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# Introduction

> The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a 'sense of common venture'; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.
>
> A Bickel, *The Least Dangerous Branch* (1962) 24.

This book aims to make a modest contribution to the on-going discourse on 'constitutionalism' in the European Union[1] by comparing avenues available to private parties to question the legality of EU laws with the mechanisms available to them for challenging the Member State rules for failure to comply with (lawful) EU measures. Anomalies and inconsistencies permeating these areas of the law will be teased out, in order to explain what appears to be a significant fault line in the EU constitution. This manifests in the fact that, without a supremacy clause in the EU Treaty,[2] or provisions addressing collateral issues such as the sanctions and procedural rules that attach to Member State wrong-doing, the Court of Justice has been required to develop agile and imaginative principles to legitimate and justify the elaboration of a federal legal structure under the EC pillar.[3] The Court placed heavy reliance on the notion of 'individual rights' and the need for their 'effective judicial protection', in constructing a federal legal polity. Yet, at the same time, these imperatives have had a relatively muted influence on Court of Justice case law concerning the rights of these same 'individuals' to question the legality



[1] eg de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (2000); K Lenaerts and T Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism', 2003, 22 *YEL* 1.

[2] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJIL 1; also GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 *CMLRev* 595.

[3] A Stone Sweet, *The Judicial Construction of Europe* (2004). For a detailed discussion of the broader issue of political justification for the federal legal construct see JHH Weiler, 'The European Court of Justice: "Beyond Doctrine" or the Legitimacy Crisis of European Constitutionalism' in A Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Courts and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context* (1998) 365.

of measures promulgated by EU institutions;[4] even though such measures, over time, have had increasingly significant impact on the interests of private sector actors.[5] Apparently, other considerations, such as the need to protect 'fledgling' EU institutions from comprehensive judicial review processes, continue to underpin the case law to date, despite the stage of evolution that the EU polity has achieved.

If the Constitution of the European Union had entered into force, it might have allowed the Court of Justice to place less reliance on 'individual rights', and 'effective judicial protection' in explaining, justifying and rationalising the far-reaching effects of EU law in the national legal systems of the Member States. This might have occurred due to Article I–6, which secured the primacy of all EU law over the laws of the Member State legal systems. It stated that the 'Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'. It was not without significance, I would argue, that Article I–6 made no reference for the need of such primary EU law to be 'directly effective' or for it to vest individuals with rights, as a prerequisite to their enforcement in the national legal system.

Further, 'relief' for the Court of Justice, in terms of supplying justification for its case law, lay in the Article I–29 duty on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[6] Given that this provision covered one of the two cornerstones of the Court's case law on Member State remedies and procedural rules, it might have allowed the Court of Justice to move away from 'rights' based doctrines to justify this case law, through reference to the plain meaning of the Constitutional text. Yet neither of Articles I–6 or I–29 are likely to enter into force. Thus, absent developments of this kind emanating from the political plane, 'individual rights' and 'effective judicial protection' will remain a hallmark for the legitimation package for the enforcement of EC law at national level, even though these factors continue to



[4] As will be shown below, the concept of 'individual concern' has been central to the test for *locus standi* under Article 230(4) of the EC Treaty, and 'individual rights' have always been relevant in determining damages liability of Community institutions under Article 288(2). This has served, however, to restrict rather than expand liability. See further chs 6 and 8 below.

[5] A Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' (1995) 32 *CMLRev* 7, 46–47; M Hedemann-Robinson, 'Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?' (1996) 2 *European Public Law* 127; see further below ch 2.

[6] A further 'codification' that assists the Court of Justice in the legitimation of its constitutional case law lies in the advent of an EU Charter of Fundamental Rights, which reflects the work of the Court of Justice in developing a corpus of fundamental human rights which the EU institutions are bound to respect, along with Member State bodies acting within the scope of EU law. It has been described by Stone Sweet, (n 3 above, 242) as the most 'striking' and 'important' codification of the constitutional edifice that has been created by the Court of Justice along with the Principle of Proportionality. For a most detailed study see T Tridimas, *The General Principles of EU Law* (2006). See also S Peers and A Ward (eds), *The EU Charter of Fundamental Rights: Law, Politics, and Policy* (2004).

have relatively weak influence in the case law on challenge to the legality of EC measures. Now that jurisdiction has been assumed by the Court of Justice over interpretation of EU measures, under the Police and Judicial Cooperation Pillar, the same principles might be expected to permeate this case law.

The European Court of Justice (ECJ) was, from the very outset, 'burdened' with responsibilities of unparalleled dimensions in crafting principles of administrative and constitutional law governing the 'new legal order'[7] established by the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community. The political structure and functions of this novel entity militated against the conclusion that it was a mere intergovernmental forum for political co-operation. The existence of legislative bodies, in the form of the Council, the Commission and the Advisory Assembly, as it then was, charged with a positive duty to elaborate legislation on subject areas designated in the foundation treaties, provided firm evidence that the Community was an entity that differed markedly from traditional international organisations.

Further, the judicial architecture itself suggested that the laws of the new polity would be subject to an enforcement and review regime unprecedented among forms of international co-operation that had existed to date. For the first time, Member State courts were specifically recruited, by the text of an international treaty, into the framework for the implementation of rules elaborated on the international plane. Under Article 177 of the EEC Treaty (now Article 234) Member State courts were empowered to refer questions to the Luxembourg court on the interpretation and validity of Community law, in the context of disputes of a purely domestic nature. Indeed, the power to refer was cast as an obligation with respect to national courts against whose decisions there was no judicial remedy.[8] The judgments issued by the Luxembourg court were thus destined for transplant into national judicial systems.

At the same time, the founders of the EEC supplied an elaborate scheme for judicial review by the ECJ of Community legal measures. These could be activated by Member States, the European Commission and, in some circumstances, private sector actors, or 'individuals' as they were termed; even though the latter were traditionally subjects, and not objects, of international law.[9] The road-map for private party judicial review was established by a set of provisions that are now encapsulated in the EC Treaty as the Article 230 action for nullity; Articles 231, 242 and 243 which govern sanctions attaching to a declaration for nullity; Article

[7] Case 26/62 *van Gend en Loos* [1963] ECR 1.

[8] For a detailed discussion of this duty see eg D Anderson and M Demetriou, *References to the European Court* (2002) 164–186. For recent authority on the consequences of failure to refer see Case C–224/01 *Gerhard Köbler v Republic of Austria* [2003] ECR I–10 239; Case C–173/03 *Traghetti del Mediterraneo SpA v Italian Republic*, judgment of 13 June 2006.

[9] For a comprehensive study of the evolution in the remedial effects of international law see D Shelton, *Remedies in International Human Rights Law* (2005).

234 validity review from national courts; the Article 241 plea of illegality; the Article 232 action for failure to act,[10] and Article 288(2), which concerns non-contractual liability of the EU institutions. Indeed, the very establishment in the foundation treaties of detailed rules for individual challenge to EC measures suggested that their impact on private sector actors was intended to be far deeper than rules that had been hitherto promulgated on the international plane.[11] Despite this highly detailed mandate to elaborate a scheme of administrative and constitutional review of EC measures, the concept of 'individual rights' and 'effective judicial protection' are yet to impact on this body of case law on anything even resembling the scale of the rules on national enforcement of (lawful) EC measures.

The *van Gend en Loos* case laid the foundations for both maximising the effects of EC law in national law, and the elaboration of the legitimation package to support this development. Seminal aspects of the case merit recollection:

> [The] Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition the task assigned to the Court of Justice under Article 177 [Art 234], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority that can be invoked by their nationals before those courts and tribunals.
>
> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community



[10] This channel of review will not be considered in detail in this study. However, two of the principle drawbacks with Article 230(4) nullity review, namely (i) the limited range of sanctions the Court is empowered to issue and (ii) the need to prove 'direct and individual' concern, apply equally to Article 232. These will be considered in detail in ch 6. For a recent examination of the action for failure to act see K Lenaerts, D Arts and I Maselis, *Procedural Law of the European Union* (2006) 329–334.

[11] Compare, however, Stone Sweet (n 3 above, 24) who argues that the founders of the EEC never intended for EC law to have such far-reaching effects in the national legal system. 'The Member States did not mean the Treaty to confer judicially enforceable rights on private individuals, businesses, and other legal persons. But the court inferred rights from certain crucial provisions, such as those obligating states to remove hindrances to trade, or to guarantee equal pay for men and women. Legal integration is therefore largely a record of how the ECJ has made creative use of its discretionary powers to remake the Treaty, and how private actors, national judges, and political elites have responded to these moves.'

law therefore not only imposes obligations on individuals—but is also intended to confer upon them rights which become part of their legal heritage . . . Article 12 [Art 25] must be interpreted as producing direct effects and creating individual rights which national courts must protect.[12]

In many respects, the *van Gend en Loos* case generated more questions than answers. First, were Treaty Articles the only provisions of Community law capable of having direct effect and, if the answer was in the negative, which other Treaty provisions were possessed of this quality? Secondly, were national courts always obliged to disapply national measures that conflicted with Community rules that were 'sufficiently clear, unconditional, and precise to be directly effective', or was the *van Gend en Loos* principle confined to Member State measures that predated directly effective EC rules? Thirdly, were Community rules to be directly enforceable against Member States only, or could they be invoked against privates parties who had failed to comply with their terms? Fourthly, what types of remedies should be available to 'individuals' (as the court termed them) who successfully argued that national law conflicted with directly effective EC measures?

The answers to these questions are well-known. The ECJ subsequently returned numerous questions from national courts concerning the interpretation of a whole raft of EC Treaty articles,[13] thereby confirming—and unsurprisingly—that direct effect would not be confined to the provision in issue in the *van Gend en Loos* case. The Court also ruled that all directly effective EC rules were supreme over conflicting national measures, which included domestic rules passed *after* the entry into force of the competing EC principle.[14] It was firmly established that Community legislative instruments, namely Regulations,[15] Directives[16] and Decisions[17] were all capable of having direct effect. The same was also extended to certain provisions of treaties that had been entered into by the EC.[18]

But the extent to which these measures, and indeed EC Treaty articles themselves, could be enforced against private sector actors, received a more



[12] n 7 above, 12–13.

[13] eg Art 90 (Art 95) Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Saarloius* [1966] ECR 205; Art 28 (Art 30) Case 8/74 *Dassonville* [1974] ECR 837; Art 39 (Art 48) Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging Detailhandel en Ambachten* [1964] ECR 177 ('*Hoekstra*'), and Case 41/74 *van Duyn v Home Office* [1974] ECR 1337 ('*van Duyn*'); Art 55 (Art 52) Case 2/74 *Reyners v Belgium* [1974] ECR 631; Art 49 (Art 59) Case 33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299; Art 81 (Art 85) Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235; Art 82 (Art 86), eg Case 22/79 *Greenwich Film Productions v SACEM* [1979] ECR 3275.

[14] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal s.p.a.* [1978] ECR 629.

[15] Case 34/73 *Variola s.p.a. v Amministrazione Italiana delle Finanze* [1973] ECR 981 ('*Variola*'); Case 50/76 *Amsterdam Bulb v Produktschap voor Siergewassen* [1977] ECR 137 ('*Amsterdam Bulb*').

[16] Case 41/74 *van Duyn* [1974] ECR 1337.

[17] Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825 ('*Grad*'). See more recently Case C-277/94 *Z Taflan-Met and Others v Bestuur van de Social Verzekerings and O Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1996] ECR I–4085. This case also addresses the direct effect of international agreements concluded between the Community and third States.

[18] eg Case 104/81 *Hauptzollamt Main v Kupferberg* [1982] ECR I–3641.

variegate response. While some Treaty articles were held to be horizontally enforceable,[19] and Regulations were considered, by virtue of the wording of Article 249 (Art 189) to be directly applicable in their entirety,[20] the direct effect of clear unconditional and precise—but unimplemented—Directives was confined to emanations of the state.[21] Indeed, the Court of Justice ultimately placed an express ban on the horizontal application of directives against private sector actors.[22] However, it is open to question whether, in real terms, this 'prohibition' has survived contemporary developments in the case law.[23]

Finally, the issue of sanctions to enforce directly effective EC rules has been the subject of a great deal of judicial attention. The ECJ has developed a large and seemingly ever-expanding body of case law concerning Member State remedies and procedural rules, all of which are designed to guarantee the effective enforcement of EC law at national level.[24]

[19] eg Art 141 (Art 119). Case 43/75 *Defrenne v Sabena* [1976] ECR 455; Art 39 (Art 48) Case 36/74 *Walrave v Kock* [1974] ECR 1405; Case C–281/91 *Angonese* [2000] ECR I–4139; Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235 (Art 85); Case 22/79 *Greenwich Film Productions v SACEM* [1979] ECR 3275.

[20] Case 34/73 *Variola* [1973] ECR 981 and Case 50/76 *Amsterdam Bulb* [1977] ECR 137.

[21] Case 8/81 *Ursula Becker v Finanzamt Münster Innenstadt* [1982] ECR 53; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723 ('*Marshall No 1*'). Case C–188/89 *Foster v British Gas* [1990] ECR I–3313.

[22] Case C–91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I–3325 ('*Dori*'); Case C–192/94 *El Corte Inglés SA v Rivero* [1996] ECR I–1281 ('*Rivero*').

[23] See, eg Case C–144/04 *Mangold Helm* [2005] ECR I–9981; Joined Cases C–397/01 and C–403/01 *Pfeiffer and Others v Deutsches Rotes Kreuz. Kreisverband Waldshut eV* [2004] ECR I–8835; Case C–201/02 *The Queen on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I–9925; Case C–473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I–10875; Case C–185/97 *Coote v Granada Hospitality* [1998] ECR I–5199; Case C–194/94 *CIA Security International SA v Signalson* [1996] ECR I–2201. For a full discussion see below ch 2.

[24] Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043 ('*Comet*'); Case 33/76 *Rewe-Zentral finanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saasrland* [1976] ECR 1989 ('*Rewe*'); Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio s.p.a.* [1983] ECR 3595; P Oliver, 'Le droit communautaire et les voies de recours nationales' (1992) 28 *CDE* 348. For further commentaries see generally, but not exhaustively, N Green and A Barav, 'Damages in the National Courts for Breach of Community Law' (1986) 6 *YBEL* 55; J Steiner 'How to Make the Action Suit the Case: Domestic Remedies for Breach of EEC Law' (1987) 12 *ELRev* 102; A Barav, 'Damages in the Domestic Courts for Breach of Community Law by National Public Authorities' in HG Schermers *et al* (eds), *Non-Contractual Liability of the European Communities* (1988) 149; D Curtin, 'Directives: the Effectiveness of Judicial Protection of Individual Rights' (1990) 27 *CMLRev* 709; A Ward, 'Government Liability in the UK for Breach of Individual Rights in European Community Law' (1990) 19 *Anglo-American Law Review* 1; S Weatherill, 'National Remedies and Equal Access to Public Procurement' (1990) 10 *YBEL* 243; S Prechal, 'Remedies After Marshall' (1990) 27 *CMLRev* 451; AG Tesauro, 'La Sanction des Infractions au Droit Communautaire' (1992) 32 *Rivista di Diritto Europeo* 477; G de Búrca, 'Giving Effect to European Community Directives' (1992) 55 *MLR* 215; E Szyszczak, 'European Community Law: New Remedies, New Directions?' (1992) 55 *MLR* 690; F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *MLR* 19; B Fitzpatrick and E Szyszczak, 'Remedies and Effective Judicial Protection in Community Law' (1994) 57 *MLR* 434; W Van Gerven, 'Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?' (1995) 32 *CMLRev* 679; R Caranta, 'Judicial Protection Against Member

Of even more significance, however, for the purposes of the present study, are the means utilized by the Court to justify the incursion of Community law into Member State legal systems which this body of case law represents, given that the EEC Treaty contained no express mandate to support it.[25] In addition to the distinguishing features of the European Community legal order emphasized in the *van Gend en Loos* case, the imperative of effective and uniform application of EC rules and the concept of a Community vesting individuals with rights which the national courts had a duty to protect, have been pivotal in supporting the constitutional structure crafted by the Court.

The rules on the impact of EC legal instruments in the national legal systems will be detailed in chapter 2. For present purposes, it is useful to note that, in cases concerning the impact of EC Treaty Articles in national law, the Court made persistent reference to the fact that provisions would be 'deprived of all effect and the . . . objectives of the Treaty would be frustrated' if the meaning and impact of these measures were left to the domain of national law.[26] The notion of 'individual rights' featured prominently in several seminal cases, including *Defrenne v Sabena*[27] and *Walrave v Kock*[28] concerning, respectively, the direct effect of Articles 141 (Article 119) and 39 (Article 48). The importance of the 'rights' discourse to the EC constitutional structure is best illustrated in the words of one of the Court's Advocates General. It has been contended that 'the obligations of the Member States and of the Community institutions are directed above all . . . to the creation of rights for individuals'.[29]



States: a New *jus commune* Takes Shape' (1995) 32 *CMLRev* 703; A Ward, 'National Sanctions in EC Law: A moving Boundary in the Division of Competence?' (1995) No 2 *European Law Journal* 205; J Steiner, *Enforcing EC Law* (1995), in particular p42ff; E Szyszczak, 'Making Europe More Relevant to its Citizens: Effective Judicial Process' (1996) 21 *ELRev* 351; C Himsworth, 'Things Fall Apart: the Harmonisation of Community Judicial Procedural Protection Revisited' (1997) 22 *ELRev* 291; C Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?' (1997) 34 *CMLRev* 1389; M Ruffert, 'Rights and Remedies in European Community Law: a Comparative View' (1997) 34 *CMLRev* 307; M Dougan, 'Cutting Your Losses in the Enforcement Deficit: A Community Right to the Recovery of Unlawfully-Levied Charges' in A Dashwood and A Ward (eds), *Cambridge Yearbook of European Legal Studies* 1 (1998) 233; A Arnull, *The European Union and its Court of Justice* (2006) 267–334; T Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CMLRev* 1199; M Dougan, *National Remedies Before the Court of Justice* (2004); M Accetto and S Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' (2005) 11 *European Public Law* 375; T Tridimas, *The General Principles of EU Law* (2006) 418–476.

[25] For detailed discussion of the broader issue of the *political* justification for the federal legal construct see JHH Weiler, 'The European Court of Justice: "Beyond Doctrine" or the Legitimacy Crisis of European Constitutionalism' in A Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (1998) 365.

[26] Case 75/63 *Hoekstra* [1964] ECR 177, 184.

[27] Case 43/75 [1976] ECR 455, para 24.

[28] Case 36/74 [1974] ECR 1405, para 34.

[29] AG Tesauro in Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur SA v Germany and The Queen v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I–1029, para 39 of the Opinion. Cited by M Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 *CMLRev* 307 at 307.

The same is reflected in the rationale for enforcing Regulations in national law. In addition to the express terms of Article 249, the Court of Justice justified the direct applicability of Regulations by reference to the notion that these measures 'confer rights on private parties' which the national courts were obliged to protect.[30] Similar findings were made in the contest of direct effect of Decisions, in that the Court asserted that 'the right of the individual' to invoke these measures in national courts was 'the same as that of a directly applicable provision of a Regulation'.[31]

The case law on the effect of Directives in national law is replete with references to both the concept of individual rights and the need for effective enforcement of Directives. Indeed, the rationale for restricting direct effect of unimplemented Directives to emanations of the State was predicated entirely on the notion of individual rights. It ran as follows. Member States were subject to implementation duties with respect to Directives under Articles 10 (Article 5) and 249 (Article 189) of the Treaty. If they should fail to meet these duties, it would be unjust to deprive individuals of rights they would have otherwise enjoyed under Community law. Or to put it differently, Member States should not be allowed to take profit from their own failure to properly transpose Directives into national law. Private parties, on the other hand, were not subject to the duties laid down in Articles 10 and 249. As a consequence it would be equally unjust to vest national courts with the authority to rigorously enforce unimplemented Directive against them.[32]



[30] Case 34/73 *Variola* [1973] ECR 981, 990.

[31] Case 9/70 *Grad* [1970] ECR 825, para 5.

[32] ibid. In particular AG Slynn in Case 152/84 *Marshall No 1* [1986] ECR 723, 734–5. See also AG Warner in Case 38/77 *Enka BV v Inspecteur der Invoerrechten en Accijnzen, Arnhem* [1977] ECR 2203, 2226; AG Mischo in Case 80/86 *Criminal Proceedings Against Kolpinghuis Nijmengen BV* [1987] ECR 3969, 3977–78; AG Lenz in Case 103/88 *Fratelli Costanzo s.p.a. v Comune di Milano* [1989] ECR 1839, 1857; Case C–91/92 *Faccini Dori* [1994] ECR I–325; Case C–192/94 *Rivero* [1996] ECR I–1281. For commentaries see eg Y Galmot and J Bonichot, 'La cour de justice des Communautés européennes et la transposition des directives en droit national' (1988) 4 *RFDA* 1; P Manin, 'L'invocabilité des directives; Quelques interrogations' (1990) *RTDE* 669; F Emmert and M Pereira de Azevedo, 'L'effet horizontal des directives de la jurisprudence de la CJCE: un bateau ivre' (1993) 29 *RTDE* 593; F Emmert and M Pereira de Azevedo, 'Les jeux sont fait: rien ne va plus ou une nouvelle occasion perdue par la CJCE' (1995) 31 *RTDE* 11; M Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59(3) *Cambridge Law Journal* 586; S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *CMLRev* 1047; S Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 *ELRev* 177; S Prechal, 'Direct Effect Reconsidered, Redefined and Rejected' in JM Prinssen and A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (2002), 15; T Tridimas, 'Black, White and Shades of Grey: Horizontality of Directive Revisited' (2002) *Yearbook of European Law* 327; D Colgan, 'Triangular Situations: the Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives' (2002) 8 *European Public Law* 545; H Somsen, 'Discretion in European Community Environmental Law: An Analysis of ECJ Case Law' (2003) 40 *Common Market Law Review* 1413; C Hilson, 'Legality Review of Member State Discretion under Directives' in T Tridimas and P Nebbia (eds), *European Union Law for the 21st Century* (2004) 1047; S Drake, 'Twenty Years After Von Colson: the impact of 'indirect effect' on the protection of the individual's Community rights' (2005) 30 *ELRev* 329; for the most detailed recent study see S Prechal, *Directives in EC Law* (2005).

Both the imperative of 'effective enforcement' and the notion of 'individual rights' have substantially underpinned the Court's seemingly never-ending case law concerning Member State remedies and procedural rules. With regard to the former, the 'principle of effectiveness' forms half of the two-part test employed by the Court to assess the compatibility with Community law of deficient Member State sanctions and obstructive procedural rules;[33] while the concept of 'individual rights' has been prominent in, among other places, the Court's case law on State liability in damages for breach of EC rules. Indeed, that concept forms the lynchpin of these principles: the ECJ has held that it is Community measures that vest *individuals with rights*, rather than *directly effective* EC measures which carry the potential to attract State liability in the event of their breach (the former representing a broader category than the latter).[34] The Court's case law on remedies and procedural rules represents the 'high water mark' or 'third generation'[35] initiatives of the effective enforcement of EC rules, and it will be examined in detail in chapters 3 and 4 of this study. The question of State liability in damages will be considered in chapter 5.[36] The close analysis canvassed in these chapters will also provide a vital reference point when it comes to comparing challenges to unlawful Member State measures with the standards of judicial review afforded to private parties who wish to contest the legality of EC rules. These will be considered in chapters 6, 7 and 8.

*Effet utile*, and individual rights, have, thus, supplied critical underpinnings to the elaboration of a federal judicial architecture. The influence, in particular, which the notion of 'individual rights' has on the domestic judiciaries of the Member States, has been summarized as follows:

> . . . in holding that a national court's first loyalty must be to the ECJ on all questions of Community law, the Court was able simultaneously to appeal to national courts *in their role* as protectors of individual rights—a very effective dual strategy. Such argumentation simultaneously strengthens the force of the Court's message to national courts by portraying the construction of the European legal system as simply a continuation of the traditional role of European courts and, indeed, liberal courts everywhere: the protection of individual rights against the state.[37]



[33] n 24 above.

[34] Joined Cases C–6/90 and C–9/90 *Francovich and Bonifaci and Others v Italian Republic* [1991] ECR I–5357 ('*Francovich*').

[35] The period in which the Court 'breaks into the national rules of the Member States themselves' in order to ensure that national remedies are 'truly effective' has been termed the 'third generation' era. See D Curtin and M Mortelmans, 'Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration: Liber Amicorum Henry G. Schermers* (1994) 434.

[36] For the most recent detailed consideration see T Tridimas, *The General Principles of EU Law* (2006), pp 498–547.

[37] A Burley and W Mattly, 'Europe before the Court: a political theory of legal integration' (1993) 47 *International Organization* 41, 64.

As long ago as 1994, one well-respected commentator asserted that a by-product of increasing the effectiveness of Community law would be a heightening of Member State awareness of loss of sovereignty.[38] This was echoed by a judge of the Court of First Instance, who warned that Court of Justice rulings on national remedies were likely to be 'extremely sensitive, as they go right to the heart of Member State's surrender of sovereignty, as agreed upon in far less explicit terms in the Treaties'.[39]

Indeed, the Court's status as the guardian of the rights of the 'individual' generated a disturbing paradox; the Court's commitment to effective judicial protection and individual rights presented as less rigorous when it came to reviewing whether EC measures were lawful. As was observed by former Advocate General Jacobs in his Opinion in Case C–50/00 P *UPA v Council*,[40] with respect to *locus standi* problems under Article 230(4), 'it may be too harsh to speak of double standards' but 'it cannot be denied that the strict rules on standing under the fourth paragraph of Article 230 EC as currently interpreted by the Court, and the textual and historical arguments invoked by the Council and the Commission in order to justify them, seem increasingly untenable in the light of the Court's case-law on the principle of effective judicial protection' before the national courts of the Member States.[41]

Thus, as will be seen from the discussion to follow in this book, close scrutiny of judicial review rules under Article 230(4), Article 234 (validity) and Article 288 shows that concern for the interests of private parties has penetrated less forcefully when the legality of measures emanating form Community institutions is in issue. Nor has the Court been minded to liberally interpret its jurisdiction under any of these provisions to guarantee the availability of an effective sanction in the face of unlawful conduct by Community institutions. Rather, both the Court of First Instance and the Court of Justice consider that they are bound by the strict terms of the EC Treaty, with respect to the scale of their own remedial powers when Community institutions are directly challenged for breaching the law.[42]

As the case law has evolved, it has in fact *minimized* the accountability of EC decision makers for unlawful conduct.[43] For example, rather than vesting the 'natural and legal persons' mentioned in Article 230 with the vaunted status of 'individuals' possessed of a bundle of rights which the ECJ has a duty to protect,



[38] D Curtin, case commentary on *Marshall No 2* (1994) 31 *CMLRev* 631, 649.

[39] K Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) *University of Chicago Legal Forum* 93, 100–101.

[40] Opinion of 21 March 2002.

[41] ibid, para 98.

[42] See eg recently Case T–2/04 *Korkmaz v Commission*, order of 30 March 2006. On the limits of remedial powers under Article 288(2) see eg Case C–63/89 *Assurances du crédit v Council and Commission* [1991] ECR I–1799.

[43] See eg observations by Burley and Mattly above n 37 at pp 60–64; GF Mancini and DT Keeling, 'Democracy and the European Court of Justice' (1994) 57 *MLR* 175, 186.

they have been characterized, rather less grandiosely than litigants bringing suit in national courts, as 'non-privileged applicants'.

Some of the central problems with Article 230 nullity review have been as follows:

(i) Despite early calls for generous interpretation of Article 230(4) rules on standing,[44] direct access to the Court of Justice under Article 230(4) was restricted by narrow interpretation of the 'direct and individual concern' prerequisite for challenge to EC legislative measures.[45]

(ii) As noted above, the Court has conservatively interpreted its jurisdiction with respect to sanctions and procedural rules in operation beneath Article 230(4), which can supply a formidable barrier to private sector actors seeking an effective remedy in the face of Community misconduct. Even the express power to order interim relief under Article 243, and the two-month time-limit for instituting proceedings under Article 230(5), have been interpreted in a manner more mindful of the interests of the Community institution concerned than of the individual litigant bringing suit.

(iii) Right of access to a court has also been impeded by the so-called *TWD* rule.[46] Despite the difficulties in obtaining a remedy under Article 230(4), applicants who 'without any doubt' could have brought suit under Article 230(4), but failed to do so, will be precluded from bringing Article 234 validity review at a later stage. This has created confusion, and particular difficulties for private applicants in the context of challenge to measures involving joint decision-making by EU institutions and national authorities.

(iv) There remains a lack of inclination on the part of both the Court of Justice and the Court of First Instance to elaborate principles that would result in a realistic appraisal of the normative or executive nature of Community measures.[47] As a result, measures are often classified as normative, when they would, more likely, have been considered executive if promulgated by a Member State Government authority. Such classification significantly diminishes the prospects for private parties for securing *locus standi* under Article 230(4).

With regard to validity review, the problems are less extreme. It has been argued that the case law has now evolved to the point that national courts must do all they can to interpret national procedures to open up a channel for validity review, even if it might not otherwise exist under national law, and even if there is no Member

[44] See eg AG Roemer in Case 6/68 *Zuckerfabrik Watenstedt GmbH* [1968] ECR 409, 419 and AG Gand in Case 69/69 *Alcan Aluminium v Commission* [1970] ECR 385, 399.

[45] ch 6 below. [46] Case C–188/92 *TWD* [1994] ECR I–833.

[47] For a discussion see TA Vandamme, *The Invalid Directive* (2005) pp7–10; A Ward, '*Locus Standi* Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity' (2003) 22 *YEL* 45.

State measure in place challenging the legality of the EC rule.[48] Further, there are firm indications in the case law that all of the remedial rules crafted in the context of failure of Member States to comply with lawful EC measures, and which will be canvassed in detail in chapters 3 and 4, also apply to claims based on the validity of EC measures.[49] This contrasts markedly with the sanctions that follow from Article 230(4) nullity proceedings; aside from the fields of interim relief and damages, there is no sign that rules on sanctions and procedures applicable to national courts have in any way influenced the Union judicature in interpreting their own powers with respect to remedies.

Yet, problems remain with respect to Article 234 review. In the context of sanctions, a Member State court can only issue a remedy that runs to the limit of the national jurisdiction concerned. Thus, it may be necessary to bring legal proceedings in all 25 Member States in order to obtain an 'effective' sanction with respect to invalid EC rules. Substantial delay remains an issue with validity proceedings. This is so due to the *Foto-Frost*[50] prohibition on national courts declaring EC measures invalid. Instead, if a national judge entertains serious doubts as to the validity of the measure, he or she must refer questions to the Luxembourg court under Article 234. Yet, private parties have no entitlement to an Article 234 validity reference; they must persuade the national judge concerned that a reference is necessary.[51] Doubt remains on the practical utility of challenging the validity of EC measures. While the Court of Justice has developed an impressive range of substantive rules against which the legality of EC measures can be tested,[52] they rarely result in a declaration of invalidity, in cases arising from Article 234 reference from national courts.

Article 288(2) compensation proceedings equally carry features that are both beneficial and detrimental to private sector actors.[53] These will be canvassed in chapter 8. Article 43 of the Statute of the Court of Justice sets a generous five-year time-limit for bringing proceedings, and the rules on standing are relatively relaxed. Private parties are not bound to prove direct and individual concern as a prerequisite to launching a damages claim against an EU institution under



[48] J Temple-Lang, 'Actions for Declarations that Community Regulations are Invalid; the Duties of National Courts Under Article 10 EC' (2003) 28 *ELRev* 102, at 111. So much so was suggested as far back as 1992 in Case C–97/91 *Borelli* [1992] ECR I–6313. See also *R v Secretary of State for Health and Others ex parte Imperial Tobacco Limited and Others* [1999] ELR 583; Joined Cases C–27 and C–122/00 *R v Secretary of State for the Environment, Transport and the Regions ex parte Omega Air and Omega Air v Irish Authority* [2002] ECR I–2569; Case C–344/04 *The Queen on the Application of (1) International Air Transport Association and (2) ELFAA v Department of Transport*, judgment of 10 January 2006; cf, however, the Opinion of AG Sharpston in Case C–432/05 *Unibet*, judgment of 30 November 2006.

[49] See in particular Case C–212/94 *FMC* [1996] ECR I–389.

[50] Case 314/85 [1987] ECR 4199.

[51] But see, however, the findings of the Court of Justice in Case C–461/03 *Gaston Schul Douaner expediteur BV v Minsiter van Landouw*, judgment of 6 December 2005.

[52] For the most detailed study see T Tridimas, *The General Principles of EU Law* (2006).

[53] ibid, pp 477–497.

Article 288(2). Further, there are signs of attempts at realistic classification of measures impugned as either legislative or normative (at least in comparison with Article 230(4) proceedings),[54] and efforts have been made to align the substantive rules on Article 288(2) liability of Community institutions with rules on Member State liability in damages. Although it is not yet clear if this objective has been achieved.[55] Most interestingly, and again in contrast with rules on *locus standi* under Article 230(4), the Court of Justice has introduced the scale of discretion enjoyed by the decision maker as an index for grounding liability.[56] This amounts to a welcome step toward a more realistic assessment of the normative or executive nature of measures impugned.

Key subsisting drawbacks with Article 288(2) review are as follows. The provision only allows the Union judicature to order payment of compensation; no other remedial order can be issued under the auspices of Article 288(2).[57] Further, the relationship between the Article 288(2) action, and validity review, remains unclear; a rule remains in the case law that private parties must first exhaust domestic remedies by seeking validity review at national level, before pursuing Article 288(2) compensation, even though this is not always required in practice.[58] And the same question must be asked about Article 288(2) review, as is posed with respect to Article 234 validity review, given that it too has a low statistical rate of success. That is, is the institution of Article 288(2) proceedings of any great practical utility?

Finally, this book will also consider the rights of private parties in the context of the inter-governmental PJCC pillar. Pursuant to Article 35 TEU, and subject to restrictions, Member States have a discretion to allow their national courts to send questions to the Court of Justice on the interpretation and validity of PJCC measures, and such references are now being made.[59] Despite the inter-governmental nature of this pillar, recent developments in the case law[60] suggest that there is greater potential than the text of the EU Treaty might have suggested for private parties to secure the enforcement of these measures in the national legal systems, and require the attachment of an 'effective' remedy. These developments will be considered in chapters 2 and 3.[61]



[54] See in particular Case C–472/00 P *Fresh Marine Company A/S v Council and Commission* [2003] ECR I–7541; Case T–178/98; *Fresh Marine Company A/S v Commission* [2000] ECR II–3331.

[55] Case C–352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil SA v Commission* [2000] ECR I–5291. See T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 *CMLRev* 301.

[56] ibid.

[57] Case C–63/89 *Assurances du crédit v Council and Commission* [1991] ECR I–1799.

[58] eg *Bergaderm* (n 55 above).

[59] eg Case C–187/01 *Hüseyin Gözütok v Klaus Brügge* [2003] ECR I–1345; Case C–105/03 *Pupino* [2005] ECR I–5285; Case C–436/04 *van Esbroeck*, judgment of 9 March 2006; Case C–467/04 *Gasparini and Others*, judgment of 28 September 2006.

[60] *Pupino* ibid.

[61] The Common Foreign and Security Policy (CFSP) will not be examined in this book, due to the absence of power in the hands of the community judicature to review CFSP measures at the behest of private parties, save for infringement of community competences (see eg Case T–228/02, *Organisation des modjahedines du peuple' d' Iran v Council*, judgment of 12 December 2006).

Thus, it is submitted that the scale of the 'function' (to use Bickel's words) attributed to the ECJ under the Treaty establishing the European Community and the absence of political initiatives codifying the federal constitutional design, are placing the Court of Justice and the Court of First Instance in an ever more precarious and awkward position. In a mature Community, in which legislation is passed on a panoramic range of subject matters[62] and within subject areas that affect both Member States governments and private sector actors, it has become increasingly difficult for the ECJ to maintain coherence in the existing judicial architecture; particularly because it has been compelled to rely on the somewhat elusive and ill-defined notions of 'individual rights',[63] and 'effectiveness', to justify the structure in place.[64] This tension is exacerbated by the expansion of the powers of EC political institutions, evidenced by the increased recourse to the co-decision procedure introduced under the Amsterdam Treaty, enhancing as it did the status and power of the European Parliament.[65] Or as one commentator has put it, 'as the Community comes to look more like a "government" exercising genuine governmental power over the "citizen of the Union", those citizens wonder why the Community should not be subject to the same . . . restraints imposed on their local, regional and national governments'.[66]

Indeed, far from 'denuding'—to adopt Bickel again—other arms of government from the 'dignity and the burden of their own responsibility', the Court of Justice has shouldered an obligation which political actors in the Community were reluctant to address at least until the time of the Constitutional Convention. The latter have elected to neither approve nor reject the Court's constitutional case law, and in particular the supremacy rule, at successive inter-governmental conferences; nor have they amended Article 289 to introduce a clear distinction between EC legislative and executive measures.[67] One commentator recently said that 'doctrinal analysis has strained to keep up with the flow of new law',[68] and



However, first pillars measures promulgated to meet CFSP commitments can be reviewed. See eg Case T–253/02 *Chafiq Ayadi v Council*, judgment of 12 July 2006; Case T–49/04 *Faraj Hassan v Council and Commission*, judgment of 12 July 2006; Cases T–315/01 *Kadi v Council*, and T–306/01 *Yusuf v Council*, both judgments of 21 September 2005.

[62] See in this regard JHH Weiler and U Haltern, 'Constitutional or International? Foundations of the Community Legal Order and the Question of Judicial *Kompetenz-Kompetenz*' in A Slaughter, A Stone Sweet and JHH Weiler (eds), (n 3 above) 331.

[63] See in particular in this regard C Hilson and T Downes, 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 *ELRev* 121.

[64] On whether legal integration can proceed in the light of the apparent absence of political support for Court of Justice 'activism' see K Alter, 'Explaining National Court Acceptance of European Court's Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in A Slaughter, A Stone Sweet and JHH Weiler (eds), (n 3 above, 227). See also Weiler (n 3 above).

[65] A Dashwood, 'Community Decision Making After Amsterdam' in A Dashwood and A Ward (eds), *Cambridge Yearbook of European Legal Studies* 1 (1998) 25.

[66] A Burley, 'Democracy and Judicial Review in European Community' (1992) *The University of Chicago Legal Forum* 81.

[67] This was a feature, however, of the Constitutional Treaty. See Ward (n 47 above).

[68] N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (vol. 25, 2005) No 4 *OJLS* 581, 582.

has argued that 'the reconnection of law and high politics which has marked the EU's maturing as a polity is here to stay . . . new theoretical thinking about EU law will find both its challenge and its opportunity in that intimate but uneasy tryst'.[69]

Thus, perhaps, the only method for easing the accumulating tensions on the Union judicature, as explained in this book, is Treaty amendment. It would need to provide, at minimum, for a supremacy clause, and a provision to buttress the Court's 'incursion' into Member State law on sanctions and procedures. If this were to take place, the Court of Justice might be in a position to resume the more conventional role of constitutional and administrative courts everywhere, and occupy itself with determining whether law-makers, whether they be Union institutions or Member State authorities, have exceeded the discretion with which they were entrusted.[70] Given the apparent failure of the Constitutional Treaty, such a development appears to be some way in the future.

[69] ibid at 601.

[70] On effectiveness and proportionality as constitutional norms see recently M Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality' (2006) vol. 31. No 4 August *European Law Review* 476.