Review of: National remedies before the European Court of Justice. Issues of Harmonisation and Differentiation

Michael Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation*, Hart Publishing, 2005, lvi + 418 pp., hardback, €40, ISBN 1-84113-395-7

The 'enforcement deficit' in the Community legal order and, more generally, the decentralized enforcement of Community law is a widely debated topic in academic circles. As is well known, given the serious drawbacks in the direct enforcement of Community rules via the Court of First Instance and, primarily, the European Court of Justice (ECJ), the latter has constructed over time a supplementary system of decentralized enforcement.

Firstly, thanks to the principles of direct effect and supremacy, all national courts have been given both the power and the duty to apply Community law in the cases on which they adjudicate. Moreover, the Treaty itself establishes a framework (that is, the preliminary reference procedure), by which the national courts can seek advice from the Court of Justice on the exact application and interpretation of Community law. However, well-known problems, such as the lack of horizontal direct effect of directives and the reluctance of some national courts to ask preliminary questions, have fueled academic speculation as to whether the time is ripe for a reconsideration of the principles governing the decentralized enforcement of Community law.

The book under review here is part of this discussion concerning the role of national courts in the enforcement of Community law and, more in particular, the drawbacks of the decentralized enforcement system. While Claes has analyzed the reaction of the national courts to the 'mandate' given to them by the ECJ[1], Prechal has focused on the current meaning and usefulness of the doctrine of direct effect[2], and Allott has questioned the very function of the preliminary reference procedure[3], Dougan focuses his attention on the rationale behind and the controversial nature of Community intervention on domestic remedies.

The author's investigation departs from the traditional distinction between decentralized and centralized enforcement of Community law. After highlighting the limits of the centralised system (via the infringement procedure set out in Article 226 EC and the action for annulment provided for in Article 230 EC), Chapter 1 places the accent upon the decentralized enforcement of Community law, and, in particular, on the Community's intervention on national remedies.

The fundamental right of access to justice, presumption of national procedural autonomy, overriding Community rules on procedural law, and the principles of equivalence and effectiveness are identified by the author as the four columns on which the Court of Justice has built the temple of rules that are necessary for the decentralized

1 M. Claes, *The National Courts' Mandate in the European Constitution* (Hart, 2005).

2 S. Prechal, 'Does Direct Effect Still Matter', 37 *C.M.L. Rev.* 1047 (2000).

3 P. Allott, 'Preliminary Rulings: Another Infant Disease', 25 Eur. L. Rev 538 (2000).

enforcement of EC law. In the author's view, the temple was built at the call of two imperatives: that of effectiveness, whereby domestic remedies should ensure adequate protection of rights stemming from EC law, and that of uniformity, whereby national laws should strive for an equal level of enforcement of EC law.

It is from this starting point that Dougan develops his examination of the ECJ's developing case law on national remedies and procedural rules. However, the author does not limit himself to the mere description of the case law in question, but takes his analysis to a higher level: namely, he attempts to use the ECJ's rulings on national procedural rules as a lens through which to analyse the current status of the European integration process. In particular, the author seeks to contribute to the academic debate on the resolution of the enforcement deficit generated by the Community's necessary reliance upon domestic remedies and procedural rules, by analysing the role played by the imperative of uniformity in two competing conceptual models.

The first model, introduced by the author in Chapter 2, is that of 'integration through law'. The rationale behind this approach is the idea that the purpose of the Treaty is to advance economic, social and/or political convergence of the European states and that the success of the European integration project depends on the progressive establishment of uniform legal rules throughout the Community. Against this background, national remedies and rules are regarded as a threat to the Treaty's economic, social and political objectives through their tendency to offer fragmented standards of enforcement of Community law: in order to solve the enforcement deficit problem, therefore, the supporters of this model consider it necessary to create a unified system of judicial protection.

However, the rationale behind this model has failed to keep pace with wider trends in Treaty political and legal evolution. In particular, the author argues that this model has proven not to respond to the current status of the European integration process, where regulatory differentiation has emerged as an alternative to uniformity. In other words, the current trend of the integration process shows that simply because the Community exercises its competence in a certain sphere of activity, it does not mean that the regulatory regime it establishes provides uniform rules across the Member States, or indeed that such uniformity is its ultimate goal.

In Chapter 3 the author analyses and discusses phenomena such as minimum harmonization clauses, derogations, policy opt-outs and enhanced cooperation that, in his opinion, show an increasing favour for diversity. It is also worth mentioning that in this analysis of regulatory differentiation within the Community legal order, the author draws an interesting distinction between vertical and horizontal differentiation. While the author uses 'vertical differentiation' to refer to the ability of member States to contribute to substantive regulatory policy within the context of a given sector of Community activity, by 'horizontal differentiation' he means the ability of the member States to decide whether or not to participate in a sector of the Community activity.

In the light of the current trend of regulatory differentiation, the author proposes in Chapter 4 an alternative solution for the enforcement deficit, namely a 'sectoral' approach, which seeks to apply the model of regulatory differentiation to procedural rules. The idea that Dougan puts forward in this work is that the Community level of remedial harmonization should be matched to the degree of substantive uniformity achieved by the Community itself in any given policy area. Thus, in areas characterized by a high level of substantive uniformity (such as state aids and competition law), Community legislation harmonizing the procedures for the decentralised enforcement seems appropriate to the author. However, in areas in which substantive uniformity does not constitute one of the Treaty's objectives (e.g. in areas of environmental, employee and consumer protection), the author submits that there is no need to establish uniform sets of remedial and procedural provisions: if in some policy areas a certain degree of cross-border differentiation is tolerated, the author argues, why is there a need, in those areas, for unified judicial rules?

While this model may seem very useful for the purposes of contributing to the enforcement deficit debate, it is not immune from criticisms, which the author does not fail to identify. The main drawbacks of the sectoral approach to remedies, indeed, are linked to the difficulty of defining a 'sector', and to the model's failure to see the importance of the principle of effectiveness for those areas which, albeit characterized by limited substantial uniformity (e.g. consumer protection), may, in the light of the peculiarities of the policy area, nevertheless require harmonization. Notwithstanding the drawbacks of the sectoral approach, the author uses this model, together with the alternative 'integration through law' model, as an interpretation tool for the purposes of analyzing the ECJ's approach to Community control over national remedies and procedural rules.

Chapter 5 and 6 are devoted to the application of the 'sectoral' model of integration to the Court's case law on a number of specific areas. By using as case-studies the *Francovich* right to reparation[4] and the rules concerning limitation periods for the commencement of proceedings, the author shows that the ECJ's current approach is that of negative harmonization: the European Court is ready to prescribe only minimum standards of effective judicial protection, leaving the member States free to supplement their own rules over the Community requirements.

As far as the case law on member States' liability for violations of EC law is concerned, the author shows that, although the ECJ recognized the need for such liability in order to protect the full effectiveness of Community law, it has left considerable leeway to the member States as to the character of reparation, its extent and the procedural conditions through which the right to reparation can be enforced, so that this right is not different from any right that individuals derive from EC law (that is, to be enforced according to national procedural rules, subject to the principles of equivalence and effectiveness).

[4] Cases C-6 and 9/90 *Francovich* [1991] ECR I-5357.

The author proposes similar results in relation to the national rules imposing limitation periods In particular, the author argues that, apart from peculiar cases (namely, cases in which claimants have been misled as to their rights, and situations in which national rules governing limitation periods are revised so as to render the exercise of Community rights more difficult than before), the European Court has defended the opinion that national time limits are acceptable under Community law as long as they comply with the principle of equivalence and effectiveness, the latter being satisfied if the time limit is reasonable.

In the author's view this case law seems to have rejected an 'integration through law' analysis of the need to centralize the legal framework of judicial protection available for the domestic enforcement of Community law. By reaffirming a preference for mere negative harmonization, the stance currently adopted by the Court appears to coincide instead with an understanding of the increasingly limited quality of substantive uniformity, and consequently of a correspondingly decreasing need for harmonized judicial rules, as suggested by the 'sectoral' approach to remedies.

The author, however, carries on a further analysis of the ECJ's seemingly 'sectoral' approach to national procedural rules and puts forward the evidence that the Court struggles to pursue a coherent agenda of remedial harmonization. Using the case-studies of the rulings on decentralized challenges to acts of the Community institutions and on domestic enforcement of both state aid rules and Community competition policy, the author shows that the Court of Justice seems to lack any consistent conception of the Community's interest in interfering with domestic systems of judicial protection.

As far as situations in which the applicant seeks to challenge the legality of Community action via the domestic courts are concerned, the author points out that judgments such as *Zuckerfabrik*[5] and *TWD*[6] mark a strong interventionist approach by the ECJ: this line of case law, however, does not seem to match with the 'sectoral' model, since these 'interventionist' cases may have been related to a policy area with either a low or high degree of substantive uniformity. Nevertheless, in the author's view, the judgments cannot be regarded as the springboard for a policy of positive harmonization either, since they relate to the specific circumstance of an applicant challenging a Community measure indirectly before a national court; these are situations in which according to the ECJ, uniform conditions are necessary in order not to undermine the uniform application of EC law and to ensure that the guarantees provided for in the Treaty system are not circumvented. These concerns, indeed, would be justified from the perspective of a 'sectoral' model as well, insofar as they seek to protect the common core of rights and obligations that are intended to bind every Member State.

While the 'sectoral' model does not seems to fit the cases discussed above, the author argues that the opposite is true for the rulings concerning the procedural rules applicable

5 Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415.

6 Case C-188/92 *TWD* [1994] ECR I-833.

to the repayment or recovery of unlawful state aid (such as *Alcan Deutschland*[7]). In this area, the high level of substantive uniformity is coupled with an aggressive intrusion into domestic standards of judicial protection. However, upon analysis of the rules on domestic enforcement of competition policy, the author is faced with a different scenario. In this policy area, notwithstanding the high degree of substantive uniformity, the Court has chosen not to pursue a too far-reaching degree of remedial harmonization, as the ruling in *Courage*[8] shows.

From these findings, in the final chapter, Chapter 7, the author draws some conclusions as to the reasons for the ECJ's seemingly haphazard approach to national procedural rules. In particular, he suggests that the case law on domestic remedies may be the result of the ECJ's underlying institutional uncertainty as to its role in the Treaty legal order. According to the author, next to the practical limitations of the court as a lawmaking body (e.g. the *ad hoc* manner by which issues are presented to the court and the inevitable influence of the particular factual circumstances of each dispute), one of the reasons for the ECJ's uncertainty as to its institutional role is its swinging relationship with the Community legislature. While in moments of political stagnation by the Commission, Council and Parliament, the Court was tacitly entrusted with furthering the process of European integration, the current legislature's active role in shaping Treaty policy and resolving the enforcement deficit may have led the Court to perceive a lack of legitimacy in its attempts to harmonize domestic remedies. At the end of the Chapter, the author provocatively submits that, in the light of the close link between the Court's approach to domestic remedies and its self-perception and sense of purpose, one may ultimately argue that remedial harmonization is a task for which the ECJ is 'inherently unsuited'.

As a conclusion, some brief final observations should be made. Firstly, the current reviewer wishes to stress the original approach of the book, whereby the analysis of the European case law on domestic remedies is inserted in the broader context of the debate on the evolving European integration project. The value of the book lies, indeed, in the author's attempt to establish a conceptual framework and a 'legal prism' through which the European Court's jurisprudence can be viewed. Dougan succeeds in showing that, by turning the prism, the 'viewer' is faced with different and sometimes contradictory scenarios.

In the reviewer's opinion, in the light of the very reason for the Community's existence, it is debatable whether 'regulatory differentiation' can be considered as a truly *alternative* model to that of 'integration through law'. From this perspective, it is respectfully submitted that, while some degree of differentiation in the Community policies must be acknowledged, the emerging differentiation devices discussed by the author could rather be seen as forms of "nuanced integration". Nevertheless, Dougan's

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7 Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591.

8 Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

attempt to analyze the ECJ's jurisprudence by matching the trends of substantive differentiation to the different levels of remedial harmonization is to be appreciated for its attempt to give a new perspective to the enforcement deficit debate.

Moreover, the book tries to shed some light on the possible reasons for the Court's sometimes inexplicable approach to the rules concerning the decentralized enforcement of Community law. In the reviewer's opinion, the simplest interpretation tool for the ECJ's attitude towards national remedies, derived from the Court's case law itself, remains the 'effectiveness test'. The ECJ has repeatedly held that domestic procedural rules should be weighed against the need to ensure effective judicial protection of individuals' rights and, only if they do not meet this minimum standard, should they be set aside by the national judge. From this perspective, it can be argued that it is immaterial whether, as a trend in the particular policy area, the Court is pursuing an agenda of uniformity or of differentiation.

However, faced with sometimes contradictory results before seemingly similar procedural rules, Dougan brings forward other, more complex and 'political' reasons for the Court's changing attitude towards remedial harmonization. The reference to the ECJ's difficult position within the Treaty legal order and its complex relationship with the Community institutions and the national courts gives food for thought and will definitely trigger future research on the role and, more in particular, the very capability and willingness of the ECJ to create a uniform system of judicial protection throughout Europe.

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