
Book Reviews

Angela Ward, *Judicial Review of the Rights of Private Parties in EU Law*, 2nd edition (Oxford, Oxford University Press, 2007) ISBN 978-0-19-920686-5, Price £44.95, 443p.

Ward's 'completely revised edition' of her first book (OUP, 2000), which was based on her doctoral thesis, is a highly comprehensive analysis of the Community's system of judicial enforcement of Community law by private parties before both national courts and the Community courts (CFI and ECJ). This second edition has brought the case law in this fast-moving area up-to-date and discusses the ECJ's policy, the impact the Constitutional Treaty may have had had it been ratified and how the system of enforcement may develop in the future. It also considers some of the latest contributions to the debate in the literature. The book's publication date means that it does not consider the Lisbon Treaty 2007 or more recent cases such as *Unibet*, *Advocaten voor de Wereld VZW* and *Kadi*.

The first part of the book analyses the case law and the Court's policy with regard to challenges to the compatibility of Member State measures before the national courts by private individuals (Chapters 2-5). The second part of the book compares the Court's approach in actions challenging the legality of Community measures (Chapters 6-9). In her Introduction, Ward points out that her analysis reveals a clear difference in approach on the part of the Union judicature which represents a 'significant fault line in the EU Constitution' (p. 1) She argues further that the ECJ's reliance on the notions of 'individual rights' and 'effective judicial protection' to justify a highly intrusive agenda in relation to judicial enforcement of EU law by private litigants before the national courts has not been drawn upon in relation to actions brought by the same parties against the Community institutions. This is despite the fact that EU measures have an increasing impact on private actors in a large number of policy areas. Ward predicts that this 'rights based' discourse will continue following the failed ratification of the Constitutional Treaty. She argues that if the primacy clause (Article I-6) and the obligation imposed on Member States to '...provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (Article I-29) had come into effect, they would have allowed the ECJ to justify its case law with reference to the 'plain meaning of the Constitutional text.' (p. 2) This would have enabled the ECJ to move away from the need for EU law to be directly effective or to confer individual rights before it can be enforced at national level. Nevertheless, she argues that Treaty amendment may be the only way of easing the tensions that arise in the case law. This would need to include at the very least a supremacy clause as well as a means of preventing the Court's extensive incursion into national procedural rules and remedies. These amendments would allow the Court of Justice to resume the traditional roles of constitutional and administrative courts, namely the review of discretion by the Member States and the Community Institutions.

In Chapter 2, Ward combines a succinct doctrinal analysis of the Court's complex constitutional principles governing the enforcement of EU law before national courts by private parties with discussion of the contemporary policy issues. She discusses the principle of direct effect and the Court's prohibition of the horizontal direct effect of directives. She identifies and maps out seven initiatives on the part of the Court to circumvent this rule: the concept of the 'emanation of the State'; the Court's interpretation of directives in horizontal disputes despite the constitutional difficulties litigants may face in enforcing their rights; the principle of indirect effect; the right to an effective remedy; the *CIA* case law; the case law on multi-angular relationships and the principle of State liability. She also considers the anomalies and lack of legal certainty presented by these principles, how they are all intertwined with one another, their relationship with the principles of effectiveness and non-discrimination (which are discussed in Chapters 3 and 4) and their application to the intergovernmental pillars. She considers whether we are in a 'post-direct effect era' (p. 19) where there is no longer a need for the doctrine of direct effect and the potential impact of the Constitutional Treaty on the enforcement of individuals' rights before national courts if it had come into force. As the Lisbon Treaty does not contain a supremacy clause, Ward argues that in its judgments the Court should elaborate clearly on which of the seven principles should be used by the national court in horizontal disputes involving directives in order to improve legal certainty.

Chapters 3 and 4 examine the ECJ's case law on the compatibility of national procedural rules and remedies with Community law. In Chapter 3, Ward traces the emergence of the principles of effectiveness and equivalence as the key tools developed by the Court to ensure the full effect of Community law. She examines the different phases of the Court's case law from its minimalist approach in the 1970s to its more interventionist approach from the 1980s onwards. She considers the ECJ's ruling in *Factortame No. 1* to be a 'flashpoint' (p. 96) in the evolution of the case law where a direct conflict arose between the Court's competing approaches to remedies, namely respect for national procedural autonomy and the right to effective protection. Ward criticises the Court's limited attempts at codifying the remedial duties of the Member States in the Constitutional Treaty (Article I-29) and persuasively argues that the Court is likely to transpose the *acquis* (which is explored in detail in Chapter 4) to the intergovernmental pillars in future case law.

In Chapter 4, Ward conducts a thorough and authoritative analysis of the application of the principle of effectiveness post-*Factortame No. 1* in the Court's case law (sometimes referred to as 'third generation' case law). This part of the chapter is usefully divided into specific remedial areas such as national time-limits, unjust enrichment, rules of evidence, interim relief, the *Johnston* right to review and the recovery of sums illegally levied or paid

by way of subsidies or State aid. The demise of the 'no new national remedies' principle laid down in *Butterboats* is also explored and Ward examines the increasing attention given to the principle of non-discrimination as a means of striking down national procedural rules. Ward argues that it is unfortunate that no clear pattern emerges from the Court's case law which is highly unpredictable and complex. With regard to national time-limits, she goes as far as to argue that legal certainty has been 'vandalized' (p. 150) by the Court. She also draws interesting comparisons with the European Convention on Human Rights and questions whether the *Johnston* right to review complies with Articles 6 and 13 ECHR. Ward strongly criticises the Court's interventionist policy in this area and calls on the Court to give greater respect to the national procedural autonomy of the Member States. This is an interesting viewpoint given that many commentators have recently argued that the ECJ has rebalanced its case law in this area and is currently in a period of general restraint or 'selective deference'.

Chapter 5 examines in detail the Community remedy of State liability introduced by the ECJ in its *Francovich* decision and how the Court has clarified and refined its scope in subsequent case law. Ward claims that the case law follows a similar pattern to the case law on national procedural rules with the Court creating considerable legal uncertainty as to the boundary between Community law and national law. The relationship between State liability and the principle of indirect effect and the obligation on national courts to provide an effective remedy is also unclear. Ward considers potential limits to the development of the Court's ruling in *Courage* and suggests that deference be shown to national laws. Readers should be aware that the European Commission issued a White Paper on Damages Actions for Breach of the EC Antitrust Rules (April 2008) which may introduce limited codification of the *Courage* doctrine and the *acquis* on procedural rules. Ward concludes that '...while the inspiration for Court designed rules on State liability may have been harmonization of domestic rules on damages, in addition, it may have promoted a uniformity of a different kind...' (p. 255), namely a convergence with the liability rules for actions brought against the Community institutions.

Chapter 6 explores the law governing the rights of private parties in the action for annulment laid down in Article 230(4) EC and examines parallel issues to those investigated in previous chapters such as time-limits, the rules on raising arguments before the Court of First Instance, delays, interim relief, the general remedial powers of the Courts and the right of access. In doing so, Ward's analysis reveals a distinct divergence in the approach of the Court. Its pro-litigant case law on national procedural rules and sanctions has little influence on actions brought by private parties before the CFI except with regard to interim relief (although the availability of the latter is severely restricted by the need to show individual and direct concern). Ward also examines the problems of access to justice emanating

from the ECJ's restrictive approach to *locus standi* and the impact of the ECJ's *TWD* ruling. She argues that '...a significant part of the 'access to justice' problems...lies in the absence of a division in EC law between normative, executive, and administrative measures.' (p. 331-2). This is aggravated by the practice of laying down highly detailed rules in Directives. She notes that although the Constitutional Treaty laid down a hierarchy of norms which sought to reflect the distinction between normative and executive measures, no reference was made to the rules on judicial review and who should have standing. Ward queries whether the case law on Article 230 (4) EC complies with Article 6 and 13 of the ECHR.

In Chapter 7, Ward examines the extent to which the 'access to justice' problems under Article 230 (4) EC are reduced by the possibility of the Article 234 validity review. She identifies certain strengths in the case law of the ECJ such as the fact that the full range of administrative acts can be challenged, that the same standards of judicial protection found in cases relating to compatibility of national law with EC law apply and that there is no longer a need for the individual litigant to wait for national implementing measures to be introduced before an action can be instigated. Nevertheless, she also identifies severe shortcomings and highlights the relatively few cases in which the litigant has successfully challenged EC measures using this route.

In Chapter 8, Ward considers whether an action for non-contractual liability under Article 288 (2) EC is a viable alternative to judicial review under Article 230(4) or Article 234 EC. The chapter analyses various aspects of the remedy including the applicable time-limits, the range of orders available to the Community Courts, the scope of the 'exhaustion of local remedies' rule, the substantive test for liability under Article 288(2) EC and the impact of *Bergaderm* and *Fresh Marine*. She compares the likelihood of success in actions for Member State liability with those for non-contractual liability of the Community institutions and identifies distinct problems that arise with the latter.

This book makes an important contribution to the debate on the effective enforcement of Union law by individuals before national courts and the Union courts. The author manages to convey the complexity of the law in a clear and accessible manner with useful sub-headings and cross-referencing throughout. Although some of the issues explored may be familiar to many, Ward offers a fresh perspective and makes some interesting observations about the current system pinpointing its flaws and suggesting ways forward. This book will undoubtedly become one of the key reference points on the law in this area for EU scholars, students and practitioners.

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