disagreement. The matter would then be passed to the national constitutional court. It would be free to deviate from the ruling of the Union courts, but must explain why its interpretation conforms with broader European values. This dialectic allows national constitutional courts to trump the authority of EU law for a number of reasons. The pragmatic one is that they would have it no other way. Whilst they are receptive to the authority of Union, neither the Spanish, Italian, French nor German Constitutional Courts have ever made a reference to the Court of Justice. This is a strong indication that the central national constitutional courts are willing to accept a European community of values on condition that they provide the ultimate safeguards. Such a position is also integral to a relationship of constitutional tolerance, If it is a choice between a value deemed fundamental on one side and one deemed non-fundamental, on the other, there seems no argument about which to choose. The definition of a ‘national’ value is, in part, that it applies only to that territory and is fundamental to a national political community’s self-recognition. The EU does not collapse, by contrast, because a single market in abortion services does not include Ireland, or laicism is applied in France in breach of the Race Equality Directive. Its values still hold elsewhere in the Union.

European-ness imposes a duty, however to justify such a choice against broader, non-communitarian values. This duty of justification combined with its only being possible for it to be granted by a constitutional court emphasises, however, the exceptionality of the procedure and offers sufficient guarantees against any slippery slope.

**(iii) Protection of the Republican Constitution:** Whilst there seems a consensus within national judiciaries that the central Union Courts retain their monopoly of review of EU legislative and administrative measures,<sup>155</sup> these seem neither to have the authority to engage in legislative review nor the formal tools to address the increasing fungibility of legislation, whereby different legislative routes are used to realize identical policy goals. Controlling the centralisation of power is one of the most challenging tasks facing any judiciary. For it goes not to placing some external constraint on what the administration can do, but calls for a substitution of judgment which goes to both the ends and means of legislation. It is not clear that such a judgment is any easier for a national court. Confined by the territorial vision of the nation-State, it will be difficult for it to judge the effects of the measure in other Member States or the Community interest. The problem is, therefore, one of enlarging judicial capacity by providing with judges sufficient information to be able to make informed decisions. It is also one of enlarging judicial authority, giving them sufficient authority to be able to no-say the legislature. It is finally one of providing formal tools so that there is universal accountability to the judiciary, whatever route the legislative process takes. All these call for judicial coalitions between national courts and the central Union courts, based, once again, upon a constitutional dialectic.

If the validity of a piece of Union legislation is raised before the Court of Justice, the Court should write to all national or supreme courts asking for their opinion on the matter. Following the thresholds set out in the Protocol on the Application of the Principles of Subsidiarity and Proportionality,<sup>156</sup> if courts representing a third of Member States, or a quarter in policing and judicial cooperation in criminal matters, then this should be seen as an extremely strong reason for the Court of Justice to declare the measure invalid. It would, however, be assumed that only exceptional circumstances could justify the Court departing from the views of national courts. Such a process would increase judicial capacity as it would give the Court of Justice a clear, detailed and principled view of how the measure is perceived within the legal orders of the Member States. It would also increase judicial authority. If the Court declared the measure invalid, it could invoke the support of a significant number of national constitutional courts in defence of its position. By contrast, if it declares a measure it can point to the support of the vast majority of the national constitutional courts as a defence against any accusation of bias.

The fungibility of Union legal procedures poses different challenges for national courts. New procedures or policies are brought in to implement soft law with its being unclear where political and legal responsibility resides or which standards of review should be applied. National courts can disapply measures generating externalities for other Member States in ways not permitted by the *Fotofrost* doctrine, under traditional EC law. The compact for national courts is to secure universal and convergent protection. They must accept, as ‘national courts in Europe’, the

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<sup>155</sup> Recent Commission Annual Reports on the Application of EC law have not found one challenge to this principle in recent years.

<sup>156</sup> Paragraph 7.

requirement to secure the protective function of judicial review in a European way. This would involve applying European Union norms of judicial review wherever national processes are affected by some process of Europeanisation, be it through framework laws, soft law, Open Method of Coordination. These all share the same departure point. Europe was a reason for action, which shaped the exercise and pattern of administrative power. The standard for review is set out in Part II of the Constitutional Treaty, of Union Charter of Fundamental Rights and Freedoms. Article II-111(1) CT states that these only states bind Member States whenever they are implementing Union law. The notion of 'Union law' is nowhere defined. A traditional understanding would be the Constitutional Treaty and its secondary legislation. Given what was said, a better understanding might be that of any formal norm adopted within a Union setting – be it soft law, benchmarks, standards, best practice. Even if this were not the case, it would not be impossible for national courts to adopt a 'best practice' of their own where they will adopt parallel standards of reviews over implementation of more diffuse processes of Europeanisation to those they apply to national measures implementing traditional Union legislation.

## VII. Conclusion

The reforms suggested require an appreciation of the current structural weaknesses of the judicial order and significant coordination by the European Union judicial community. The presentations by the Presidents of both the Community courts to the Convention suggest this is not yet present in Luxembourg.<sup>157</sup> One paradox raised by this is that, in a rather patronising manner, one has heard that the Achilles' Heel of the Union legal order is the formalism and limitations of the new Member States' judiciaries. It would be ironic, indeed, if it was the formalism and limitations of Luxembourg that leads to the next institutional crisis in EU law. Another is that given the unprecedented new demands it places on the Union judiciary, it will be ironic if this crisis is prompted by the Constitutional Treaty. For, given the systemic nature, salience and scale of the problem, there is an inevitability that a crisis will arise unless the European Union judicial community reconstructs itself to deliver its constitutional responsibilities more effectively, equitably and efficiently. If it fails to do this, there is a danger that it will be other non-judicial actors who will seek to resolve the institutional crisis for it, and the changes proposed by then may be the anti-thesis of constitutionalism in that they are likely to be reactive, ad hoc and dominated by arguments far removed from legal reason.

\* London School of Economics and Political Science. The author is grateful for advice given on this piece by Karen Alter and José de Areilza. All faults are the author's.

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<sup>157</sup> Oral presentation by Gil Carlos Rodriguez Iglesias to the 'discussion circle' on the Court of Justice, CONV 572/03; Oral presentation by Bo Vesterdorf to the 'discussion circle' on the Court of Justice, CONV 575/03.