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Access to justice in the Community courts: a limited right?

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***C.J.Q. 224** This article examines access to the European Court of Justice under Art.230 EC, relating to judicial review, and submits that the approach to *locus standi* for natural and legal persons under that article is both inconsistent and inappropriate. It is argued that other avenues of redress are often limited, the European Court of Justice has contradicted its own jurisprudence from other areas, the judicial review process has the potential to reduce the Community's democratic deficit, the jurisprudence is out of step with that of Member States and the approach contravenes rights protected by the Charter of Fundamental Rights of the European Union. The article concludes with proposals for reform of Art.230 EC.

Introduction

Access to justice is an essential right in a society based on the rule of law,¹ and adequate redress for unlawful state action must be available if government itself is to be subject to this. However, most societies commonly accept restrictions on the right to challenge action or inaction by the state in the interests, for example, of deterring frivolous claims or of ensuring legislative freedom. At EU level, the balance has been struck by permitting challenges to Community law to be brought in the Community courts, but restricting the standing of some potential applicants to bring such actions.

***C.J.Q. 225** This article argues that the approach to standing of natural and legal persons under Art.230 EC adopted by the Court of Justice is both inconsistent and inappropriate. This, it is submitted, emerges from a number of distinct analyses which will be made after explaining the current law on standing. First, an applicant faced with restrictions on its rights under Art.230 EC is equally likely to find other avenues of redress closed, yet the court has failed to address the impact of its approach to standing in this wider context. Secondly, the court appears to have neglected the reasoning behind some of its own jurisprudence imposing obligations on Member States and adopting liberal views on access to Community law in national courts. Thirdly, the restrictions on standing increase the democratic deficit which has plagued the Community since its inception. Fourthly, they are less generous than the approach to judicial review adopted by many of the Member States. Finally, the restrictions are contrary to the right to a fair trial in the Charter of Fundamental Rights of the European Union.

This article argues that these criticisms mandate a new approach to standing and concludes with proposals for this.

The standing of natural and legal persons under Art.230 EC

Article 230 EC, which sets out the rules governing judicial review of Community measures, provides not only the grounds of claim, but also the requirements which must be met if the claim is to be admissible. These requirements as to *locus standi* vary according to the type of applicant. Article 230(4) EC provides that legal and natural persons ("non-privileged applicants") may apply only for the annulment of decisions addressed to them, and decisions, or decisions in the form of regulations, which are of direct and individual concern to them.² The Community courts have also held that nonprivileged applicants may challenge directives, on the ground that the Community institutions should not be able, through their choice of legislative instrument, to deprive such applicants of the possibility of challenge.³ However, this is limited to directives which are of direct and individual concern to the applicants.

Member States, the Council, the Commission and the European Parliament (“privileged applicants”), and the Court of Auditors and the European Central Bank (the “intermediate” category of applicants), may challenge the legality of any form of Community legislation except secondary legislation adopted *C.J.Q. 226 under Title IV EC (asylum and immigration).⁴ However, the possibility of challenge by privileged or intermediate applicants does not provide additional protection for non-privileged applicants, since the latter cannot compel the former to bring a challenge. Indeed, Art.230 EC provides that intermediate applicants may bring challenges only for the purpose of protecting their prerogatives. Organisations which lack legal personality, and which therefore have no standing at all, are in an even weaker position.

The reason underlying these restrictions is, of course, the desire to avoid a flood of claims which could swamp the Community courts and produce uncertainty in the law. This underlies not only the original drafting of Art.230(4) EC but also the persistent failure of the Member States in later Treaties to amend it. The provisions of the Treaty establishing a Constitution for Europe do contain amendments (see below) but these are relatively minor and largely preserve the restricted grant of *locus standi*.

It is thus evident that the courts' interpretation of the preconditions of direct and individual concern, and of the requirement that a regulation be in name or substance a decision, is crucial to non-privileged applicants' access to justice, and will now be examined in more detail.

Direct concern

The Court of Justice has held that a non-privileged applicant may only contest a measure which impacts upon it directly, either because the measure leaves no discretion to the Member State authorities responsible for implementing it,⁵ or because the authorities have indicated, prior to the adoption of the measure, how any discretion will be exercised.⁶ The court has mitigated the harshness of this rule by accepting as sufficient indication not only express statements, but also behaviour which makes plain the intentions of the authorities.⁷ However, this liberality is limited since, if any discretion remains when the measure is adopted, the action will be inadmissible for lack of direct concern.⁸ The other indicator of the court's liberality in this area, its extension of standing to challenges to directives, has therefore been of little benefit in practice. It is virtually impossible for a directive to be of direct concern to an applicant, since directives are addressed to Member States and, by their very nature, leave those states some discretion in implementation.

It is true that where the existence of discretion prevents an action under Art.230 EC, the Member State's subsequent acts, which will directly impact upon the applicant, may be challenged in the national courts. However, the state may be able to argue that its action is within both the parameters of the Community measure and the standards required by judicial review at national level. Although the applicant could then plead the illegality of the Community *C.J.Q. 227 measure by way of reference to the Court of Justice under Art.234 EC, this is subject to a number of difficulties, discussed further below. It is therefore submitted not only that the court's interpretation of direct concern unduly restricts access to justice, but that it is not ameliorated by alternative methods of redress.

Individual concern

The Court of Justice has interpreted individual concern as meaning that the measure must, in some way, differentiate the applicant from all others.⁹ The applicant may be part of a closed class, that is to say, the group of potential applicants concerned by the measure is fixed and ascertainable at the time the contested measure is adopted.¹⁰ The difficulty with this is that most measures are applicable for a definite or indefinite future period, and thus the group of potential applicants is neither fixed nor ascertainable at the date the measure is passed. The court has mitigated the harshness of this rule by accepting that the applicant may be differentiated on the facts in some other way.¹¹ For example, in *Codorniu v Council*,¹² a Spanish wine-producer was permitted to challenge a regulation which reserved use of the term “crémant” to certain wines from France and Luxembourg because it had registered the term in 1924 and traditionally used it before and after registration, and was therefore affected by the regulation to a greater extent than other producers.¹³ This approach is used most successfully in the areas of anti-dumping (by complainants, producers, exporters and importers),¹⁴ competition (by complainants and those expressly entitled to be heard during the investigative procedure)¹⁵ and state aids (by complainants),¹⁶ and has been recognised by the Member States in the proposals in the Treaty establishing a Constitution for Europe outlined below.

However, it is submitted that again this liberality is limited. First, the Court of Justice has not applied this approach consistently.¹⁷ Secondly, it remains necessary to assess the impact of the measure on the applicant by comparison with its potential for impact on others. This particularly restricts challenges to directives or regulations, since they are general rather than specific in nature; and it is submitted that a potential applicant who is affected significantly should be able to bring a challenge, regardless of whether others are, or could be, affected.

***C.J.Q. 228 Measures which are true decisions**

Article 230 EC provides that regulations may only be challenged by a nonprivileged applicant if they are in fact decisions in the form of regulations. The Court of Justice has held that this requires that the measure be either of specific rather than general application and thus in substance a decision, or of individual concern to the applicant and thus a decision in his regard.¹⁸

However, regulations are unlikely to be of specific application since, according to Art.249 EC, they have general application. Nor are they likely to be of individual concern to an applicant while the test for individual concern remains subject to the restrictive interpretation outlined above. In *Unión de Pequeños Agricultores v Council (UPA)*,¹⁹ the Court of Justice rejected the arguments (discussed below) of Advocate General Jacobs in that case,²⁰ and of the Court of First Instance in *Jégo Quéré & Cie SA v Commission*,²¹ for a more generous approach and confirmed that Unión de Pequeños Agricultores, a trade association representing small agricultural businesses in Spain, had no *locus standi* to challenge a regulation which reformed the system of aid for olive oil. The regulation was, by its nature and scope, legislative in character and therefore not a decision within the meaning of Art.249 EC. Although it could still be of individual concern to UPA, and thus a decision regarding it, none of the circumstances in which associations had been held to be individually concerned existed on the facts.

The provisions of the Treaty establishing a Constitution for Europe

Article III-270, which will replace Art.230 EC if the Treaty comes into force, provides that a non-privileged applicant may, as at present, challenge an act addressed to it. However, the two other possibilities of challenge by such applicants provided by Art.III-270 are different. First, an applicant may challenge (any) act which is of direct and individual concern to it, rather than only decisions and regulations in the form of decisions. Proposals for the current cumulative test of direct and individual concern to be made alternative were, however, rejected.²² Secondly, such an applicant may challenge a regulatory act which is of direct concern to it and does not entail implementing measures. The requirement of an absence of implementing measures is intended to restrict *locus standi* to cases where the individual is unable to contest national implementing measures,²³ and the term "regulatory act" was chosen in preference to "an act of general application" in order to restrict standing to regulatory rather than legislative acts. A further change introduced by Art.III- *C.J.Q. 229 270 is that acts of bodies, offices and agencies of the EU may be challenged, in addition to acts of the institutions.

It is evident from this analysis that the court's interpretation of the standing rules in Art.230 EC, which in respect of legislative acts would be little changed by the Treaty establishing a Constitution for Europe, is open to criticism even within the terms of that Article. However, the criticism becomes even more cogent when viewed in the context of other factors, to which this article will now turn.

Other avenues of redress against the Community

The Court of Justice in *UPA*²⁴ and *Jégo-Quéré*²⁵ argued that Arts 230, 234 and 241 EC constituted a complete system of legal remedies ensuring effective judicial review. However, it is submitted that this is not so. As Advocate General Jacobs in *UPA*²⁶ and *Jégo-Quéré*²⁷ and the Court of First Instance in *Jégo-Quéré*²⁸ noted, where natural or legal persons are unable to use Art.230 EC to challenge a measure directly, they might also be unable to do so indirectly by pleading its invalidity before the before the Community courts under Art.241 EC or Art.288 EC, or before a national court with a request for a reference under Art.234 EC.²⁹ This is in part a result of the court's restrictive interpretation of these Treaty articles, and it is submitted that when interpreting Art.230 EC the court should have taken account of the restrictions explicit in the Treaty and those which it has implied.

Article 241 EC

Article 241 EC provides that in proceedings where a regulation is at issue, the grounds of challenge in Art.230 EC may be relied upon by the applicant to allege that the regulation is inapplicable. It is submitted that this provision is, however, no substitute for a more generous interpretation of Art.230 EC. First, Art.241 EC is not an independent action and therefore the applicant must have some other cause of action in order to utilise it. Secondly, the result is a ruling of inapplicability in the proceedings, rather than that the measure is void.

Article 234 EC

The Court of First Instance in *Jégo-Quééré* and Advocate General Jacobs in *UPA* both criticised Art.234 EC as a method for an individual to obtain a declaration that a Community measure was unlawful. First, national courts are not competent to declare Community law invalid.³⁰ Secondly, an applicant has no **C.J.Q. 230* right to decide whether a reference is made, or which measures are referred and on what grounds.³¹ Thirdly, it might be necessary for an applicant to breach the implementing measures in order to challenge the resulting sanctions or, in the absence of implementing measures (as in *Jégo-Quééré*), to breach the Community law and then assert its illegality in proceedings against it. In either event, individuals should not be required to breach the law in order to gain access to justice.³² Fourthly, a reference under Art.234 EC has a number of procedural disadvantages compared to Art.230 EC, such as substantial delays.³³ In the interests of legal certainty, a measure should be reviewable as soon as possible and not only when implementing measures have been adopted. Indeed, the importance of legal certainty in this context is emphasised by the two-month time limit applicable to actions under Art.230 EC.³⁴ Fifthly, the granting of interim measures by the national courts, for example suspending a national measure based on the contested Community law, might detract from the uniform application of Community law.³⁵ Sixthly, parties with a sufficient interest can intervene in Art.230 EC proceedings, whereas under Art.234 EC that right is restricted to Member States, Community institutions and those who have intervened in the national proceedings.³⁶ In addition, Art.234 EC jurisdiction under Title IV EC is limited to references from final courts and, in all cases, the normal criteria for Art.234 EC references must be established,³⁷ the underlying dispute must be genuine,³⁸ the factual and legal context must be established,³⁹ and a ruling on the question must be necessary to the resolution of the dispute.⁴⁰

In *UPA* the Court of Justice considered, but rejected, the possibility of adopting a more generous approach to *locus standi* in those cases in which Art.234 EC could not provide a remedy.⁴¹ Its argument that such an approach would ignore the express requirement in Art.230 EC of individual concern is refuted below. However, its argument that the Community courts could not reliably identify such cases, because they have no jurisdiction to interpret and apply national procedural law, has considerable force. It is submitted that the logical conclusion of this argument, when taken with the criticisms of Art.234 **C.J.Q. 231* EC outlined above, is that the court must adopt a more generous approach to *locus standi* for all cases involving non-privileged applicants.

Article 288 EC

There are two distinct problems with the use of Art.288 EC as an alternative to Art.230 EC. First, as the Court of First Instance⁴² and Advocate General Jacobs⁴³ recognised in *Jégo-Quééré*, it is different in nature. An Art.288 EC action cannot produce an equivalent solution to Art.230 EC because it does not enable the courts to review all the factors affecting the legality of a measure and cannot result in the annulment of the measure held to be unlawful.

Secondly, although Art.288 EC has no formal *locus standi* requirements, it is submitted that the substantive conditions implied into it by the court are not significantly easier for an applicant to satisfy than the *locus standi* rules under Art.230 EC. Article 288 EC provides that the Community is liable according to “the general principles common to the laws of the Member States” for damage caused by its institutions or servants. The court has interpreted this as requiring proof of damage, causation and a wrongful act,⁴⁴ and has imposed additional conditions in relation to wrongful acts which involve the exercise of legislative discretion in areas of economic policy. In these cases--which are by far the majority of all Art.288 EC cases--the applicant must prove that the act constitutes not just a breach of Community law, but a “sufficiently serious” breach.⁴⁵ As a result, there are few successful claims under Art.288 EC, and its usefulness is therefore limited.

The Court of Justice's jurisprudence on redress against the Member States

The approach of the Court of Justice to the question of individual access to Community law in

domestic courts demonstrates a markedly different attitude to its approach to direct actions under Art.230 EC. The court concluded its judgment in *UPA* by noting that an alternative system for judicial review could be adopted, but that it was for the Member States to do this by Treaty amendment.⁴⁶ While it is true that such amendments are a matter for the Member States, this argument is somewhat disingenuous given that the court has developed a number of doctrines unsupported by an express Treaty base, in order to promote and protect Community law against private parties and Member States. It has consistently sought to facilitate individual access to Community law, for example, by creating the concepts of direct and indirect **C.J.Q. 232* effect and Member State liability, not on the basis of the EC Treaty,⁴⁷ but on the basis of the superiority and need for effectiveness of Community law.⁴⁸

It is submitted that this divergence in approach is inappropriate. In asserting the superiority of Community law over domestic law, the Court of Justice was able to point only to the "terms and spirit of the Treaty" as making it impossible for Member States "to cause to prevail, against a legal order which they themselves have accepted on conditions of reciprocity, a subsequent unilateral provision, which cannot therefore affect the common order."⁴⁹ It extended this, without any further Treaty basis, to rule in *R. v Secretary of State for Transport Ex p. Factortame Ltd*⁵⁰ that national law must be disapplied pending a ruling on its compatibility with Community law, in order to ensure access to justice for individuals.

The idea that individuals might be able to rely on a Treaty measure directly in a domestic court, despite the absence of national implementation, is similarly unsupported by any explicit Treaty measure. Instead, in introducing the concept of direct effect in *Van Gend en Loos*, the court relied upon the preamble to the Treaty to provide its justification for the inception of the principle of direct effect. It concluded that:

"Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."⁵¹

The court did not confine itself to Treaty articles as the fabric for its new creation, but expanded its raw materials to include, perhaps most surprisingly, directives. It ruled in *Van Duyn v Home Office*⁵² that directives could have direct effect. However, Art.249 EC clearly differentiates directives, which are binding only as to effect, from regulations, which are directly applicable. It is submitted, therefore, that the court was stretching its reasoning to the limit in making this attribution to directives. Article 249 EC states that a directive sets out objectives for the Member States to achieve, and this does not suggest that its function is to create an express route to the domestic courts. That the court has stopped short of allowing directives to have horizontal direct effect suggests that the direct effect doctrine is intended as an enforcement weapon against Member States, rather than a technique for increased individual access to the law. Certainly, this restriction reduces the usefulness of direct effect as a tool of **C.J.Q. 233* democratic legitimacy (see below).⁵³ The argument put forward by the court, that the effectiveness of directives would be hindered were individuals denied access in their domestic courts, is persuasive, but reliance on this in the absence of explicit references in the Treaty itself is inconsistent with the court's approach to Art.230 EC. Indeed, it is noteworthy that an Advocate General of the Court of Justice has highlighted the development of the principle of direct effect as the primary underpinning principle of individual rights in the Community, whilst Art.230 EC passes without mention in this respect.⁵⁴

The development of the doctrine of indirect effect is perhaps less inconsistent, since the duty of Member States under Art.10 EC to take all measures necessary to ensure the fulfilment of their Treaty obligations is clearly apt to include a duty on Member States to interpret national law consistently with Community law. In addition, the restrictive approach post-*Marleasing*⁵⁵ has limited the duty to cases where this interpretation is not obviously inconsistent with domestic law.

However, Member State liability provides a further example of judicial creativity, with the court relying on Art.10 EC to create a duty to make good damage caused by a Member State's failure to meet its Community law obligations.⁵⁶ Yet the lack of an express Treaty provision for such an action is unlikely to be accidental given the explicit provision for Community liability in damages under Art.288 EC.

It is submitted that it is inconsistent for the court to establish new jurisprudential tools such as direct effect, indirect effect and Member State liability in the absence of an explicit Treaty basis, while

refusing, not to disapply the concept of individual concern, but merely to broaden its interpretation. Its statements in *UPA*⁵⁷ and *Jégo Quéré*⁵⁸ that adherence to the principle of effective judicial protection could not have the effect of setting aside an *express* Treaty provision are therefore as disingenuous as they are irrelevant. It is also curious that the court has felt unable to utilise the Community's express obligation under Art.5 EC to act within the powers conferred upon it in the Treaty, in order to further develop Art.230 EC, in the same way as it has used Art.10 EC. These inconsistencies have been acknowledged by a member of the Court of Justice, in contrasting the "straight line" running between *Plaumann* and *UPA* with the initial "daring" of the court's case law.⁵⁹

***C.J.Q. 234 The role of Art.230 EC in the democratic deficit within the Community**

It is not only in relation to the Art.230 EC process that the individual is largely excluded from input into the Community's decision-making processes. Almost from its inception, the Community has been dogged by accusations of the existence of a "democratic deficit" brought about by its institutional arrangements, under which the citizen's connection to the decision-making processes of the Community is severely limited.

The legislative deficit

The Parliament is the only direct connection between the populace of the Community and its legislative processes, and even it is not necessarily a guarantee of effective representation. Though its influence has grown substantially through increased application of the co-decision procedure⁶⁰ and enhanced oversight of the Commission,⁶¹ its participation in many areas is still limited to consultation or other processes where its will can effectively be overridden by a determined Council.

The Council itself has emerged as the most likely rival to the Parliament for the position of democratic representative, since Member States may claim to be acting on behalf of their citizens when exercising their voting rights in the Council. However, Member State governments are unlikely to be ousted from power because of Community policy, given the plethora of issues influencing voting in domestic elections.

The European Commission's claims to democratic legitimacy are yet weaker. Although Commissioners are appointed by Member States, they act independently rather than representatively, which may cast doubt on their responsiveness to the citizenry. Although the Commission is theoretically accountable to the electorate through the scrutiny exercised by the Parliament, there is no evidence that it is regarded as such by the ordinary citizen, and indeed serious questions exist over its fiscal accountability.⁶²

Though the perception of these institutional roles has been criticised as being simplistic,⁶³ it is evident from this that the distance, both geographical and legislative, between the citizen and the Community institutions may readily prevent citizens from engaging in the decision-making process.⁶⁴ *C.J.Q. 235 Interest group theory suggests that parties such as the Member States, involved in a regulatory structure such as the Community, will operate to further their own best interests rather than serve the "public interest".⁶⁵ Historically, dominant actors are unlikely to relinquish positions of strength outwith the exertion of irresistible external pressure.⁶⁶ It is thus natural that Member State Governments, which created and evolved the Community, wish to maintain a firm hand on its legislative tiller, particularly in the face of accusations of cession of national sovereignty to the Community.

This state of affairs is not necessarily inappropriate.⁶⁷ The expectation that the Community should simply assume the democratic characteristics of a large nation state is out of step with contemporary thinking on the question of constitutionalism,⁶⁸ which recognises the need to develop new structures to meet the demands of globalisation.

If the legislative deficit remains, the question that then arises is how the Community might develop other means of establishing a connection with its citizens and providing them with adequate access to the decision-making process. This may be addressed through the development of new approaches to the legislative process and, indeed, much has been made of the development of, and the shift away from, the Community's "classic" legislative methods.⁶⁹ This has occurred, first, through increased recourse to framework directives, allowing greater discretion in relation to implementation by Member States. Secondly, expert committees have been utilised to a greater extent. Thirdly, the Community has chosen to involve civil actors more in the decision-making process.⁷⁰ However, it is submitted that these developments themselves have made only a limited impact on the democratic deficit. The greater discretion given to Member States may increase accountability at that level, but the overall

policy driver remains at the Community level. The use of expert committees in the legislative process may produce more enlightened results; nevertheless the process remains largely internalised within the Community institutions.⁷¹ Similarly, the participation of civil actors occurs at the behest of the institutions⁷² and is likely to be otherwise limited to those parties with sufficient resources to bully their way in.

The Community has also engaged with new methods of governance, most notably those labelled “Social Dialogue” and the “Open Method of Coordination” (“OMC”).⁷³ The “Social Dialogue” approach makes use of voluntary agreements entered into by recognised representatives of employers *C.J.Q. 236 and employees which can later be enacted by the Council of Ministers.⁷⁴ The OMC approach seeks to agree broad policy objectives to be implemented by Member States and establishes means of sharing good practice and checking progress between the Member States. While both approaches could be seen as enhancing legitimacy by devolving decision-making closer to those affected, both occur outside the remit of the European Parliament.⁷⁵ This weakening of democratic legitimacy⁷⁶ may be mitigated in OMC by the subjection of action to scrutiny by domestic systems of review. However, the Social Dialogue approach may be perceived as a case of the Community giving with one hand and taking away with the other. It is noteworthy that involvement in the Social Dialogue process has been considered in the context of Art.230 EC proceedings, the Court of First Instance having accepted that participation in the process will confer standing on non-privileged applicants.⁷⁷ It has, however, limited this by determining that only those participants deemed indispensable to ensuring effective representation of the parties affected by the Social Dialogue process will be considered as being individually concerned for the purposes of Art.230 EC.⁷⁸

While both the development of the “classic” legislative method and the development of new approaches may have something to offer in terms of adding legitimacy, this is undoubtedly limited to relatively narrow areas of decision-making. Thus, this new approach cannot wholly address the broader concerns of democratic deficit. There remains a substantial core of Community activity which remains locked firmly within the old decision-making processes.

The judicial deficit

Judicial review concerns the “review of the conformity of inferior norms to higher norms deemed to be at the basis of a political society”.⁷⁹ The grounds for review set out in Art.230 EC clearly meet this description, identifying the higher order norms to which the Community must adhere. This is further underpinned by the Community's commitment in Art.5 EC to act within the authority conferred by the Treaty.

It is submitted, however, that the Court of Justice's restrictive jurisprudence is incompatible with the broader purpose of judicial review. The grant of unrestricted standing to the Commission, the Council, Member States and, eventually and somewhat grudgingly,⁸⁰ the Parliament, suggests a degree of covetousness in the allocation of power. The judicial review process thus *C.J.Q. 237 replicates the legislative process, facilitating the domination of institutional interests at the expense of the citizenry. This is further emphasised by a tendency for much Art.230 EC litigation to focus on inter-institutional disputes, rather than individual claims, which again reflects interest group theory. While the institutions of the Community may rightly be concerned with ensuring that the other institutions act lawfully, the Community's citizens may perceive this as a case of the foxes guarding the chicken coop, with the only issue being the allocation of lunch.

If the whole process of judicial review is merely an internal mechanism for the settling of intra-Community disputes, it cannot provide any substantial degree of democratic legitimacy. While the systems of checks and balances necessary in a democratic system of government may be present at a constitutional level, individual participation is largely excluded, yet:

“In a democracy citizens are to have an equal right to participate in and to determine the outcome of the constitutional and legislative processes which establish the laws with which they are to comply ... Each citizen is to have an equal right to take part in constitutional processes that establish laws and basic social institutions.”⁸¹

The Court of Justice's approach will not provide enhanced democratic legitimacy while it fails to acknowledge individuals with a special interest in the substance of Community action but who cannot demonstrate a pronounced demarcation from other potential litigants. In fact, it widens the deficit by creating a gap between the significant institutional and state interests at the higher level and the interests of the individual.

However, it is submitted that this *ex post facto* judicial method of achieving effective individual representation at Community level is more appropriate than *ex ante* legislative involvement.⁸² First, the distance between the decisionmaking process and the citizen suggests that the input should come from those most likely to be impacted upon by a measure, which may not become evident until after implementation. Secondly, the strong institutional and state interests outlined have the capacity to substantially restrict individual intervention at a formative stage. Thirdly, in any event, such intervention would be cumbersome and would be dominated by those with sufficient financial and political resources to intervene rather than the significantly weaker individual.

Conclusions on the democratic deficit

The Community system has limited citizen participation both *ex ante* and *ex post facto*, with a legislative process of dubious democratic legitimacy and a narrowly focused *ex post facto* review as initiated by individuals. The citizen's ability to participate in the constitutional affairs of the Community and, more importantly for the individual, to protect their own interests, is limited to the election of MEPs and national government representation; necessarily blunt *C.J.Q. 238 and ineffective instruments for the resolution of individual complaints concerning specific aspects of Community action. As a result, Europe's citizenry is largely excluded from the democratic process.

A more inclusive approach to standing under Art.230 EC would enhance the democratic nature of the Community and could augment trust amongst the populace⁸³ : "An important task of the courts is to place limits upon governmental activity, but this serves to legitimate government as well as to control it."⁸⁴ Although the judicial review process is inevitably limited to ensuring the legality of decision-making, and does not necessarily offer the individual substantial possibilities of a challenge to the material nature of a measure, greater access for individuals would at least facilitate participation and enhance that legality. The engagement of a democratically unaccountable judiciary in the scrutiny of legislation enacted by more representative bodies is not inherently undemocratic⁸⁵ where the courts are involved in testing the compatibility of such measures as against a higher order of law such as a constitution or, in the case of the Community, an overriding and authoritative Treaty.

The approach to standing in the Member States

The form of Art.230 EC has been influenced by the systems of judicial review in the Member States, most notably France.⁸⁶ However, even a brief analysis of the French system suggests that it permits significantly greater access to judicial review than under Art.230 EC. When other domestic systems such as Germany and the United Kingdom are considered, it is evident that despite limiting access to judicial scrutiny, each nevertheless offers significantly greater opportunities to secure legality and constitutionality than Art.230 EC. Both French and German systems separate the constitutional and administrative aspects of review, and these will be examined separately before considering the English system.

Constitutional review

Under French constitutional law, the *Conseil Constitutionnel* is required to scrutinise all *lois organiques*, laws affecting the interrelationship of the primary actors in the constitution, and declare their constitutionality prior to enactment.⁸⁷ Ordinary laws, *lois ordinaires*, are not automatically subject to scrutiny, but may be scrutinised by the *Conseil* at the behest of any one of the President *C.J.Q. 239 of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, 60 deputies (members of the National Assembly) or 60 senators.⁸⁸ The exclusion of the right of individual suit is not as problematic as in the EU context, both because of the relative proximity of the legislative process to the citizen at a domestic level and the role of the *Conseil*. The relative ease with which this role can be activated, and its mandatory nature in relation to the most important legislation, suggests a much more robust system of constitutional review than operated under Art.230 EC, which gives no such role to the Community courts.

German public law has no equivalent of the *Conseil* to act in an advisory capacity prior to the enactment of legislation. The *Grundgesetz* provides for the direct right of individual complaint to the *Bundesverfassungsgericht* where a breach of basic rights is alleged.⁸⁹ The claimant will have *locus standi* if they personally suffer a detriment as a direct consequence of unconstitutional state activity, a significantly lower threshold than that utilised by the Court of Justice. Although even this threshold makes it unlikely that individuals will be able to challenge statutes directly, it will usually allow them to challenge a judicial or administrative decision and thus contest the constitutionality of the statute

indirectly. The *Grundgesetz* also provides for ordinary courts to make a reference to the *Bundesverfassungsgericht* where the constitutionality of a statute arises in the course of proceedings between parties.⁹⁰

Administrative review

Both German and French public law operate a system of administrative review below the highest constitutional level. The French system of *Droit Administratif*, which has otherwise contributed much to the Art.230 EC procedure,⁹¹ is considerably more liberal in its approach to standing than Art.230 EC as interpreted by the Court of Justice. *Droit Administratif* requires only that the applicant should be able to demonstrate that the decision subject to review is detrimental to their good. Though the *Conseil d'Etat* has placed some limitations upon the ability of individuals to challenge administrative action and refuted a general right to bring suit, it has accepted that a collective interest may be sufficient.⁹² It has tended to focus on the level of impact upon the individual in according standing, rather than attempting to delineate the applicant from all others.⁹³

German law also operates a second tier of review of administrative decision making where questions of constitutionality do not arise. Here, too, the process requires an individual to demonstrate the violation of a legally protected **C.J.Q. 240* interest (see above). However, the approach is narrower than that adopted under *Droit Administratif* as it does not allow collective actions.⁹⁴

The English approach

Despite the superficial similarity between Art.230 EC and English judicial review, neither of which distinguish between constitutional and administrative review, it is submitted that English law is more liberal in allowing individual access to the higher order norms (*i.e.* Acts of Parliament) in the constitution. The claimant must have a "sufficient interest in the matter to which the application relates",⁹⁵ and it can be argued that access to higher order norms has been further facilitated by the enactment of "constitutional statutes" such as the European Communities Act 1972 and Human Rights Act 1998.⁹⁶ This liberal approach has even extended to allowing public-interest groups to bring actions. In this regard, and also in relation to individuals, the English approach has extended standing where the matters might not otherwise be brought before a court but are deemed to be of importance.⁹⁷

Conclusions on Member State approaches

It is submitted that judicial review at Community level should be made at least as effective as at national level. The relative distance of Community legislative and administrative procedures from the citizen means that review is arguably more important at Community level, yet the opportunities for individuals to engage the mechanism are less.

The requirements of fundamental rights

It is submitted that the current approach of the Community courts to individual standing under Art.230 EC contravenes the rights to an effective remedy⁹⁸ and a fair hearing⁹⁹ developed by those courts and enshrined in Art.47 of the Charter of Fundamental Rights of the European Union (the Charter). However, there are currently two difficulties in attempting to use them as grounds for widening access to justice under Art.230 EC. First, the Charter is not legally binding.¹⁰⁰ The rights contained in it therefore have no **C.J.Q. 241* direct legal effect¹⁰¹ and, while the Commission does examine proposals for legislation and other measures for compliance with the Charter,¹⁰² it has generally been taken into account by the Community courts only as a reaffirmation of existing rights.¹⁰³ However, Art.I-7 and Pt II of the Treaty establishing a Constitution for Europe provide for the Charter to be incorporated into the Treaties and to have binding legal effect,¹⁰⁴ which would remove this objection to reliance on Art.47 if and when the Treaty comes into force.

The second difficulty is that although the Court of First Instance in *Jégo-Quéré* interpreted the right to an effective remedy as requiring an extension of the Art.230 EC *locus standi* requirements,¹⁰⁵ the Court of Justice did not. Nor is the Charter, even if it acquires the status of law, likely to be of assistance in widening the scope of the rights to a fair trial and an effective remedy. In *UPA* Advocate General Jacobs relied on it as merely a reaffirmation of the right to an effective remedy,¹⁰⁶ and although Advocate General Ruiz-Jarabo strongly argued in *Aalborg Portland A/S and others v Commission* that the Charter extended the scope of the right to a fair trial (to include the right of persons to be heard by the institutions of the EU prior to the taking of any individual measure which

could affect them adversely, and the right of access to their file),¹⁰⁷ the Court of Justice did not adopt this argument.¹⁰⁸

An argument that the rights to a fair trial and an effective remedy require persons adversely affected by Community law to have the right to challenge it may, however, derive support from the jurisprudence of the European Court of Human Rights. In *Osman v United Kingdom*, that court ruled that although the right to institute proceedings was not absolute, "limitations applied [must] not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".¹⁰⁹ Unfortunately, while the Court of Justice has drawn on the European Convention on Human Rights ("ECHR")¹¹⁰ to establish, *inter alia*, the rights to a fair hearing and a legal remedy, it has not always interpreted the scope of ECHR-derived rights in line with the European Court of Human Rights.¹¹¹ However, Art.1-7 of the Treaty *C.J.Q. 242* establishing a Constitution for Europe gives the EU competence to accede to the ECHR and this may lead to a convergence of the jurisprudence.¹¹²

A further possible solution is an action before the European Court of Human Rights. In *Matthews v United Kingdom*¹¹³ that court upheld a challenge to the legality of an Act annexed to Dec.63/787, on the grounds that the transfer of powers to an international organisation such as the EU was compatible with the ECHR only if fundamental rights were protected. Since the decision and the Act constituted a Treaty, and therefore did not give rise to the possibility of a legal challenge before the Court of Justice, the Member States remained responsible for this protection. They entered into Treaties freely and could not argue that the responsibility for the protection of rights was beyond their control. However, this development would appear to be limited to the Treaties, because the Court of Justice has jurisdiction to review most secondary legislation, at least on the application of privileged applicants.

Conclusion

It has been argued above that the restrictions on the standing of non-privileged applicants imposed by the court are both inconsistent and inappropriate. It is therefore submitted that Art.230 EC should be interpreted not merely more liberally, but more consistently so, than hitherto.

A proposed new approach to direct concern

First, even where the Community grants discretion to the national authorities to implement Community policy, a challenge to the underlying Community law should still be admissible. It is not the subsequent national law which is the source of the invalidity, but the Community law. Indeed, national courts may suspend national law based on allegedly invalid Community law pending an Art.234 EC ruling on the latter from the Court of Justice.¹¹⁴

The court has recognised that the existence of discretion in the legislation should not preclude a claim,¹¹⁵ and on this basis it is submitted that a claim should not be debarred merely because the discretion is exercised after, rather than before, the Community measure is adopted. It is proposed that an *C.J.Q. 243* applicant should be directly concerned unless any discretion allowed to the Member State is so wide as to a material extent to break the chain of causation between the Community measure and its impact on the applicant. It would be inappropriate were an illegal measure to be immune from challenge by nonprivileged applicants merely because a Member State retained a limited discretion in implementation.

A proposed new approach to individual concern

Secondly, an applicant whose legal position is substantially--in the sense of exceeding normal economic risks--affected by a measure should be regarded as being individually concerned. This would better serve the interests of justice than the tests currently applied, while preventing frivolous actions. Support for such an approach comes from both *UPA* and *Jégo-Quéré*, albeit from the Advocate General and the Court of First Instance rather than the Court of Justice. In *UPA*, Advocate General Jacobs argued that, in order to provide adequate judicial protection of persons affected by Community measures, a person should be regarded as individually concerned where "by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests".¹¹⁶ Subsequently, the Court of First Instance in *Jégo-Quéré* concluded that it was not necessary to interpret individual concern as requiring that an applicant seeking to challenge a general measure be differentiated from all others affected by it in the same way as an addressee. It would be sufficient if,

“the measure in question affects [the applicant's] legal position, in a manner which is both definite and immediate, by restricting [his] rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard”.¹¹⁷

Precedent for such a development can also be found in the jurisprudence of the Community courts. As discussed above, they have interpreted Art.230 EC to include types of measure omitted from that article,¹¹⁸ and they have also interpreted it as including applicants omitted from Art.230 EC. In *Parliament v Council (Chernobyl)*¹¹⁹ the Court of Justice permitted judicial review by the Parliament, despite the absence in Art.230 EC of any reference to the Parliament and its own confirmation less than two years previously in *Parliament v Council (Comitology)*¹²⁰ that Parliament had no *locus standi*. In *Chernobyl*, the court held that the Parliament had *locus standi* in order to protect its prerogatives, on the ground that alternative legal remedies, such as Art.232 EC (challenges to failures to act), Art.234 EC, and the Commission's duty to ensure Parliament's prerogatives were respected, were inadequate to guarantee *C.J.Q. 244* review of a measure adopted in disregard of these prerogatives. *Locus standi* under Art.230 EC was therefore essential to the maintenance of the institutional balance.¹²¹ These arguments are remarkably similar to those advanced by the Court of First Instance in *Jégo-Quééré* and Advocate General Jacobs in *UPA*, that is to say, that individual access to justice would only be maintained if individuals were permitted to challenge measures which substantially adversely affected their interests. However, this parallel was not recognised--or at least not admitted--by the court which, as has been seen,¹²² expressly stated that a new interpretation of Art.230 EC could only result from a change to its text by the Member States. The meaning ascribed to the concept of individual concern by the courts therefore should, and could, encompass an applicant whose legal position is substantially and immediately affected by a measure.

Advantages of a new approach

Access to justice

As the Court of Justice accepted in *UPA*, the Community is based on the rule of law, and its institutions must therefore be subject to judicial review of the compatibility of their acts with the EC Treaty and with general principles of law, including the fundamental right to judicial protection. Interpreting the concept of *locus standi* more widely would increase access to justice and therefore the effectiveness of Community law.

Coherence in the law

The more generous approach outlined above would be consistent with the Community courts' approach to access to justice at Member State level, and with their recognition of the principle of proportionality¹²³ which, it is submitted, requires that restrictions on standing needed to ensure legal certainty and deter frivolous litigation do not prevent genuine claims being heard.¹²⁴

The new approach would also provide a single coherent test,¹²⁵ and would be consistent with the wording of Art.230 EC. For example, in *Extramet Industrie v Council*,¹²⁶ an importer was permitted to challenge a regulation imposing an anti-dumping duty, because it was the largest importer in the Community, the end-user of the product, and economically dependent on imports since the only Community supplier was its main competitor and unwilling to supply it. It could be said that the regulation had substantially and immediately affected its rights by effectively requiring it to pay the duty. Similarly, in *Codornui v *C.J.Q. 245* Council*,¹²⁷ the rights of the Spanish wine-producer which had used the term “crémant” for decades could have been said to be substantially and immediately restricted by a regulation which reserved use of the term to certain other wines.

A more generous approach would also see the development of greater consistency and coherency across the Court of Justice's jurisprudence and between judicial review at Member State level and at Community level.

Democratic issues

The adoption of the new approach proposed here would narrow the democratic deficit in the Community. Currently, the citizen is removed from the Community's decision-making processes because of the nature of the institutional structure. Providing greater access for individuals to the

judicial decision-making process would do much to resolve this problem and engage the citizen in the Community project.

Disadvantages of a new approach

The only real disadvantage of a more generous approach to *locus standi* is that it would increase the number of admissible actions, and thus the workload of the Community courts and delays in the process. However, it is submitted that justice delayed for all is preferable to justice denied for the many.

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1. See, for example, A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed., MacMillan, London, 1959), Ch.IV; P. Craig, *Administrative Law* (4th ed., Sweet & Maxwell, London, 1999), pp.27-29; *Entick v Carrington* (1765) 19 State Tr. 1029; *R. v Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539; *M v Home Office* [1994] 1 A.C.377; and Case 294/83 *Parti Ecologiste "Les Verts" v Parliament* [1986] E.C.R. 1339 at [23]. See the Final Report of Working Group II on the Incorporation of the Charter/Accession to the ECHR, CONV 354/02, Brussels, October 22, 2002 and the Sixth Report of the Select Committee of the House of Lords, *The Future Status of the EU Charter of Fundamental Rights*, 2002-2003 HL 48.
2. See further F. G. Jacobs, "The Right to a Fair Trial in European Law" (1999) 2 E.H.R.L.R. 141 at pp.147-148 and the House of Lords Select Committee on the European Union Report 8th Report 1999-2000, May 16, 144-6 at [132]-[135]. Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] E.C.R. 4407.
3. See, for example, Case C-298/89 *Gibraltar v Council* [1993] E.C.R. I-3605 and Cases T-172 & 175-177/98 *Salamander AG v Parliament and Council* [2000] E.C.R. II-2487. Commission, "The Charter in the European Context; the Commission Acts on its Principles" www.europa.eu.int/comm/justice_home/unit/charte/en/european-context-principles.html. See also, De Burca, above n.63 (1st ser.) at p.826.
4. Review of the Treaties or of secondary legislation adopted under Title VI EU (police and customs co-operation) or Title V EU (foreign and security policy) is, of course, excluded. See, for example Case T-377/00 *Philip Morris International v Commission* [2003] 1 C.M.L.R. 21 and Case C-232/02 P R *Technische Glaswerke Ilmenau GmbH*, judgment of October 19, 2002, not yet available in English.
5. Cases 41-44/70 *International Fruit Co v Commission* [1971] E.C.R. 411. CONV 850/03, Brussels, July 18, 2003, http://europa.eu.int/futurum/constitution/index_en.htm, Art.7. See further S. Carruthers "Beware of Lawyers Bearing Gifts: a Critical Evaluation of the Proposals on Fundamental Rights in the EU Constitutional Treaty" (2004) 4 E.H.R.L.R. 424.
6. Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207. Above n.21 (1st ser.) at [41].
7. *Piraiki-Patraiki*, above n.6 (1st ser.). Above n.18 (1st ser.) at [39].
8. See, for example, Case 123/77 *UNICME v Council* [1978] E.C.R. 845 and Case 62/70 *Bock v Commission* [1971] E.C.R. 987. Joined Cases C-204-5/00 P judgment of January 7, 2004, not yet reported, at [27].
9. Case 25/62 *Plaumann & Co v Commission* [1963] E.C.R. 95. *Aalborg Portland* above n.87 (1st ser.).
10. See, for example, *International Fruit Co*, above n.5 (1st ser.). (1999) 29 E.H.R.R. 245 at [147].
11. See further A. Arnulf, "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty" (1995) 32 C.M.L.Rev. 7 and P. Craig, "Legal Standing and Substantive Review in Community Law" (1994) 14 O.J.L.S. 507. However, it has held that such sources cannot extend the scope of the Treaties beyond the competences of the EU (Case C-249/96 *Grant v South West Trains* [1998] E.C.R. I-621).
12. Case C-309/89 [1994] E.C.R. I-1853. See also "Les Verts", above n.1 (1st ser.). For example, in Cases T-305-7, 313, 316, 318, 325, 328-329 & 335/94 *Limburgse Vinyl Maatschaappij and others v Commission* [1999] E.C.R. II-931 the Court of First Instance concluded that protection against interference with personal privacy by public authorities was a general principle of EU law distinct from the right in Art.6 and did not, contrary to Art.6 ECHR as interpreted by the European Court of Human Rights, apply to business premises.
13. See also Cases 106-7/63 *Toepfer & Getreide-Import Gesellschaft v Commission* [1965] E.C.R. 405. See further Carruthers, above n.5 (2nd ser.).
14. Case C-358/89 *Extramet Industrie SA v Council* [1991] E.C.R. I-2501. (1997) 28 E.H.R.R. 361 discussed in Schermers (1999) 36 C.M.L.Rev. 673 and I. Canor, "Primus Inter Pares : Who is the Ultimate Guardian of Fundamental Rights in Europe?" (2000) 25 E.L.Rev. 3. The court held that the decision and the Act, which excluded Gibraltar from direct elections to the European Parliament, breached the

obligation under Protocol 1 to the ECHR to hold free elections.

15. Case 26/76 *Metro-SB-Großmärkte GmbH & Co KG v Commission* [1977] E.C.R. 1875. Cases C-143/88 & 92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] E.C.R. I-415 and C-465/93 *Atlanta Fruchthandels-gesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft*. [1995] E.C.R. I-3761.
16. Case 169/84 *COFAZ SA v Commission* [1980] E.C.R. 391. *Piraiiki-Patraiki*, above n.5 (1st ser.).
17. See, for example, Case 231/82 *Spijker Kwasten BV v Commission* [1983] E.C.R. 259 in which the sole importer of the product, whose activities had prompted the state's request for a decision, was held not to be individually concerned. Above n.18 (1st ser.) at [102].
18. Case C-50/00 P *Unión de Pequeños Agricultores v Council (UPA)* [2002] 3 C.M.L.R. 1. Above n.21 (1st ser.) at [41]-[42].
19. Above n.18. See also its judgment in Case C-263/02 P *Commission v Jégo-Quéré & Cie SA*, judgment of April 1, 2004, not yet reported. *Salamander AG and others*, above n.3 (1st ser.).
20. See also *Jégo-Quéré* above n.19 (1st ser.), in which A.G. Jacobs reiterated his concern at this approach after the Court of Justice's judgment in *UPA*. Case C-70/88 [1990] E.C.R. I-2041.
21. Case T-177/01 *Jégo Quéré & Cie SA v Commission* [2002] E.C.R. II-2365. Case 302/87 [1988] E.C.R. 5615.
22. Working Document I, "Access to the Court of Justice for individuals--Possible Amendments to Article 230, paragraph 4, of the EC Treaty" CERCLE I, Brussels, February 12, 2003. Above n.80 (1st ser.) at [16]-[20].
23. Final Report of the Discussion Circle on the Court of Justice, CONV 636/03 CERCLE I 13, Brussels, March, 25, 2003. Above n.46 (1st ser.).
24. Above n.18 (1st ser.) at [40]. See, for example, Case C-331/88 *R. v Minister for Agriculture, Fisheries and Food Ex p. FEDESA* [1990] E.C.R. I-4202 at [13].
25. Above n.19 (1st ser.) at [30]. See also *Osman v United Kingdom*, above n.9 (2nd ser.), in which the European Court of Human Rights ruled that a limitation on access to the courts will not be compatible with Art.6(1) [ECHR--the right to a fair trial] if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.
26. Above n.18 (1st ser.) at [38]-[49]. See also A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [64].
27. Above n.19 (1st ser.) at [44]-[45]. Above n.14 (1st ser.).
28. Above n.21 (1st ser.) at [44]-[47]. Above n.12 (1st ser.).
29. *UPA*, above n.18 (1st ser.) at [38]-[49] and Case C-263/02 P *Jégo-Quéré* above n.19 (1st ser.) at [44]-[45].
30. A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [41].
31. A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [42].
32. Court of First Instance, Case T-177/01 *Jégo-Quéré*, above n.21 (1st ser.) at [45] and A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [43].
33. A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [44]. See further the 20th Annual Report of the Court of Justice and the Court of First Instance of the European Communities.
34. A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [48].
35. A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [44]. See, for example, *R. v Secretary of State for Health and another Ex p. ABNA Ltd and others* [2004] Eu.L.R. 88.
36. A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [47].

- [37.](#) See further Guidance on References by National Courts for Preliminary Rulings [1997] 1 C.M.L.R. 78.
- [38.](#) Case 104/79 *Foglia v Novello (No. 1)* [1980] E.C.R. 745.
- [39.](#) Case C-83/91 *Meilicke v ADV/ORGA* [1992] E.C.R. I-4871.
- [40.](#) Case C-343/90 *Lourenço Dias v Director da Alfandega do Porto* [1992] E.C.R. I-4675 and *Meilicke*, above n.39 (1st ser.).
- [41.](#) Above n.18 (1st ser.) at [43].
- [42.](#) Above n.21 (1st ser.) at [46]-[47].
- [43.](#) Above n.19 (1st ser.) at [45].
- [44.](#) Case 4/69 *Alfons Lütticke GmbH v Commission* [1971] E.C.R. 325.
- [45.](#) Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] E.C.R. 975 and Cases 83 & 94/76 & 4,15 & 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v Council and Commission (Second Skimmed Milk Powder)* [1978] E.C.R. 1209.
- [46.](#) *UPA*, above n.18 (1st ser.) at [45].
- [47.](#) Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] E.C.R. 1; Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen*; Cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1991] E.C.R. I-5357.
- [48.](#) *Van Gend en Loos*, above n.47 (1st ser.) at [5]; *Von Colson*, above n.47 (1st ser.) at [26]; *Francovich*, above n.47 (1st ser.) at [33]-[34].
- [49.](#) Case C-16/64 *Costa v ENEL* [1964] E.C.R. 585 at 597.
- [50.](#) Case C-213/89 [1990] E.C.R. I-2433. See further C. Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 Y.E.L. 13 at p.229.
- [51.](#) *Van Gend en Loos*, above n.47 (1st ser.) at [3].
- [52.](#) Case 41/74 [1974] E.C.R. 1337.
- [53.](#) M. Dougan, "The 'Disguised' Vertical Direct Effect of Directives" (2000) 59 C.L.J. 586 at p.589.
- [54.](#) F. G. Jacobs, "The Evolution of the European Legal Order" (2004) 41 C.M.L.Rev. 303 at pp.306-308. A.G. Jacobs does later acknowledge the deficiencies of the rules on standing, at pp.313-315.
- [55.](#) Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] E.C.R. I-4135. See also Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] E.C.R. I-6911.
- [56.](#) *Francovich*, above n.47 (1st ser.) at [36].
- [57.](#) Above n.18 (1st ser.) at [44].
- [58.](#) Above n.19 (1st ser.) at [44]-[45].
- [59.](#) C. Timmermans, "The European Union's Judicial System" (2004) 41 C.M.L.Rev. 393 at p.395.
- [60.](#) See further A. Dashwood, "The Constitution of the European Union after Nice: Law-Making Procedures" (2001) 26 E.L.Rev. 215.
- [61.](#) Arts 193, 197, 200, 201 and 214 EC; see on this V. Mehde, "Responsibility and Accountability in the European Commission" (2003) 40 C.M.L.Rev. 423.

- [62.](#) Court of Auditors, *Annual Report Concerning the Financial Year 2002* [2003] O.J. C286/01; N. Moussis, "For a Democratic Reform of European Institutions" (2003) 28 E.L.Rev. 250.
- [63.](#) G. De Burca, "The Constitutional Challenge of New Governance in the European Union" (2003) 28 E.L.Rev. 814 at p.818. Though *cf.* J-P. Jacqué, "The Principle of Institutional Balance" (2004) 41 C.M.L.Rev. 37 at pp.70-80.
- [64.](#) P. Craig, "The Nature of the Community: Integration, Democracy and Legitimacy" in P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999), pp.23-24.
- [65.](#) A. Ogus "Rethinking Self-Regulation" (1995) O.J.L.S. 97 at p.98.
- [66.](#) L. Hancher and M. Moran "Organising Regulatory Space" in R. Baldwin, C. Scott and C. Hood, *A Reader on Regulation* (Oxford University Press, Oxford, 1998), p.159.
- [67.](#) P. Craig and G. De Búrca, *EU Law* (Oxford University Press, Oxford, 2003), pp.169-170.
- [68.](#) N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 M.L.R. 317 at p.333.
- [69.](#) J. Scott and D. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" (2002) 8 E.L.J. 1.
- [70.](#) Scott and Trubek, above n.69 (1st ser.) at pp.2-3.
- [71.](#) De Burca, above n.63 (1st ser.) at p.819.
- [72.](#) Scott and Trubek, above n.69 (1st ser.) at p.3.
- [73.](#) For a detailed account of the OMC see: S. Regent, "The Open Method of Co-ordination: a New Supranational Form of Governance?" (2003) 9 E.L.J. 190. The use of "structural funding" has also been identified as a new method of governance within the Community, see Scott and Trubek, above n.69 (1st ser.) at p.4.
- [74.](#) Arts 138 and 139 EC.
- [75.](#) De Burca, above n.63 (1st ser.) at p.835.
- [76.](#) De Burca, above n.63 (1st ser.) at p.836.
- [77.](#) Case T-122/96 *FEDEROLIO v Commission* [1997] E.C.R. II-1559
- [78.](#) Case T-135/96 *UEAPME v Council* [1998] E.C.R. II-2335.
- [79.](#) F. Michaut, "Legal Theory and the Establishment of the Basic Norms of a Society (or What is Judicial Review of Constitutionality about?)" (1996) 9 Rat.Jur. 415.
- [80.](#) See Case C-70/88 *Parliament v Council* [1990] E.C.R. I-2041 and "Les Verts", above n.1 (1st ser.).
- [81.](#) S. Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990) 9 Law and Phil. 327 at p.334.
- [82.](#) J. Alder, "The Purpose of Judicial Review in English Law" (1990) 22 Bracton L.J. 37 at p.39.
- [83.](#) See generally, K. Lenaerts, "In the Union We Trust': Trust-Enhancing Principles of Community Law" (2004) 41 C.M.L.Rev. 317.
- [84.](#) Alder, above n.82 (1st ser.) at p.41.
- [85.](#) L. Tremblay, "General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law" (2003) 23 O.J.L.S. 525.
- [86.](#) P. Birkinshaw, *European Public Law* (Butterworths, London, 2003), p.127; M.-P. Granger, "Towards a Liberalisation of Standing

Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission and Union de Pequeños Agricultores v Council* (2003) 66 M.L.R. 124 at p.132.

87. Arts 46(5) and 61(1), Constitution of 1958.
88. Art.61(2), Constitution of 1958.
89. Art.93(1) 4a, Basic Law.
90. Art.100(1).
91. The utilisation of Advocates General and the grounds for review under Art.230 EC have clear parallels in French law.
92. *Syndicat des Propriétaires du Quartier Croix-de-Seguey-Tivoli*, Conseil d'Etat, July 13, 1948.
93. L. N. Brown, and J. Bell, *French Administrative Law* (5th ed., Oxford University Press, Oxford, 1998), pp.166-169.
94. See generally N. Foster, *German Law and Legal System* (2nd ed., Blackstone Press, London, 1995).
95. Supreme Court Act 1983, s.31(3); CPR Pt 54.
96. See A. Arnulf "Two and a Quarter Pounds of Jam Weighs About a Kilogram" (2002) 27 E.L.Rev. 239; N. Barber and A. Young "The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty" (2003) P.L. 128.
97. *R. v HM Inspectorate of Pollution Ex p. Greenpeace Ltd (No.2)* [1994] 4 All E.R. 329; *R. v Secretary of State for Foreign Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386; *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Rees-Mogg* [1994] 1 All E.R. 457.
98. Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651.
99. See, for example, Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] E.C.R. 1825.
100. See, for example, A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed., MacMillan, London, 1959), Ch.IV; P. Craig, *Administrative Law* (4th ed., Sweet & Maxwell, London, 1999), pp.27-29; *Entick v Carrington* (1765) 19 State Tr. 1029; *R. v Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539; *M v Home Office* [1994] 1 A.C.377; and Case 294/83 *Parti Ecologiste "Les Verts" v Parliament* [1986] E.C.R. 1339 at [23]. See the Final Report of Working Group II on the Incorporation of the Charter/Accession to the ECHR, CONV 354/02, Brussels, October 22, 2002 and the Sixth Report of the Select Committee of the House of Lords, *The Future Status of the EU Charter of Fundamental Rights*, 2002-2003 HL 48.
101. See further F. G. Jacobs, "The Right to a Fair Trial in European Law" (1999) 2 E.H.R.L.R. 141 at pp.147-148 and the House of Lords Select Committee on the European Union Report 8th Report 1999-2000, May 16, 144-6 at [132]-[135]. Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] E.C.R. 4407.
102. See, for example, Case C-298/89 *Gibraltar v Council* [1993] E.C.R. I-3605 and Cases T-172 & 175-177/98 *Salamander AG v Parliament and Council* [2000] E.C.R. II-2487. Commission, "The Charter in the European Context; the Commission Acts on its Principles" [www.europa.eu.int/comm/justice_home/unit/charte/en/european-context-principles.html](http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-principles.html). See also, De Burca, above n.6 (1st ser.) at p.826.
103. Review of the Treaties or of secondary legislation adopted under Title VI EU (police and customs co-operation) or Title V EU (foreign and security policy) is, of course, excluded. See, for example Case T-377/00 *Philip Morris International v Commission* [2003] 1 C.M.L.R. 21 and Case C-232/02 P R *Technische Glaswerke Ilmenau GmbH*, judgment of October 19, 2002, not yet available in English.
104. Cases 41-44/70 *International Fruit Co v Commission* [1971] E.C.R. 411. CONV 850/03, Brussels, July 18, 2003, http://europa.eu.int/futurum/constitution/index_en.htm, Art.7. See further S. Carruthers "Beware of Lawyers Bearing Gifts: a Critical Evaluation of the Proposals on Fundamental Rights in the EU Constitutional Treaty" (2004) 4 E.H.R.L.R. 424.
105. Case 11/82 *Piraiki-Patraiki v Commission* [1985] E.C.R. 207. Above n.21 (1st ser.) at [41].
106. *Piraiki-Patraiki*, above n.6 (1st ser.). Above n.18 (1st ser.) at [39].
107. See, for example, Case 123/77 *UNICME v Council* [1978] E.C.R. 845 and Case 62/70 *Bock v Commission* [1971] E.C.R. 987. Joined

Cases C-204-5/00 P judgment of January 7, 2004, not yet reported, at [27].

- [108.](#) Case 25/62 *Plaumann & Co v Commission* [1963] E.C.R. 95. *Aalborg Portland* above n.87 (1st ser.).
- [109.](#) See, for example, *International Fruit Co*, above n.5 (1st ser.).(1999) 29 E.H.R.R. 245 at [147].
- [110.](#) See further A. Arnulf, "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty" (1995) 32 C.M.L.Rev. 7 and P. Craig, "Legal Standing and Substantive Review in Community Law" (1994) 14 O.J.L.S. 507. However, it has held that such sources cannot extend the scope of the Treaties beyond the competences of the EU (Case C-249/96 *Grant v South West Trains* [1998] E.C.R. I-621).
- [111.](#) Case C-309/89 [1994] E.C.R. I-1853. See also "*Les Verts*"; above n.1 (1st ser.). For example, in Cases T-305-7, 313, 316, 318, 325, 328-329 & 335/94 *Limburgse Vinyl Maatschaappij and others v Commission* [1999] E.C.R. II-931 the Court of First Instance concluded that protection against interference with personal privacy by public authorities was a general principle of EU law distinct from the right in Art.6 and did not, contrary to Art.6 ECHR as interpreted by the European Court of Human Rights, apply to business premises.
- [112.](#) See also Cases 106-7/63 *Toepfer & Getreide-Import Gesellschaft v Commission* [1965] E.C.R. 405. See further Carruthers, above n.5 (2nd ser.).
- [113.](#) Case C-358/89 *Extramet Industrie SA v Council* [1991] E.C.R. I-2501.(1997) 28 E.H.R.R. 361 discussed in Schermers (1999) 36 C.M.L.Rev. 673 and I. Canor, "*Primus Inter Pares* : Who is the Ultimate Guardian of Fundamental Rights in Europe?" (2000) 25 E.L.Rev. 3. The court held that the decision and the Act, which excluded Gibraltar from direct elections to the European Parliament, breached the obligation under Protocol 1 to the ECHR to hold free elections.
- [114.](#) Case 26/76 *Metro-SB-Großmärkte GmbH & Co KG v Commission* [1977] E.C.R. 1875. Cases C-143/88 & 92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] E.C.R. I-415 and C-465/93 *Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft*. [1995] E.C.R. I-3761.
- [115.](#) Case 169/84 *COFAZ SA v Commission* [1980] E.C.R. 391. *Piraiiki-Patraiki*, above n.5 (1st ser.).
- [116.](#) See, for example, Case 231/82 *Spijker Kwasten BV v Commission* [1983] E.C.R. 259 in which the sole importer of the product, whose activities had prompted the state's request for a decision, was held not to be individually concerned. Above n.18 (1st ser.) at [102].
- [117.](#) Case C-50/00 P *Unión de Pequeños Agricultores v Council (UPA)* [2002] 3 C.M.L.R. 1. Above n.21 (1st ser.) at [41]-[42].
- [118.](#) Above n.18. See also its judgment in Case C-263/02 P *Commission v Jégo-Quéré & Cie SA*, judgment of April 1, 2004, not yet reported. *Salamander AG and others*, above n.3 (1st ser.).
- [119.](#) See also *Jégo-Quéré* above n.19 (1st ser.), in which A.G. Jacobs reiterated his concern at this approach after the Court of Justice's judgment in *UPA*. Case C-70/88 [1990] E.C.R. I-2041.
- [120.](#) Case T-177/01 *Jégo Quéré & Cie SA v Commission* [2002] E.C.R. II-2365. Case 302/87 [1988] E.C.R. 5615.
- [121.](#) Working Document I, "Access to the Court of Justice for individuals--Possible Amendments to Article 230, paragraph 4, of the EC Treaty" CERCLE I, Brussels, February 12, 2003. Above n.80 (1st ser.) at [16]-[20].
- [122.](#) Final Report of the Discussion Circle on the Court of Justice, CONV 636/03 CERCLE I 13, Brussels, March, 25, 2003. Above n.46 (1st ser.).
- [123.](#) Above n.18 (1st ser.) at [40]. See, for example, Case C-331/88 *R. v Minister for Agriculture, Fisheries and Food Ex p. FEDESA* [1990] E.C.R. I-4202 at [13].
- [124.](#) Above n.19 (1st ser.) at [30]. See also *Osman v United Kingdom*, above n.9 (2nd ser.), in which the European Court of Human Rights ruled that a limitation on access to the courts will not be compatible with Art.6(1) [ECHR--the right to a fair trial] if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.
- [125.](#) Above n.18 (1st ser.) at [38]-[49]. See also A.G.'s Opinion, *UPA*, above n.18 (1st ser.) at [64].
- [126.](#) Above n.19 (1st ser.) at [44]-[45]. Above n.14 (1st ser.).
- [127.](#) Above n.21 (1st ser.) at [44]-[47]. Above n.12 (1st ser.).

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