DEVELOPMENTS

Book Review – Nicolai Böcker's *Wirksame Rechtsbehelfe zum Schutz der Grundrechte der Europäischen Union*

By Marten Breuer[*]

[Nicolai Böcker, *Wirksame Rechtsbehelfe zum Schutz der Grundrechte der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden 2005, ISBN 3-8329-1328-9, pp. 280, 54,00 €)

The book under review,[1] a doctoral thesis supervised by Prof. Dr. Jürgen Schwarze and submitted to the Albert-Ludwigs-Universität Freiburg in 2004/2005, deals with a topic which, at first sight, seems to be typically a German one: the introduction of a fundamental rights complaint (*Grundrechtsbeschwerde*) at the EU level with the aim of providing "effective legal remedies for the protection of fundamental rights of the European Union", as stated by the title. However, when looking more closely, one discovers that this book is, by far, not restricted to the fundamental rights issue, but largely deals with the problem of protecting individual rights in the EU court system in general. This topic has found great attention in the context of the *UPA* and *Jégo Quéré* jurisprudence of the Court of First Instance (CFI)[2] and the European Court of Justice (ECJ).[3] The arguments put forward in the discussion surrounding these cases are used in order to advocate the introduction of a fundamental rights complaint in the EU.

The book is divided into two parts. Part one comprises a stock-taking of the status quo. Part two explores reform options. At the beginning of the first part (section A), the author identifies the principle of effective legal protection as being

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[1] NICOLAI BÖCKER, WIRKSAME RECHTSBEHELFE ZUM SCHUTZ DER GRUNDRECHTE DER EUROPÄISCHEN UNION, 2005.

[2] Case T-177/01, Jégo Quéré v. Commission, 2002 E.C.R. II-2365.

[3] Case C-50/00 P, Unión de Pequeños Agricultures v. Council, 2002 E.C.R. I-6677; Case 263/02 P, Commission v. Jégo Quéré, 2004 E.C.R. I-3425.

the leading principle of the whole research.[4] Although this may be correct, one would have expected this point to be dealt with in greater detail. As we shall see later, part two of the study concentrates solely on the problem of judicial protection against invalid legal norms of EC law.[5] From the constitutional law perspective, the question arising here is whether or not direct actions against abstract, general norms are a legal requirement. The standpoint of most Member States' constitutional courts,[6] as well as, the European Court of Human Rights (Eur. Court H.R.),[7] is that direct judicial protection must be afforded only against legal acts of the executive, not those of the legislator. Böcker leaves this aside arguing that the ECJ has not distinguished between the two categories.[8] At a later stage of his inquiry, however, (and, one must add, in a different context,) he proposes to differentiate by the criterion of "democratic legitimacy." According to this concept, acts emanating from the co-decision procedure (Art. 251 EC) shall be deemed equivalent to "legislative acts" because of the involvement of the European Parliament (EP). Whereas, legal norms created by the Commission are regarded as being non-legislative in nature.[9] This very argument could have, and should have been used for the question of effective legal protection as well. By leaving out this opportunity, Böcker fails to make clear to what extent his proposals reflect actual legal (constitutional) requirements, and to what extent they are proposals in a political sense.

The first part is continued by three sections presenting a very learned analysis of the characteristics of the annulment procedure under Art. 230 (4) EC (section B),[10] of the preliminary ruling procedure under Art. 234 EC (section C),[11] and of liability proceedings (section D)[12].[13] The results may be summarized as follows: The action

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[4] BÖCKER, *supra* note 1, at 40-48.

[5] *Id*. at 135.

[6] *See e.g.* BVerfGE 24, 33, 49-51.

[7] *See* James and others v. The United Kingdom, ser. A No. 98 at para. 85 (Eur.Ct. H.R. 21 February 1986), on the one hand, and Silver and others v. The United Kingdom, ser. A No. 61 at paras. 118-119 (Eur. Ct. H.R. Judgment of 25 March 1983), on the other hand.

[8] BÖCKER, *supra* note 1, at 44.

[9] *Id*. at 230-233.

[10] *Id*. at 48-83.

[11] *Id*. at 83-112.

[12] *Id*. at 112-123.

for annulment under Art. 230 (4) EC is restricted in two respects. First, it can be directed, in principle, only against a decision, and second, the capacity to bring legal proceedings (*Klagebefugnis*) presupposes that the decision "is of direct and individual concern" to the claimant. Regarding the first aspect, the author demonstrates that the ECJ is more generous nowadays by allowing actions for annulment also against directives.[14] However, regarding the second aspect, the ECJ in *UPA* has stuck to the narrow interpretation of "individual concern" as given in its *Plaumann* judgment,[15] thus, contradicting both AG Jacobs and the CFI's judgment in *Jégo Quéré*.[16] The gaps that are left are filled by the preliminary ruling procedure and by liability proceedings, but only in an insufficient manner. Proceedings under Art. 234 EC are less favorable than direct actions because (1) they depend on the willingness of the national judge to direct a question to the ECJ,[17] (2) they are non-contradictory in nature,[18] (3) they are more time-consuming, and therefore, more cost-intensive than direct actions[19] and (4), in cases of allegedly invalid norms of EC law, the national judge is a priori unable to offer judicial relief. This is because norms of EC law may be invalidated only be the ECJ, according to the ECJ's *Foto-Frost* jurisprudence.[20,21] Liability proceedings, on the other hand, cannot be regarded as being an effective substitute for actions for annulment because (1) liability depends on a "sufficiently serious breach" of EC law[22] and (2)

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[13] The short section E is dedicated to legal protection against measures under the second and third pillar of the EU, followed by a résumé and an appraisal (section F).

[14] BÖCKER, *supra* note 1, at 51-57, 77.

[15] Case 25/62, Plaumann v. Commission, 1963 E.C.R. 199.

[16] BÖCKER, *supra* note 1, at 57-76.

[17] There is no effective means against a judge who is not prepared to do so, even if he is under a legal obligation, *see id.* at 97-105. *See also id.* at 130: "paternalistic character" of the preliminary ruling procedure.

[18] *Id*. at 108.

[19] *Id.* at 108-109.

[20] Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 4199.

[21] BÖCKER, *supra* note 1, at 129-130. – A fifth argument is not elaborated in detail: In cases where the national judicial system is incomplete, the preliminary ruling procedure fails because there is no national judge to refer the case to the ECJ. Although there are allegations that under certain conditions, such "gaps" exist in the French and Spanish judicial system (*id*. at 89) Böcker leaves this question to future comparative law studies (*id.* at 129). This is regrettable since, in the eyes of the reviewer, it would have made the argument of deficient judicial protection in the EU even more compelling.

[22] *Id.* at 117-120.

liability is unable to compensate violations of strictly personal fundamental rights (*höchstpersönliche Grundrechte*).[23]

In the second part, as indicated above, the scope of the inquiry is reduced to the problem of judicial protection against invalid legal norms of EC law. This is because of the alleged reason that there is no need for a reform, as far as, the implementation of norms of EC law by the Member States and by the EU institutions is concerned.[24] This argument, however, is debatable. Certainly, in cases of implementation measures by the Member States, the preliminary ruling procedure is not a priori ineffective because, unlike cases involving validity questions, the national judge has the competence to quash the (national) legal act.[25] However, what if he does not do so due to an incorrect interpretation of EC law, like in the *Köbler* case?[26] In such circumstances, Böcker later argues, there is "no complete denial of justice" since in questions of interpretation, "the ECJ has the last word, but not the monopoly of interpretation".[27] This appears to be rather legalistic. Going back to the *Köbler* case, if the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) had interpreted EC law correctly, Mr. Köbler's claim would have been successful. Unfortunately, the court did not, thereby disregarding its duty under Art. 234 (3) EC to direct a request for a preliminary ruling to the ECJ. In the subsequent liability proceedings, Mr. Köbler did not succeed either because the ECJ found that there was not a "sufficiently serious breach" of EC law by the Supreme Administrative Court. Is it really convincing to argue that, in such a case, there is "no complete" denial of justice?

What follows (section A) is a very instructive comparative law overview of different types of legal protection with regard to acts of Parliament.[28] Three models are identified: the model of parliamentary legal protection, the model of indirect judicial control, either by the respective ordinary court or by a preliminary ruling procedure to the constitutional court, and the model of direct individual complaint.

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[23] *Id.* at 131-132.

[24] *Id.* at 135.

[25] *Id.* at 129.

[26] Case 224/01, Köbler v. Austria, 2003 E.C.R. I-10239; for further reading, *see* Marten Breuer, *State liability for Judicial Wrongs and Community Law: the case of Gerhard Köbler v. Austria*, 29 EUR. L. REV. 2, 243-254 (2004).

[27] "*Der EuGH besitzt zwar das letzte Wort, aber kein Auslegungsmonopol. Eine Nichtvorlage kann daher bei Auslegungsfragen keine vollständige Rechtsverweigerung bewirken*", BÖCKER, *supra* note 1, at 182; similarly *id.* at 214, 218.

[28] *Id.* at 141-147.

The author correctly argues that the first model is not acceptable with regard to the EU given the deficit of direct democratic legitimacy.[29] Therefore, the choice to be made is between direct and indirect judicial control.[30]

These questions are dealt with in great detail in the section B. His arguments can only be briefly summarized here. With respect to the model of indirect judicial control (*i.e.* the preliminary ruling procedure), the author takes the remarkable view that the ECJ in *UPA* has given up its concept of procedural autonomy of the Member States by requiring complete judicial protection.[31] In his opinion, this could negatively affect the relationship between Member State courts and the ECJ in the long run, since the national courts could come under more and more pressure from Luxembourg.[32] The model of direct judicial control (*i.e.* actions for annulment) has indisputable advantages, such as, better accessibility for the individual[33] or contradictory nature.[34] On the other hand, the risk of overcharging the EU courts with direct actions and the potential consequence of causing considerable delays must not be underestimated.[35] Therefore, a further alternative is to combine the models of indirect and direct judicial protection by adding to the preliminary ruling procedure a hierarchical element. This would be to allow direct access for the individual in cases where the national judge refuses to request the ECJ for a preliminary ruling.[36]

These different concepts are further worked out in section C. The proposals made by AG Jacobs[37] and the CFI[38] for extending the direct access of the individual to the EU courts by a broader interpretation of the "individual concern" requirement in Art. 230 (4) EC[39] are judged as being inadequate.[40] What Böcker proposes, which

[29] *Id.* at 148.

[30] *Id.* at 151-153.

[31] *Id.* at 175.

[32] *Id.* at 215.

[33] *Id.* at 180.

[34] *Id.* at 192.

[35] *Id.* at 196-199.

[36] *Id.* at 164.

[37] Case C-50/00 P, Unión de Pequeños Agricultures v. Council, 2002 E.C.R. I-6677, para. 60 (opinion of AG *Jacobs*).

[38] Case T-177/01, Jégo Quéré v. Commission, 2002 E.C.R. II-2365, para. 51.

[39] BÖCKER, *supra* note 1, at 220-228.

was already mentioned at the beginning, is to differentiate by the criterion of "democratic legitimacy".[41] This proposal is found to be in harmony with the changes provided for by the Treaty establishing a Constitution for Europe.[42] Yet, another concept would be the introduction of a genuine fundamental rights complaint. This model of a specific instrument of fundamental rights protection has already been mentioned in section B,[43] but without any detailed analysis. Now, in section C, this remedy is described as a possible alternative to direct actions under Art. 230 (4) EC.[44] A subsidiary fundamental rights complaint could match the balance between overcharging EU courts with direct actions, on the one hand, and denying direct access for the individual on the other hand.[45] The author then comes back to the model of introducing a hierarchical element into the preliminary ruling procedure. Here, two solutions are possible. In cases where the national judge refuses to request the ECJ for a preliminary ruling, a remedy to the ECJ could be directed (1) either at the mere procedural question of whether or not the case must be referred to the ECJ, or (2) at the material questions of the case.[46] Böcker's position is that the second option is preferable since the ECJ is not used to fact finding and the judges are not familiar with the national legal order.[47] On the other hand, this option should be admitted only after the exhaustion of domestic remedies.[48] However, this argument cannot be followed. The requirement of exhaustion of domestic remedies is inconsistent with Böcker's earlier argument that due to the ECJ's monopoly in validity questions, the national judge is a priori incompetent to afford judicial relief.[49] Why require the exhaustion of domestic remedies, if none of the national judges may give the claimant what he or she asks? At last the German character comes through when Böcker finally depicts a model following the constitutional complaint to the German constitutional court.

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[40] *Id.* at 243-244.

[41] *Id.* at 229-234, 244.

[42] *Id.* at 233-234.

[43] *Id.* at 148-151.

[44] *Id.* at 234-243.

[45] *Id.* at 245.

[46] *Id.* at 246-248, 248-251.

[47] *Id.* at 248.

[48] *Id.* at 251.

[49] *See supra* note 21.

Although the reviewer has felt the necessity to contradict some of Böcker's positions, he nonetheless wants to point out that this book is of great importance. It has the merit of having compiled numerous arguments for and against direct access to EU courts, particularly in fundamental rights matters. The reasoning is always at a very high academic level. The fact that at the end of the study, the fundamental rights complaint is presented, not as the only solution, but as the solution favored by the author, makes his reasoning, in the eyes of the reviewer, a bit weaker. This is because it is a German who pleads for the introduction of a German-modeled fundamental rights complaint. What Böcker's study shows is that there are several models to change the current situation. What it demonstrates, above all, is that there is a political need for reform of access to justice in the EU. Therefore, this book is a "must" for anybody who is interested in the problem of judicial protection in the EU.