

Allison Östlund

Effectiveness versus Procedural Protection

Tensions triggered by the EU law mandate of
ex officio review



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Preface by Eleftheria Neframi

This insightful book offers a fresh discourse on the question of judicial protection and the role of the national judge in the legal order of the European Union. At a time when the Member States' obligation to ensure independence of the national judges as element of the rule of law is under constant scrutiny, a thorough and comprehensive inquiry into the contribution of the national judge himself to the standard of judicial protection is welcome and opportune.

In a classic top-down approach national procedural rules, such as those limiting *ex officio* review, which are at the heart of the present work, are seen as limits to the effectiveness of EU law. Given that effective implementation of EU law is tantamount to judicial protection, the national judge, while exercising his European mandate, has the obligation to set aside such national procedural rules. However, this book suggests a bottom-up perspective where national procedural rules are more than a limitation to the effectiveness of EU law and aim at the protection of all litigants, beyond the EU law beneficiaries.

Allison Östlund sets out to provide interesting insights into the balancing exercise between effectiveness of EU law and national procedural rules. The tension between substantive judicial protection through limitation of national procedural autonomy and the national procedural protection standards highlights the essence of the judicial function and a progressive constitutionalisation through the procedural approach to fundamental rights protection in the EU.

Through thorough research and careful analysis of selected case law and literature, this book sheds new light on the interweaving and interaction of national and European legal orders. The author's interdisciplinary background enriches the book with clarity, critical spirit, didactical and profound analysis, and sufficient detail to afford the link between technical questions and overarching horizontal fundamental principles.

It has been a great pleasure to work with Allison Östlund and I am proud to introduce a valuable book for scholars, students and practitioners.

Eleftheria Neframi, Professor of European Law, University of Luxembourg

Preface by Ola Zetterquist

These are exciting times to be part of the judicial family, especially if you like your family gatherings to resemble something like a scene out of “My Big Fat Greek Wedding”. Lots of different families and cultures are gathered in one (hopefully) happy community. There are those familiar faces that have been with you ever since you were breast-fed national law in legal kindergarten. Then there are the more recent arrivals. EU law is a member of the legal family that national judges operate within. To many national judges, however, EU law seems to be one of those distant relatives seen only on rare occasions and then with an awkward feeling of unfamiliarity that comes from distance and not quite sharing the same language. The longstanding contact with those other not quite so distant relatives, the European Convention on Human Rights and the European Court of Human Rights, has facilitated the reception of the new family member. However, there are still ample opportunities for clashes over the family-dinner table. National judges of today thus find themselves in a rather new setting and may now and then envy previous generations of judges who needed not bother about exotic new family members and their pesky requirements. As in all big families, adaptation and flexibility are required to keep things running smoothly. Applying both national and European law in everyday work is normally a task that national judges handle both diligently and willingly – all in the service of justice as we know the concept since antiquity and our common forebears. However, some recent developments in EU law have given rise to some deep questions on the role of judges and courts. To some judges this is the legal equivalent of the philosophical soul-searching question of “who am I?”. This is the background against which this impressive monograph plays out.

The origin of the recent soul-searching is the approach that the Court of Justice of the European Union (CJEU) has taken on national constraints on *ex officio* review posing obstacles to the enforcement of EU law in national litigation. In particular, the CJEU has focused on national rules preventing judges to apply EU law of their own motion – i.e. limiting their possibilities to investigate elements of law or fact which have not been invoked by the litigants. The purpose of this approach is to promote the effective implementation of EU law, and, by consequence, substantive protection of the rights conferred by EU law. Few judges have sincere objec-

Preface by Ola Zetterquist

tions to the idea of substantive legal protection and effective implementation of laws enacted (effectiveness and protection of rights were indeed the very reasons underlying the notion that EU law was to have direct effect¹). The problematic issue is that the obligation imposed by the CJEU may seem to be at odds with the idea that most judges have of their office. Judges are the objective arbiters who dispense justice, be it national or European, from above the messy stage of the parties to the case. The notion of a “fair trial” by an “impartial tribunal”, which is the very essence of the right contained in art. 6 of the European Convention of Human Rights, implies that judges stay above the scene of the parties and do not themselves become actors on it. The principles of judicial passivity and party disposition in civil law cases exist for good reasons. The effective implementation of Union law therefore risks coming at the expense of procedural equal treatment.

To be fair, the CJEU has never told national judges to ditch the notion of procedural equality but rather to strike a balance that ensures both EU law effectiveness and appropriate standards of procedural protection conferred by both national and European law. This is a formidable judicial task, worthy of Dworkin’s famous superjudge Hercules. National judges, slightly ill at ease with the new requirements imposed by the European relatives, may take the gloomy view that they are more likely to fail on both counts – still asking themselves who they really are in the legal family-drama – actors or arbiters. On this complicated issue they are now greatly helped by this important contribution on how to navigate the precarious waters between the right to a fair and impartial trial and the obligation to ensure the effective application of substantive EU law. I am proud and honoured to introduce you to this formidable monograph by my friend and colleague Dr. Allison Östlund.

Ola Zetterquist, Associate Professor of European Law at the University of Gothenburg and Judge at the Court of Appeal for Western Sweden

1 Pierre Pescatore, “The Doctrine of ‘Direct Effect’: An Infant Disease of Community Law?”, *European Law Review* [1983] pp. 155-177.

Thank you!

My deepest appreciation and gratitude are directed to Professor Eleftheria Neframi for having supervised the PhD thesis on which this book is based. Since I first started my research, she has guided me in every step of this process and been a great source of inspiration in her own academic endeavors. Her contributions on legal substance have been invaluable, and her persistent encouragement and optimism have invigorated my enthusiasm and confidence in my research. I am also profoundly grateful to Judge Ola Zetterquist of the Court of Appeal for Western Sweden, who remained available to me throughout the project as co-supervisor and shared his perspectives and experiences from combining legal practice with academic work, stimulating my interest in the role of the national judge in Union law.

My gratitude is also directed to Professors Herwig Hofmann and Johan van der Walt of the University of Luxembourg, whose doors were always open to me and who, any time I entered, offered new perspectives and insights into my research topics. I would like to thank them, together with Judge Sacha Prechal of the Court of Justice of the EU and Professor Morten Broberg of the University of Copenhagen, for coming to Luxembourg to share their observations and expertise.

I would also like to thank my advisors along the way, who have taken the time to read my work at various stages and to help me structure my ideas. Professor Arjen Meij of the University of Luxembourg generously offered his time from the early stages of the project, reading numerous drafts and providing valuable insights that were decisive for the direction that my research would take. Pascal Cardonnel of the Court of Justice invited me to investigate a variety of intriguing legal issues, all of which were luxuriously tailored to my own specific research interests and therefore greatly inspired my original research proposal.

I remain indebted to those of my friends and colleagues who took the time to help me finalize my work by reading and commenting on this manuscript. Zheni Zhekova, Catherine Warin, Clelia Lacchi, Andra Giurgiu, Anna Wallerman, Sebastian Wejedal, André Passet and Lotta Rogosik all set aside time to read my drafts in great detail, increasing the quality of my work (of course, all errors remain mine alone). Likewise, Anthi Beka of the Court of Justice and Jonas Hallberg of the Swedish Board of

Thank you!

Trade continuously shared with me their ideas and gave invaluable feedback. In addition, I thank all my friends from Luxembourg and Sweden who encouraged and inspired me along the way.

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Abbreviations

Art(s).	Article(s)
ASA	Association Suisse de l'Arbitrage/Swiss Arbitration Association
Behav. Sci. Law	Behavioral Sciences and the Law
Cah. dr. eur.	Cahiers de droit européen
cf.	compare
CFR	Charter of Fundamental Rights of the European Union, also referred to as the Charter
Ch.	Chapter
CJEU	Court of Justice of the European Union, also referred to as the Court of Justice
C.J.Q.	Civil Justice Quarterly
CLR	California Law Review
CMLR	Common Market Law Review
DCFR	Draft Common Frame of Reference
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECL	European Constitutional Law Review
ECtHR	European Court of Human Rights
ed(s).	editor(s)
edn.	edition
EEC	European Economic Community
EFTA	European Free Trade Association
EJCL	Electronic Journal of Comparative Law
EJPR	European Journal of Political Research
ELJ	European Law Journal
ELR	European Law Reporter
E.L. Rev.	European Law Review
EN	English
ERA	Europäische Rechtsakademie/Academy of European Law
ERPL	European Review of Public Law
ERT	Europarättslig tidskrift
et seq.	and that which follows
EU	European Union, also referred to as Union
Eur. Procurement & Pub. Private Partnership L. Rev.	European Procurement & Public Private Partnership Law Review

Abbreviations

Eur. Rev. Pr. L.	European Review of Private Law
f./ff.	folio/next page(s)/paragraph(s)
fn.	footnote
FR	France/French
FT	Förvaltningsrättslig Tidskrift
Hague J Rule Law	Hague Journal on the Rule of Law
Harv. L. Rev.	Harvard Law Review
ibid.	ibidem, mentioned previously
I•CON	International Journal of Constitutional Law
J.D.E.	Journal de droit européen
J. Int'l Arb.	Journal of International Arbitration
JEPP	Journal of European Public Policy
JILP	NYU (New York University) Journal of International Law and Politics
JT	Juridisk Tidskrift
LIEI	Legal Issues of Economic Integration
Loy. L.A. L. Rev.	Loyola of Los Angeles Law Review
MJECL	Maastricht Journal of European and Comparative Law
NGO	Non-governmental organization
no.	number
OJ	Official Journal of the European Union
p(p).	page(s)
para(s).	paragraph(s)
PEJP	Principle of effective judicial protection
QB	Queen's Bench Division
RAND	The Research and Development Corporation
REALaw	Review of European Administrative Law
Rev. Aff. Eur.	Revue des affaires européennes
sic	sic erat scriptum (EN: thus was it written)
TEU	Treaty on European Union
TFEU	Treaty of the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UNCITRAL	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration
US	United States of America
v./vs.	versus
viz.	namely
YEL	Yearbook of European Law