Genesis and Development of Legal Protection before Community Courts: A review of *Eva Drewes*, Entstehen und Entwicklung des Rechtsschutzes vor den Gerichten der Europäischen Gemeinschaften, Duncker & Humblot, Berlin 2000.

By Timo Tohidipur[*]

A. Launch of a Supranational Legal System

The emerging of an early idea, - the idea of a united Europe in peace replacing the destructive force of nationalism - could not have been a proper blueprint for the formation of a European Society until the brute force of the two World Wars prepared the ground for the awareness of political, economical, and social necessities. The first chapter in the book of the European Union regarding this founding idea was written back in 1951/52 by establishing the European Coal and Steel Community (ECSC) as a Community based upon law. At first, following *Jean Monnet´*s sectoral approach toward integration in connection with the idea of supranationalism, unifying element should have been the supranational administrative body called "High Authority" (former name of the Commission in the first ESCS-Treaty). Given that the ECSC arose on the basis of law, one of the first and most important questions seemed to be the need of legal protection framing and balancing the power of the nearly almighty High Authority. This need should be satisfied by the establishment of a European Court of Justice (ECJ) as a permanent Court in the ECSC-Treaty. Although the shape of the former European Community has been immensely changed and extended through the years of integrational process, the once established ECJ still remains the judicial core in the institutional structure. But how did the system of legal protection react on the defiances of the integrational process?

It is said that no political organization can properly be understood unless it is set in its historical context.[1] The judicial system is no less subject to this dictate. The im-

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portance of the jurisdiction of the European Court of Justice nowadays underlines the need to look at its "genesis." *Drewes* undertakes this look by presenting a good historical foundation in a first chapter based on an incredible amount of source material.[2] This first part of the study has indeed a more descriptive-historical than analytical approach focusing the negotiation process of 1950/51. The reader gets a well readable report on the negotiations on supranationalism and on the dispute between, basically, France and Germany concerning the establishment of a permanent court in the Coal and Steel Community. While the European States have obviously been the principal figures in the evolutionary process of European unification movement, the United States have, at the same time, played an important supplementary role, [3] which seems somehow be neglected in the first part of the study. The idea of a European Community would have been left in spheres of utopian perceptions if American pressure on France forcing this nation to take the lead in a process of European Integration after the British refusal never took place. This pressure which lasted during the negotiation process has also had an impact on the relevance of the rule of law in the European integration and with it on the establishment of a European Court. At the same time, the idea behind that American pressure remains another story.

B. Trying the Reconstruction

In the main part, the *Drewes* study examines the annulment procedure from its genesis to today. In general the purpose of actions for annulment (Article 230 EC) is to have binding legal instruments of the Council, Commission, European Parliament or the European Central Bank annulled. Citizens and firms can only proceed against decisions that are personally addressed to them or, though addressed to others, have a direct individual effect ("individual concern") on them. If EU citizens or firms are involved in such an action as plaintiff or defendant, the action must be brought before the Court of First Instance (CFI). Disputes between institutions, however, must be conducted before the ECJ. Concentrating on the annulment procedure seems to be the best way to focus the story´s topic because the annulment procedure as a judicial procedure against impeachable administrative acts has ever been a symbol of legal protection of citizens and firms against the High Author-

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[1] NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 1 (1994). *See also* source cited *infra* note 3.

[2] *Dokumente zum Europäischen Recht*, tome 1-3 (Rainer Schulze &Thomas Hoeren eds., 1999) (providing an important source in the German language of the historical foundation).

[3] KATHLEEN BURK & MELVYN STOKES, THE UNITED STATES AND THE EUROPEAN ALLIANCE SINCE 1945 18 (1999) (providing a short overview, particularly at note 4 on page 18 concerning Geir Lundestad's examination in this book).

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ity/Commission in granting them the right of appeal before the ECJ and later, before the CFI. Granting citizens and artificial persons a right of appeal and accepting their legal status in the European legal order is furthermore one important element in the differentiation between the supranational character of the Communities or the European Union and a mere international organization committing only states to law.

The debate on the annulment procedure has intensified again in 2002. The CFI tried to reinterpret the presuppositions of Art. 230 (4) EC facing the question whether the right to effective judicial protection is guaranteed in the system of Community remedies.[4] In the *Jégo-Quéré* case the CFI held that only a new interpretation of "individual concern" in Art. 230 (4) EC could ensure that adequate judicial protection is provided for private applicants in Community law. This "dream" did not last very long. Although the proposals of the Advocate General Jacobs in the case *Unión de Pequeños Agricultores* supported the idea of a new interpretation, this effort was thereafter driven back by the ruling of the ECJ[5] strengthening the traditional approach manifested in his previous judicature. But the debate goes on.[6]

Leaving current procedural presuppositions aside, Drewes´ study discusses intensively the dogmatic presuppositions of the annulment procedure especially in the Treaty of the European Coal and Steel Community but also in the Treaty of the European Economic Community and sets them in context of French and German law of administrative procedure. Contrary to the statements of the "fathers" of the ESCS-Treaty back in 1951, who expressed the compatibility of the legal protection system of the ESCS-Treaty and both, French and German systems, *Drewes* underlines the founding different approach of the French and German system of legal protection against administrative acts. The approach of the French system of legal protection regarding administrative law is a more objective one, having the eye on a certain number of qualifying requirements for a lawful administrative act, which are reviewed by a court. Behind that stands the central idea of ensuring a lawful

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[4] Case T-177/01, Jégo-Quéré v. Commission, 2002 E.C.R. II-2365 ; see commentary by Dominik Hanf, Facilitating Private Applicants' Access to the European Courts ? On the Possible Impact of the CFI's Ruling in *Jégo-Quéré*, 3 German Law Journal No. 7 (1 July 2002), available at: http://www.german lawjournal.com/article.php?id=166.

[5] ECJ C-50/00 P, Unión de Pequenos Agricultores v. Council, ECR 2002 I 6677 (hereto the commentary by Dominik Hanf, Kicking the ball into the Member States' field: the Court's response to *Jégo-Quéré* (Case C-50/00 P *Unión de Pequeños Agricultores*, Judgment of 25 July 2002), 3 German Law Journal No. 8 (1 August 2002), available at: http://www.germanlawjournal.com/article.php?id=171), and the latest Appeal-decision ECJ (1.April 2004) Case C-263/02 P, available at www.curia.eu.int.

[6] Marton Varju, *The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention*, 10 European Public Law 1, 42 (2004).

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and effective acting administration. To the opposite, the german system takes primarily the (subjective) individual rights of the person affected ("*subjektiv-öffentliches Recht*") into account which is some kind of expression of a liberal state under the rule of law. There is no restriction on pre-formulated presuppositions; a violation of the right of an individual through an administrative act is sufficient.

C. Judicial Emancipation

At the beginning of the ESCS the French system with its "recours pour excès de pouvoir" seemed a kind of role model for the legal protection against impeachable administrative acts before the ECJ but following *Drewes´* argument, the ECJ, and later, the CFI also extended their sight to the more German-like idea of securing individual rights of the citizen affected. The ECJ didn't accept a limitation of causes of an action laid down in the Treaties. He extended the judicial review of administrative acts and thereby provides effective safeguard measures for the citizens of the European Union. At this point *Drewes* alleges the disentanglement of the exact Treaty provisions via judicature of the ECJ but regards this as a part of the dynamic evolution of European Law.

The *Drewes* study should be read together with a paper of *Carl Hermann Ule* back in 1952.[7] *Ule* pointed out, very clearly, that the Court's competence of reviewing actions was strictly limited because the ESCS-Treaty did not enclose any judicial competence for reviewing the subsumption of the High Authority, indeed very often the most important part of a legal matter. *Ule,* in addition, also compared the system of judicial review in the European Community of Coal and Steel with the French and German systems very intensively and concluded that the Court must be guided by some kind of inventing spirit to fulfill the expectations in his duty of judicial review. Following *Drewes's* argument, this inventing spirit actually took place in the courtrooms in Luxemburg.

Drewes concludes that it is wrong to reduce the judicial system of the European Union to a simple copy of the French judicial system or any other system of an EU Member State. Nevertheless, the organization of the Court has still much in common with the French system of High Courts especially regarding the institutionalization of an advocate general, only known in French courts as "commisaire du government." *Drewes´*s main thesis reads as follows, "the European Court of Justice has through the years established its own procedural law in which the national (procedural) law is only partially included but not dominant." The study ends with

[7] Carl Hermann Ule, *Der Gerichtshof der Montangemeinschaft als europäisches Verwaltungsgericht, DVBl.*, 65-72 (1952).

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a clear statement, "It´s not the law of France or Germany or any other Member State that has to be applied but only the law of the Treaties."

The synthesis of French and German procedural (administrative) law was the substrate of the procedural law of the European Union. There is no doubt about the emancipation process taking place in Luxemburg and this procedural emancipation could be seen as a part of the surrounding integrational concept of the establishment of a new legal order since the Costa/ENEL-case[8]. The complete concept of the ECJ is based upon the idea of the European Union as a new legal order and its dynamic development on the basis of the Treaties.

[8] Case C-6/64, Costa v. ENEL, 1964 E.C.R. 585.

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