

Toward Constitutionalisation of the Former Pillars

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A. Hinarejos, *Judicial Control in the European Union, Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, Studies in European Law 2009), 232 p., ISBN 9780199569960

This is a very timely contribution and the outcome of a DPhil thesis researched by Dr Hinarejos at the University of Oxford. Despite the uncertain status of the Lisbon Treaty – in the run-up to that Treaty – she produced an excellent manuscript and turned her doctorate into an interesting read on the EU intergovernmental pillars. And more specifically: on the role of the European Court of Justice in this process before and after the entry into force of the Lisbon Treaty. The outcome of this book is the result of one of the first major works on the subject. The author has focused her research question on the ‘cherry picking’ of the failed Constitutional Treaty in the wake of the failure of that document and in the run-up to the Lisbon Treaty, i.e., ways of fixing constitutional problems by borrowing what the Constitution otherwise would have granted. In the same way, I will endeavour to cherry pick this book by looking at the most important and interesting aspects of it.

This is a well structured book and it is therefore easily accessible. It is a study of the jurisdiction of the Court of Justice in the Area of Freedom, Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP). This is also how the book is divided in two parts, by first setting out the AFSJ and the former third pillar discourse and thereafter, in the second part, looking more closely at the CFSP. The book concludes by providing a thoughtful account of the broader question of the Court’s jurisdiction. More specifically, the book charts the constitutional terrain and developments in this area by analysing it in the context of the broader debate on the function of Courts and adjudication in general.

With these general observations in mind it seems appropriate to look more closely at the book as such. Accordingly, the book begins by explaining the con-

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stitutional role by Courts in general and the European Court of Justice (ECJ) in particular. In this vein, the book sets out the classic fundamental rights discourse in the EU and thereby traces the foundation period of the EU where the court managed to unite both the need to expand the European project as such and the need to convince national courts that human rights were adequately protected at the EU level.

As does most scholarship conducted before the entry into force of the Lisbon Treaty – in the run-up to and the political negotiations for it – the book looks at different scenarios, that is both the pre-Lisbon era, which could be referred to as the ‘depillarisation’ era and the changes brought by the Lisbon Treaty. By referring to ‘depillarisation’ the author means the period between the failure of the Constitutional Treaty and the entry into force of the Lisbon Treaty. Hence, the author sets out to explore the by now classic *Pupino* case-law on the possibilities of indirect effect of framework decisions in the former third pillar. At the time of the *Pupino* ruling this was a very controversial issue, given that Article 34 EU made it clear that framework decisions did not have direct effect. In particular, the author looks at the European arrest warrant (EAW) saga and the challenges posed by national courts as to the legal validity of this framework decision. Hence she looks at the approach by the German Constitutional Court in the context of the EAW. This Court treated third-pillar law as purely international law with no direct effect or supremacy. Such an approach is contrasted with the Polish approach. The Polish Constitutional Court, when faced with conflicting national law and the question of whether to execute the Arrest Warrant in question, decided to delay the annulment of the national implementation measure while instructing the national legislator to amend the national constitution. Moreover, the author sets out to investigate the Czech and the Belgian attitudes, where the Czech approach, although hesitant to the EAW, reconciled the national implementation law with the constitution through interpretation. This meant that the Czech Constitutional Court did not need to ask the ECJ. The Belgian Court, however, did ask the ECJ. This is the *Advocaten voor de Wereld* case. The author argues that this meant that the Belgian court therefore considered that EU law took primacy over national law, including in third-pillar situations. Such a case study is of importance as it illuminates the difficulties that face the national courts in the growing area of the AFSJ. So the test case here is the *Advocaten voor de Wereld* case, where the ECJ got the opportunity to express a view on the legal validity of the EAW. The ECJ upheld the legality of the European Arrest Warrant, which has been heavily criticized in the literature.

The author argues moreover that the Court as an international court has nothing to do but uphold the notion of *pacta sunt servanda*. What such an obligation entails in the third-pillar area remains, however, somewhat unclear. Yet the author

moves on to argue that allowing third-pillar measures to be granted supremacy as a matter of EU law is dangerous from the perspective of the cause of conflict – which could therefore cause enforcement problems – between the ECJ and national courts. In this regard, a parallel is drawn to the German Constitutional Court – once more – and its famous *Solange* doctrine, which seems particularly crucial in the AFSJ sphere. It could be added here that such an observation appears particularly pertinent given the more recent ruling, not available at the time of publishing of the book, by the German Court on the validity of the Lisbon Treaty, delivered on 30 June 2009. It should perhaps be recalled that in this case, the German Constitutional Court expressed concerns about EU law involvement in the sensitive area of criminal law and policy. Thus, the book provides a detailed account of the status of third-pillar measures by analyzing the meaning of direct applicability and direct effect in this area. The main argument as presented in this book, is that before the Lisbon Treaty, there was no *Foto-Frost* in the third pillar because Union law was simply not ready for it. The author moreover argues that the supremacy-direct effect debate will not go away, the entry into force of Lisbon notwithstanding. It would, however, have been interesting with a more detailed account of the Lisbon Treaty in this regard. In any case, the author sets out to analyse the constitutionalisation of the third pillar against the bigger question of judicial protection at the EU level. More specifically, the question is whether supremacy can apply only when there is direct effect or whether it can apply also in its absence. Here the author rephrases it as a question of the scope of direct effect rather than whether there is supremacy or not. In this regard, one may perhaps have wished for an analysis of the notion of loyalty and effectiveness given the strong impact of the loyalty obligation and its consequences in the Lisbon Treaty as to boundary between the AFSJ and the CSFP. It is equally not entirely clear what the author means with the ‘unclear’ situation after the Lisbon Treaty. It would perhaps have been desirable with a clarification in this regard.

In any case, the second part of the book looks at the depillarisation of the CFSP – Common Foreign Security Policy. Here the author discusses the famous *Kadi* case in the light of judicial protection and the problematic situation before the Lisbon Treaty and the lack of judicial control in this area. She goes on to discuss to what extent the Lisbon Treaty has fixed the problems raised by the *Kadi* case by discussing the new provisions of Article 75 TFEU and Article 275 TFEU, which provides for jurisdiction for cases involving restrictive measures against individuals. This is a novelty in the Lisbon Treaty and as such extremely important. In this context the author also examines the relationship between the European Court of Human Rights and the ECJ. Recent case-law is discussed here with regard to the equivalent protection regime (that state action taken in compliance with interna-

tional obligations is justified as long as the relevant organization protects human rights in a manner equivalent to that provided by the Convention).

The final chapter of the book is entitled 'A Constitutional Court for the EU' and addresses the future challenges that faces the European Court in this area.

Overall the author has a very positive view towards the Court as the rescuer of European law and judicial protection. The contention as presented by this book is that the Court's activism is justified in the absence of a full-fledged system. Even though it is doubtlessly true that the Court has had a difficult job and therefore tried to balance the constitutional mess which has signified the area at stake, if there is anything one could ask for in this book – and without calling it criticism – it is perhaps a wider spectrum to also consider the possible dangers with judicial activism from a legitimacy perspective in greater detail, as well as more references to existing literature. Furthermore, one could perhaps also have asked for a broader analysis of the Charter of Fundamental Rights as well as the possible accession to the ECHR and its implications for effective judicial protection after the Lisbon Treaty. Another issue which could have been addressed further is the complex regime of the opt-out/opt-in framework where some Member States are not participating in all elements of the AFSJ provisions, as well as the new mechanisms of enhanced cooperation (closer cooperation in some areas by some Member States). These are big challenges for the future. Moreover, for example, the section on judicial control over AFSJ bodies could have included a section on the European Public Prosecutor (should such a prosecutor be established). Admittedly it has, however, merits that it is so focused and detailed that it almost reads like a handbook. Therefore it would be a mistake not to read this book, and as such it is valuable reading for anyone who wants to deepen his or her knowledge on judicial protection and the function of the Court of Justice in this growing and complex area. The book offers an interesting and intellectually challenging as well as thoughtful contribution to the law on judicial protection in the EU. It is therefore to be recommended to not only academics and students of EU law but also to practitioners as essential reading on getting to grips with these important issues. As already noted, unfortunately some parts of the book are outdated – in all but the transitional provisions of the Lisbon Treaty – due to the entry into force of Lisbon. The pre-Lisbon chapters do however still have an important function as background reading for those who wishes to understand the complex issues facing the EU in this area and the history leading up to them.

