Judicial Protection Under the Constitution

Spyridon Flogaitis/Andreas Pottakis*

Articles EC 220 ff.; Draco I-28; III-258 ff.[1]

1. Introduction

The challenges for the system of judicial protection of the EU spring from two main developments: first, the enlargement of the EU, which inevitably affects all institutions of the Union, most notably their organisational structure and modus operandi, second, the deepening and widening of the areas falling within the scope of competences of the EU. Article I-28 Draft Constitution states that the Court of Justice of the EU shall include the ECJ, the High Court and specialised courts.[2] These courts, together with the national courts of all levels, constitute the intricate nexus offering judicial protection in the EU. The issues that dominated debates on the reform of the system of judicial protection varied from the amendment of Article 230.4 EC on the locus standi of applicants, to the impact of the incorporation of the Charter of Human Rights and to the competences of the ECJ in the areas of the second and third pillar. They all relate to the deepening and widening of the Union through this Draft Constitution.

2. Locus Standi

The debate on the amendment of Article 230.4 EC on the locus standi of applicants has been holding strong for some time now. In 2003, in its assessment of

* Professor at the University of Athens, Director of the European Public Law Center / Ph.D. at Law, University of Oxford, Head of the Scientific and Education Unit at the European Public Law Centre.

[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

[2] The Discussion Circle on the ECJ set up under the auspices of the Convention for the Future of Europe noted in point 15 of its final report to the Convention that the term 'specialised courts' is more fitting to judicial panels set up to hear and determine at first instance certain classes of action or proceeding brought in specified areas, mentioning as example the Community patent Court that is described in the Council decision of 3 March 2003.

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the discussions at the Convention on the Future of Europe,[3] the European Group of Public Law (EGPL) predicted that the 'incorporation of the Charter into the EU legal order would definitely switch the emphasis and orientation of the Court'. This may be so in the sense that such incorporation might convey the introduction of an individual application system, procedurally similar to a constitutional complaint, potentially through a more generous interpretation of the existing normative framework within the EU, notably Article 230 concerning the applicant's locus standi and the provisions of the Charter itself, especially Article 47.

The members of the Discussion Circle on the ECJ established under the auspices of the Convention on the Future of Europe seemed divided. For the majority, the wording of Article 230 EC (now Article III-270 Draft Constitution) satisfies the essential requirements of providing effective judicial protection of the rights of litigants. Drawing arguments from the jurisprudence of the ECJ,[4] the Circle reaffirmed that it is for the Member States to establish a system of legal remedies and procedures, which ensures respect for the right of individuals to effective judicial protection as regards rights resulting from Union law.

Some members of the Circle called for the extension of the right of individuals to institute proceedings before the Court. Under Article 230.4 EC, an individual only has the right to appeal against an act addressed to him or her or which is of direct and individual concern to him or her. The Article thus gives individuals no right to appeal against acts of general application. According to these members of Circle, as well as according to the Court of First instance (see its famous *Jégo-Quéré* decision, which was squashed by the Court in its *Union de Pequeños Agricultores* decision), individuals should have such a right, at least under certain circumstances.

The Draft Constitution holds what seems to be a compromise in this respect. Article III-270(4) gives any natural or legal person the right to institute proceedings 'against a regulatory act which is of direct concern to him or her and does not entail implementing measures'. The phrasing is intriguing. What are 'regulatory acts'? This term is not used in the Articles I-32 ff., which define the legal acts of the Union and distinguish between legislative acts (European laws and Framework laws) on the one hand, non-legislative acts (regulations and decisions) on the other. Probably the intention of the phrasing is to protect European laws against direct proceedings of individuals, but the term seems to leave the Court ample room for manoeuvre. So, the issue of locus standi remains open for discussion, and the call by the EGPL for a generous interpreta-

[3] European Group of Public Law (EGPL) Proposal on the Debate on the European Constitution (*European Review of Public Law*, European Papers 2, 2003).

[4] Case C-50/00 P, Union de Pequeños Agricultores, paras. 41-42.

tion of Article III-270(4) in relation to Article II-47 (which holds the right to an effective remedy when rights and freedoms guaranteed by the law of the Union are violated) merits more consideration.

3. The charter of human rights

It seems likely that discussions will centre on the parallel application of the Charter with human rights provisions in national constitutions and the ECHR and the extent to which judicial protection offered by each supersedes or complements the others. Indeed, one of the issues touched upon by the Working Group II of the Convention was the impact that the accession to the ECHR with the parallel incorporation of the Charter would have on the authority of the EU. The Working Group opined that 'the Court of Justice would remain the sole supreme arbiter of questions of Union law and of the validity of Union acts, the European Court of Human Rights could not be regarded as a superior Court but rather as a specialised court exercising external control over the international law obligations of the Union resulting from accession to the ECHR'. The Group went on to assert that 'the position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court at present.'[5]

In its explanatory notes on the Charter of Human Rights, the Convention stated that 'paragraph 3 [of Article II-52] is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the principle that, insofar as the rights in the present Charter also correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR'. This means in particular that the legislator, in laying down limitations to those rights, must comply with the limitation standards laid down in the ECHR, while trying to avoid affecting the autonomy of Community law. In the explanatory note on Article II-53, the Convention stated that 'the level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR with the result that the arrangements for limitations may not fall below the level provided for in the ECHR'.

4. Second and Third Pillar law

While the inroads made recently towards a common European approach in the Foreign and Security Policy have been notable, the advances from the point of

[5] Working Group II 'Incorporation of the Charter/accession to the ECHR'. Final Report CONV 354102, 22 October 2002.

view of the Court's competences have remained marginal and understandably modest. According to Article III-282, as amended by the IGC, 'the Court of Justice of the European Union shall have no jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V concerning the Common Foreign and Security Policy and Article III-194 insofar as it concerns the Common Foreign and Security Policy'. However, the Court shall have jurisdiction to monitor compliance with Article III-209, which states that the implementation of the Foreign and Security Policy shall not affect the other competences of the Union. Furthermore, it shall have jurisdiction to rule on proceedings, reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V, if they are brought before the Court in accordance with the conditions laid down in Article III-270(4). The Foreign and Security Policy thus largely remains outside the scope of judicial review. It will probably take strong political will to make further advances in this area.

When it comes to law under the Third Pillar and Title IV of the EC Treaty (Immigration and Asylum), more progress has been made. In accordance with the Articles 35(5) EU and 68(2) EC, Article III-283, as amended by the IGC, provides that the Court, in exercising its competences concerning the area of freedom, security and justice, shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of national security. Nevertheless, the other exceptions to the competences of the Court to give preliminary rulings or to review the validity of EU and EC acts, which are contained in the Articles 35 EU and 68 EC, have vanished.

Questions for scholarship and practice

1. What is meant by the term 'regulatory acts' in Article III-270(4)?
2. Will the legal arsenal for the protection of human rights available to courts throughout Europe, national and supranational, produce an effective system of judicial protection for human rights?

Literature

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