Judicial activism and legal politics

The purpose of this book

In legal literature, only a handful of books and articles endure for more than a relatively short period of time. Most are overtaken by the ever-growing volume of more recent literature, and are forgotten. In the area of law of interest to us here, two publications in particular deserve to be remembered. The first is Eric Stein's article, ‘Lawyers, Judges and the Making of a Transnational Constitution’, published in the American Journal of International Law in 1981. The second is Joel F. Handler's book, Social Movements and the Legal System: A Theory of Law Reform and Social Change, published in 1978. I had the privilege of meeting Professor Stein while I was a visiting professor at Michigan Law School. I took the opportunity of discussing with him the unique role of the European Court of Justice (ECJ) in transforming an international treaty system into a constitutional framework. I never met Professor Handler, but his book remains an impressive analysis of the use of rights and remedies in the US courts to establish civil rights, to establish environmental protection and to improve consumer protection.

These two publications formed the basis for my habilitation on an 'International Product Safety Law', in which I attempted to set out a theory on an 'International Constitution for the Trade in Dangerous Products'. Here, I tested the judge-made EU constitution as a basis for action in the international arena. However, a stumbling block in my reasoning quickly became apparent: the fragile legitimacy of an international order in which lawyers and judges step beyond the boundaries of market freedoms and engage in matters of social policy and social change. Fritz W. Scharpf's article, ‘Joint Decision Trap: Lessons from German Federation and European Integration’, published in Public Administration in 1988, foretold the now all-too-apparent struggle between law and politics in the future constitution of Europe.
Since then, my academic interests have revolved around three issues: the judge-made EU legal order; the role and function of social movements in using the ECJ for social change; and (though to a lesser extent) the legitimacy and accountability of the ECJ’s leading role in European integration (I say ‘to a lesser extent’ because political scientists do not devote enough attention to the role of law, or, should I say, to the rule of law?). If politics prevail over law, the outcome could well be that the European Union (or, legally speaking, the European Community) would ‘face a rapid process of dilution and would soon be transformed into one of the many international organisations which rub along more or less effectively according to the changing interests of the contracting states’. I will not hide my admiration for the wisdom of judges and their sense of ‘realism and passion’ in building the EU legal order, while I equally admit the moral right, even the necessity, to raise the question of legitimacy.

**The scenario for judicial activism and legal politics**

The preliminary reference procedure under Article 234 (ex Article 177) of the EC Treaty brings together (1) national courts and the ECJ, (2) the social movements in the Member States and the EU as legal players and (3) issues of the legitimacy of judge-made law. Therefore, it goes without saying that the preliminary reference procedure lies at the heart of my academic interests. While there is a rich literature on the preliminary reference procedure, I sought in vain for the answers to three questions:

(1) What is the role and function of individual and/or collective litigants in achieving market freedoms and/or in implementing social change in, for example, sex discrimination, environmental protection and consumer protection? The relative lack of research

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3 Here, I am slightly twisting the wording of Mancini and Keeling’s eminent analysis of the ECJ’s politics. In analysing Costa v. ENEL and van Gend en Loos, they demonstrate that the ECJ’s intention was to shield the European Community against precisely such a danger. See G. F. Mancini and D. T. Keeling, ‘Language, Culture and Politics in the Life of the European Court of Justice’ (1995) 1 Columbia Journal of European Law 397.
4 Again, these are words used by Mancini and Keeling.
in this area may be due to the more state-focused perspective of the literature on European law, in contrast to the position in the United States where litigation is a substantial and legitimate element in implementing economic and social rights.\(^5\) This is what I term the ‘Joel Handler-type of question’, or, in other words, the role and importance of organised law-enforcement in the EU.

(2) The Article 234 preliminary reference procedure has been used to establish the European legal order, mainly in order to guarantee the operation of the common market. Key issues here include the use of market freedoms, and the use of negative rights, to remove statutory barriers to trade and to remove outmoded and outdated manifestations of national decision-making in order to achieve market integration.\(^6\) However, it is by no means clear to what extent the Article 234 preliminary reference procedure is equally apt to realise the internal market, a concept which goes beyond mere market freedoms and strives for the implementation of a market in which social policy has a place.\(^7\) Positive rights in the hands of private individuals or public interest groups are necessary in order to ensure the implementation of, for example, equal treatment, environmental protection and consumer protection, and in order to enforce market regulation. If these rights exist, and if the courts are willing to enforce them, then the legitimacy issue becomes a central issue. The position is even more complex with regard to the role and function of Article 234 in private law issues: can the preliminary reference procedure be equally used to establish a European private legal order? Analysis of the role and function of the Article 234 preliminary reference procedure is therefore needed at three levels: at the level of the common market; at the level of the internal market; and at the level of the European private legal order.

(3) The Article 234 preliminary reference procedure is initiated by litigants in the national courts of the Member States. We know that the courts of the Member States make use of the procedure to

varying degrees. However, we do not know *why* the courts of certain Member States bring certain issues before the ECJ. This forms the third question. This third question is based on the hypothesis that each and every Member State makes a unique contribution to the building of the European legal order by means of the preliminary reference procedure.

*Limitations on and pre-conditions to this study*

My analysis starts from the premise that the Article 234 preliminary reference procedure is the key to building a European legal order. However, the analysis will include a consideration of judicial co-operation between the national courts of the Member States and the ECJ, of how and why rights and remedies are used by individual and collective litigants, and, last but not least, of whether and to what extent the solutions found by the courts are legally and politically ‘legitimated’. Therefore, an analysis of the interplay between judicial co-operation, organised law-enforcement and legal-political legitimacy will need to consider the questions not just of pure market freedoms, but also of the ‘Europeanisation’ of social policies and national private legal orders. And, if possible, the question of the contribution of the Member States will have to be assessed. All these questions boil down to the question simply of how far the law reaches, and/or whether the issue is more correctly one of politics. Ideally, the book can be read as a contribution to the European integration process, or, more ambitiously, to European constitution-building from the bottom up.

I will not be able, however, to provide answers to all the questions raised. I hope, though, to be able to shed light on unresolved issues. In order for the analysis to be constrained to manageable proportions, I will first set the book in the context of a stream of research in order to make clear the current state-of-the-art and the sorts of gap that may be filled by the analysis undertaken here. Therefore, I will set out the basics of the European legal order, and the importance and reach of direct effect and supremacy in the common market, the internal market and the European private legal order. Against this background, it will then be possible to fit the analysis into the current state of research on judicial co-operation, organised law-enforcement and the legal-political legitimacy of the judge-made legal order. The ‘common market’, the ‘internal market’ and the ‘European private legal order’ are terms which will have to be dissected in order to establish precisely
what they mean. The overall idea is to link the common market to the notion of ‘freedom’, the internal market to the notion of ‘equality’ and the European private legal order to the notion of ‘justice’. Again, these are broad categories and deserve even greater attention. For the purposes of this book, however, I will not enter into a legal-philosophical debate, but rather will use these terms in a pragmatic way.

The issues then remaining are more technical in nature, though they are nevertheless of considerable importance to the analysis undertaken here. I will need to demonstrate why I have selected the United Kingdom in order to establish the hypothesis of a genuine national input into the Article 234 preliminary reference procedure. Last but not least, I will need to explain why I have chosen the Sunday trading, equal treatment and good faith issues as my field of research, and the methodology I have used. This is particularly necessary as the book relies heavily on case studies as an appropriate research method to provide answers to the theoretical issues on which the whole book rests. Once I have explained the reasons for my choices, I hope this will stimulate the reader to read the three case studies and the conclusions at the end of the book in order to decide for himself whether I have provided answers to these issues.

The basics of the European legal order

An overview

The European legal order rests on the doctrines of direct effect and supremacy. The Single European Act transformed the ‘common market’ into the ‘internal market’, thereby shifting the focus from market freedoms to the integration of social policies. The process is reflected in the ECJ’s notion of the European legal order, which is now understood as a ‘constitutional charter’. Table 1.1 highlights the ongoing European integration process and the legal-political difficulties which result from the growing intrusion of EC law into the arena of social policy and private law matters. The table highlights why particular fields of research were chosen: the Sunday trading cases are a striking

Table 1.1 *The European integration programme and its legal-political difficulties*

<table>
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<th>Common market</th>
<th>Internal market</th>
<th>Private legal order</th>
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<td></td>
<td>Market freedoms</td>
<td>Social policies</td>
<td>Consumer protection</td>
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<td></td>
<td>Arts. 28 and 48</td>
<td>Art. 141 and the equality Directives</td>
<td>Art. 153 and the Directives on consumer protection</td>
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<td>Supremacy</td>
<td>+/- (plus/plus)*</td>
<td>+/- (plus/minus)</td>
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<td>Stable</td>
<td>Unstable</td>
<td>Under attack</td>
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<td>Horizontal direct effect</td>
<td>Horizontal effect of Art. 141</td>
<td>Horizontal effect of Art. 153 (?)</td>
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<td></td>
<td>No horizontal effect of Art. 28</td>
<td>No horizontal effect of the equality Directives</td>
<td>No horizontal effect of the consumer protection Directives</td>
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<td></td>
<td>Vertical direct effect</td>
<td>Vertical direct effect of Art. 28</td>
<td>Vertical direct effect of Directives</td>
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<tr>
<td>Statutory liability</td>
<td>Claim for compensation if Art. 28 is violated <em>(Brasserie du Pêcheur)</em></td>
<td>Claim for compensation in case of non- or incomplete implementation <em>(Francovich)</em></td>
<td>Claim for compensation in case of non- or incomplete implementation <em>(Dillenkofer)</em></td>
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*+ means ‘strong’; double ++ means ‘very strong’; — means ‘weak’; and —/- means ‘very weak’.*
example of the realisation of market freedoms; the equal treatment cases are the prime example of the reach of EU social policy in labour law; and the good faith cases are the prime example of private law being affected by European law.

The vertical/horizontal dimension of the European legal order

The two constituent elements of the European legal order, direct effect and supremacy, were developed in the early 1960s at a time when the ECJ was establishing the European legal order for a *common market*. The focus therefore was on the market freedoms, in particular on removing barriers to trade which discriminated against imports. The prime example of such a case was *van Gend en Loos*.\(^{12}\) Private parties were given the right to invoke Article 28 (ex Article 30) against a Member State’s legislation in order to remove unlawful barriers to trade. These rights may be considered as negative rights, as they are designed to eliminate barriers to trade and to enlarge market freedoms. *Costa v. ENEL*\(^{13}\) expressly established what was implicit in *van Gend en Loos*, that is, the supremacy of EC law over national law. For more than two decades, the ECJ developed the European legal order by granting direct effect to various Articles of the EC Treaty, mainly those designed to establish the common market. Typically, the parties to this type of litigation were private individuals suing their own Member State. This type of case involved the *vertical* effect of EC law.

The decisive step forward, the true shift away from a market-focused European legal order, came with the adoption of the Single European Act. The Single European Act transformed the *common market* into the *internal market*, thereby focusing on the necessary integration of social policies. This process is reflected in the ECJ’s notion of the European legal order, which is now understood as a ‘constitutional charter’.\(^{14}\) The implicit message here is that the internal market can be completed only by establishing social standards for EU citizens. Social policies therefore became part of the EC Treaty, indirectly in Article 95 (ex Article 100a) and directly in integrating health and safety at work as well as environmental protection. Consumer protection followed suit in the Maastricht Treaty (Article 153 (ex Article 129a)). This does not, however, mean that the original Treaty of Rome and

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the secondary law adopted under the unanimity rule of Article 94 (ex Article 100) have been restricted to realising the market freedoms alone. The two equality Directives, Directives 75/117/EEC and 76/207/EEC, as well as early consumer protection Directives on product liability (Directive 85/374/EEC) and doorstep selling (Directive 85/577/EEC) provide evidence of an emerging European legal order under which sex discrimination could not be permitted to remain and in which the consumer was beginning to be shaped into the powerful figure that he would eventually become in the internal market.

The traditional means of giving shape to social policy objectives, as laid down in the EC Treaty, is by the adoption of Directives. Directives are addressed to the Member States, and therefore substantive rights can prima facie only emerge once the Directives are implemented in national law. The two constituent elements, direct effect and supremacy, could not be applied ‘as is’ to the early social elements of the common market nor to the more ambitious elements of the internal market. However, as early as 1974, the ECJ held in van Duyn\textsuperscript{15} that, in certain circumstances, provisions of Directives not yet implemented in national law may be relied on by private individuals. The ECJ went on to grant vertical direct effect\textsuperscript{16} to a number of Directives. However, it declined to grant horizontal direct effect to Directives. That is why the ‘constitutional charter’ remains incomplete, despite the efforts of Advocate-General Lenz in Faccini Dori\textsuperscript{17} to justify the granting of horizontal direct effect to Directive 85/577/EEC on doorstep selling. The famous Francovich doctrine,\textsuperscript{18} as confirmed in Dillenkofer,\textsuperscript{19} and the EU conformist interpretation of national law,\textsuperscript{20} were meant to compensate for any remaining deficiencies caused by the lack of horizontal enforcement of Directives. The ECJ used the same type of thinking to close the gap resulting from the lack of direct effect of Article 28.

\textsuperscript{17} Advocate-General Lenz' conclusions, 9 February 1994, Case C-91/92, Faccini Dori [1994] ECR I-3342, paras. 67–73.
In *Brasserie du Pêcheur*, the ECJ recognised the Member State’s liability to compensate private parties for damage resulting from the non-application of Article 28.

At first, it was only the *vertical* direct effect of primary and secondary EC law that was in issue. It was not until the early 1980s that the question of *horizontal* direct effect was considered. In 1981, in *Jenkins*, the ECJ held that Article 141 (ex Article 119) is equally applicable in contractual relations between an employer and an employee. However, the judgment was seen by many to be limited to the area of labour law. The situation changed, however, in 1995 when, in *Bosman*, the ECJ granted horizontal direct effect to Article 39 (ex Article 48). Since then, the debate over horizontal direct effect of Treaty provisions has intensified. The revised Article 153 (ex Article 129), granting a right to information, introduced in the Treaty of Amsterdam, is said to have horizontal direct effect. Thus, it seems that the history of horizontal direct effect, whether of Treaty provisions or of Directives, has only just begun.

The supremacy of EC law in the area of trade is relatively well established. However, Keck has demonstrated that there are limits to a European legal order built on direct effect and supremacy, and, today, a more sophisticated approach to the rights and responsibilities of the Member States, the market participants and the European Community is required. This is particularly true with regard to supremacy in the field of social policy. The creation of social policy is a part of the core activities of the nation state. Without competence for social policy, the legitimacy of the nation state itself is challenged.

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why the internal market project has taken the EU a long way beyond the boundaries of a mere market order. The ongoing resistance of the Member States to the ECJ’s reading of Article 141 and the two equality Directives is evidence of the delicacy of EU labour law – a law which does not sit well with many national legal traditions and cultures.

There is, however, a further dimension inherent in the internal market project which has long remained hidden within the broader understanding of ‘social policy’, and the potential of which for conflict in the furtherance of European integration, of the building of a European legal order, based on direct effect and supremacy, becomes ever clearer. This dimension is the ever-growing number of EC private law rules, with consumer protection rules being the prime example. The question now therefore is whether and how a European private legal order, based on direct effect and supremacy, may be made compatible with the rules governing the legal order on market freedoms and the legal charter on social policies. EC intervention goes to the heart of a nation state’s cultural and historical identity, to the very existence and availability of a genuine national private legal order. The implications of the emerging European private law seem to overarch the set of principles governing social policy. EC rules do not involve Member States alone, with their responsibility for the social protection of their citizens. European private law now affects the contractual relations between private parties, and thus a European construction of contract law is now emerging. Directive 93/13/EEC, on unfair terms in consumer contracts, lies at the heart of this conflict.


There is a growing amount of research on European private law: see e.g. S. Grundmann, Europäisches Schuldvertragsrecht (Berlin, 1999); and S. Grundmann and J. Stuyck (eds.), An Academic Green Paper on European Contract Law (The Hague, London and New York, 2002).

