PART I

1

Theorising the relationship between the judiciary and the legislature in the EU internal market

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The aim of this edited collection is to explore, from a public law perspective, the dynamic relationship between the Court of Justice of the European Union (CJEU) and the EU legislature across a range of policy areas linked to the completion of the EU internal market. The themes discussed here have not been systematically explored in relation to the EU, though there is a wealth of material from the US and other national constitutional orders from which comparisons may fruitfully be drawn.[1]

To begin with, I set out, in straightforward terms, the task facing the judiciary and the legislature in the EU internal market context, and go on to outline two extreme visions, which serve to illustrate two radically different ways in which the relationship between the judiciary and the legislature may be conceptualised. Readers are invited to consider the appeal of each vision, first in relation to the tasks facing courts and political institutions operating within any constitutional frame; and second in relation to the specific EU internal market context. Thus, later sections of this introduction identify principles from which theories on the relationship between the judiciary and the legislature may be constructed. They also discuss the specifics of the EU constitutional context. In particular, attention is devoted to the salient features of the EU Treaties and the position of the judiciary and the legislature in the EU legal order. In a final section, the substantive chapters of the volume are introduced, with an explanation as to how each contributes to a better understanding of the relationship between the legislature and the judiciary.

1 See, e.g., M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the US Supreme Court' (2006) 4 *International Journal of Constitutional Law* 618; S. Gardbaum, 'The Myth and Reality of American Constitutional Exceptionalism' (2008) Jean Monnet Working Paper 07/08; G. Nolte (ed.), *European and US Constitutionalism* (Cambridge University Press, 2005).

1 The task of the legislature and judiciary – two extreme visions

The EU is a *sui generis* polity, whose authority derives from successive European Community and European Union Treaties. The Treaties, most recently amended, renumbered and renamed by the Treaty of Lisbon in December 2009, state that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'.[2] They also confer certain competences on the Union which are to be used in order to attain the objectives set out in the Treaties. It is entirely uncontroversial to state that interpretation of the Treaties and acts of EU institutions, as well as review of the legality or validity of legislative (as well as executive) acts of the latter,[3] all fall within the jurisdiction of the Court. It is also entirely uncontroversial to state that, within the limits set out in the Treaties (and policed by the Court), the institutions of the Union, including the legislature, may act in a range of ways so as to attain the objectives set out in the Treaties. These preliminary observations, through which readers are invited to draw parallels with other legal systems in which the legislature operates within a constitutional framework, plausibly lead to two (extreme) visions of the way in which the relationship between the judiciary and the legislature may be conceptualised; with the first privileging the judiciary over the legislature and the second privileging the legislature over the judiciary.

In the first vision, the Treaties are the primary law of the EU. All legislation is secondary. The Court's interpretation of the Treaties cannot, and should not, be influenced by the passage of secondary legislation. In deciding on the legality of secondary legislation in the internal market area, the Court should not hesitate to use judicial review to annul legislation which is contrary to its conception of the Treaties and the internal market. The Court's teleological approach to Treaty interpretation, though undoubtedly contentious,[4] is now well-established, and has served the process of integration well. In its interpretation of EU legislation, the Court should

2 Article 19(1) TEU.

3 Cases may come before the Court either from national courts via the Article 267 TFEU preliminary rulings procedure, or directly via Article 263 TFEU. A third category of cases comes to the Court via Article 258 TFEU. Such cases are brought by the Commission against Member States where Member States have failed to fulfil an obligation under the Treaties.

4 See, e.g., H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy-Making* (Dordrecht: Martinus Nijhoff, 1986), and K. Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press, 2009).

use the Treaties as its touchstone, and be prepared, within the albeit contested limits of judicial propriety, to strain the meaning of legislation so that it most closely corresponds with, and indeed furthers, the Court's conception of the internal market.

In the second vision, the influence of the political institutions on the meaning of key concepts introduced in the Treaties cannot sensibly be limited to their role in Treaty revision – frequent though such revision is. The argument here is that the internal market concept should not be defined solely by the Court, but that it is a political matter on which national governments, the Commission, the European Parliament and a range of other stakeholders have relevant and valuable input. This vision appears particularly attractive in the internal market context, in which it has, at least since the Single European Act, been accepted that negative (judiciary-driven) and positive (legislature-driven) integration are complementary routes towards the attainment of the internal market.[5] Granted, there are limits imposed by the Treaties (and policed by the Court); but the Court should, in its case law, strive to reflect the will – perhaps the 'democratic will' – expressed by the political institutions. In this vision, the Court should only exercise its power to review the acts of the Union institutions in extreme circumstances, where, for example, the legislature has manifestly exceeded the proper limits of its power; should engage in a literal reading of secondary legislation (in particular, perhaps, where the legislature has 'sanctioned' particular restrictions on free movement); and should even, perhaps, be prepared to adjust its own interpretation of the dictates of the Treaties in the light of the stance adopted by the legislature. At the very least, those who subscribe to this vision would agree with Paul Craig, who has argued that 'where the Community legislature has given considered thought to the more particular meaning to be accorded to a right laid down in a Treaty article and expressed this through Community legislation, the Community courts should treat this with respect';[6] though they might want to spell out rather more clearly what the requirement of 'respect' amounts to in this context. They would also agree with those writers who call for deference, or self-restraint, on the part of the Court. There are a variety of theories underlying this sort of call for judicial self-restraint, many of which boil down to a concern among courts to 'avoid intrusion on the perceived proper domain of

5 See, e.g., K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998).

6 P. Craig, *EU Administrative Law* (Oxford University Press, 2006), p. 520.

political judgment'.[7] The boundary between the political and the legal is, however, as we shall see, far from easy to locate.

These two visions reflect very different approaches to the task of constitutional interpretation and judicial review. The first sees the constitution in formal terms and leaves questions of interpretation in the expert and independent hands of the judiciary. The Court's task is to police the outer limits of what is constitutional and to rule on whether the legislature has infringed those limits. In the EU internal market context, the Court's interpretation of the free movement and other linked provisions of the Treaties is crucial. Since *Dassonville*,[8] the Court has interpreted the free movement provisions expansively, bringing a broad range of national measures within their scope and thereby reducing the scope for national diversity. The second sees the constitution as a more organic document, which reflects the changing will of the people. One of the effects of Court decisions is to 'concretise' the constitution – so that, over time, the Court contributes to the creation of a tighter framework affecting the legality of private (and State) conduct. Crucially, legislative interventions also play a part in this concretisation process, leading one towards the conclusion that it is via a dynamic dialogue between the judiciary and the legislature that the internal market concept evolves.

As later chapters of this volume make clear, the case law of the CJEU does not conform to either of these two extreme visions. The Court is, albeit on rare occasions, prepared to annul EU legislation which, in its view, infringes the Treaties. It also, rather more commonly, shows itself willing to interpret EU legislation creatively, so that its scope and meaning come to correspond to the Court's view of the demands of the internal market. However, on other occasions, the Court seems to give more weight and respect to EU legislation, showing itself to be reluctant to annul it (even when it seems possible to argue that it is in breach of the Treaties), and interpreting it literally (even when a literal interpretation goes against the main thrust of its case law). What becomes apparent from an analysis of the Court's jurisprudence, is that it rarely, if ever, gives an overt rationalisation for its choice of approach. This is perhaps indicative of the fact that it has yet to identify the 'proper' relationship between the judiciary and the legislature in the internal market context. In many ways, while this is frustrating, it is hardly surprising. As we shall see below,

7 S. Weatherill, 'Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation', in N. Nic Shuibhne (ed.), *Regulating the Internal Market* (Cheltenham: Edward Elgar, 2006), p. 38.

8 Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] ECR 837.

academic writers are divided, some advocating a case-by-case contextual approach to the role of courts in constitutional adjudication while others seek to reach more principled conclusions by drawing on arguments based on a combination of democracy, legitimacy and expertise. The weight of such arguments is, as we shall see below, contested, not only in general terms but also with regard to the specific EU internal market context.

As for the legislature, it has shown itself willing to use the competences available to it under the Treaties to adopt a variety of different forms of legislation in the internal market context. As Claire Kilpatrick's chapter makes clear, there are a number of desirable features which legislation may be able to offer, when compared with the alternative – incremental judicial elaboration of the constitution. Legislation can offer structure, detail and certainty in a way which is at least unusual in the case of judicial elaboration. It is also likely, though this claim deserves particularly close scrutiny at the European level, that legislation will have stronger claims to democratic legitimacy. One should, however, pause to reflect that legislation may serve one of two distinct objectives: it may be adopted to consolidate or codify, and thereby make more visible, the jurisprudence of courts; or, alternatively, it may be adopted as a reaction against particular features of courts' jurisprudence.[9] Later chapters illustrate that the former is much more common than the latter – such that it is, I believe, a mistake to represent the relationship between the judiciary and the legislature as an essentially conflictual one. Nevertheless, it is those areas in which there are clear differences between the approaches adopted by the legislature and judiciary which are the most interesting in the light of the aims of this book. Those are the high-stakes areas in which it is easiest to see whether, and how, judicial or political readings of the constitution come to dominate.

2 General theories on the relationship between the judiciary and the legislature

The issues with which this volume is concerned arise most starkly in cases in which the judiciary is faced with a conflict, or a potential conflict, between a constitutional norm (in the EU context, an Article of the

9 To make matters more complex, it may often be the case that it is difficult to determine the objectives of Community legislation. There are a number of different institutions involved in the legislative process at the EU level and these may have rather different aspirations. As we shall see in the substantive chapters of this book, many of the measures which the Court is called upon to assess embody a confused bundle of sometimes contradictory objectives.

Treaties, for example) and a piece of legislation (in the EU context, a Regulation or Directive adopted under the ordinary legislative procedure, on the basis of a proposal of the Commission, by the European Parliament and the Council,[10] for example). It may be that the judiciary is asked to rule on the legality or validity of the legislation; or that it is asked to interpret the legislation in the light of the constitutional norm.

In the EU context, the situation is often more complicated, with questions concerning the interpretation of either the Treaties or EU legislation (or often both) coming before the CJEU, via what is now the Article 267 TFEU preliminary ruling procedure from national courts, in the context of actions concerning the applicability of national level legislation (whose conformity with EU law may be in doubt) to the conduct of individuals. Nevertheless, despite the complications created by the multi-level governance structures in the EU, the core task for the CJEU, like the task facing many other constitutional courts, is to review, or to interpret, legislation in the light of a constitutional text.

The role of the judiciary in constitutional contexts has, of course, come under enormous scrutiny.[11] Ultimately, it is for judges to define the boundaries of their own role, and to decide how far to exercise what may be termed deference, or self-restraint, in the face of legislation. Courts tend to show awareness of their institutional position and are often wary of substituting their judgment for that of the initial decision-maker, typically preferring instead to assess whether the balance reached is reasonable; it is said that to substitute judgment might 'take the courts beyond the reviewing function and would usurp the proper role of government'.[12]

> Some self-restraint or deference is required to ensure that judges do not simply take over the role of ministers and officials in determining and applying government policy. But too much self-restraint or deference will prevent the judges from fulfilling their own constitutional role of ensuring the lawfulness, fairness and justifiability of administrative action.[13]

10 See Article 294 TFEU.

11 See J. Waldron, 'The Core of the Case Against Judicial Review' (2005–06) 115 *Yale Law Journal* 1346; J. Ely, *Democracy and Distrust* (Harvard University Press, 1980); T. R. S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) *Cambridge Law Journal* 671; A. Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222.

12 See A. Davies, 'Judicial Self-restraint in Labour Law' (2009) 38 *Industrial Law Journal* 278, at 282.

13 *Ibid.*, at 284.

The lack of external control mechanisms on the judiciary (*quis custodiet ipsos custodes?*) emphasises how important it is for judges to be trusted. Such trust has to be earned and retained and may be derived, at least in part, from the quality, however defined, of a court's judgments.

Much of the debate on the role of the judiciary in a constitutional context has centred on the role of courts in the context of judicial review, but I argue here that similar considerations do, and should, apply to the judiciary in their interpretative role.[14] As we shall see in this book, the CJEU is, in many contexts, reluctant to engage in judicial review of Union legislation, preferring instead to engage in strategies which involve what may be thought to be surprising or strained interpretations of EU legislation.[15] There is, I argue, no hard and fast dividing line between judicial review (in which a court may annul a legislative act because of its failure to conform to the constitution) and a strategy based on interpretation (in which the court may insist on a particular reading of a piece of legislation, such that it conforms with the constitutional text but perhaps not with the intentions of the legislature). In employing a strategy based on interpretation rather than review, courts may, for better or worse, succeed in hiding the extent of their disagreement with the legislature. Later chapters pick up on the extent to which openness and honesty are characteristic of judgments of the Court, linking this with the extent to which the Court is able to engender and retain trust.

Academic writing describes the issues facing the judiciary in a variety of different ways. Some, adopting a non-doctrinal approach, suggest that judges should simply decide on a case-by-case basis and prefer not to begin the task of articulating principles which serve to determine the degree of deference to accord to the legislature in various contexts.[16] As the substantive chapters of this book demonstrate, the CJEU does not seem to have adopted a clear approach in the internal market context.

14 See J. Rivers, 'The Interpretation and Invalidity of Unjust Laws', in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999).

15 See, e.g., K. Mortelmans, 'The Relationship between Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule' (2002) 39 *Common Market Law Review* 1303, at 1316: 'in a number of cases the Court circumvents the validity issue, and recasts it as an interpretation of a rule of secondary law'.

16 See also: 'Judicial activism or judicial self-restraint, understood as normative or interpretative ideology, are concepts that should be abandoned when analysing the ECJ's judicial decision-making process.' J. Bengoetxea, N. MacCormick and L. Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in G. de Búrca and J. Weiler (eds.), *The European Court of Justice* (Oxford University Press, 2001), p. 44.

Nevertheless, the aim here is to articulate factors and principles which might be thought to affect the extent to which the judiciary should be prepared to show deference to the legislature, first in general terms and second with regard to the specific EU internal market context.

These factors and principles are necessarily based on some sort of a comparative institutional analysis of the judiciary and the legislature and their capacity to deal with particular questions. The key elements of this analysis, according to the approach adopted by a range of writers, are arguments based on a combination of democracy, legitimacy and expertise. Perhaps the strongest argument against judicial review, and I would add, against strong teleological interpretative strategies, is one based on democracy.[17] Jeremy Waldron argues, albeit in the US context, that 'ordinary legislative procedures' are able to resolve disagreements which citizens may have about rights, and that 'an additional layer of final review by courts adds little to the process except a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights'.[18] Later chapters in this book consider whether his argument can be transplanted into the EU context, in which there are, of course, concerns about the democratic credentials of the legislature and persuasive claims made for the democratic capacity of courts – and in particular the CJEU – which may be able, especially in transnational matters, to provide a forum for the voices of those often ignored in the policy-making processes at national level to be heard.[19] Writers who focus less on democracy, and more on legitimacy or expertise, tend to end up with more nuanced views.[20] Those who put legitimacy

17 See, e.g., Waldron, n11 above. His 'essay criticizes judicial review on two main grounds. First, it argues that there is no reason to suppose that rights are better protected by this practice than they would be by democratic legislatures. Second, it argues that, quite apart from the outcomes it generates, judicial review is democratically illegitimate.'

18 *Ibid.*, at 1406.

19 See, e.g., J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); M. Maduro, *We, The Court: the European Court of Justice and the European Economic Constitution* (Oxford: Hart, 1999); and O. Gerstenberg, 'Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism' (2002) 8 *European Law Journal* 172.

20 Legitimacy is, to be sure, a difficult concept, which can be measured in a variety of different ways. See G. de Búrca, 'The Quest for Legitimacy in the European Union' (1996) 59 *Modern Law Review* 349; C. Lord and P. Magnette, '*E Pluribus Unum*? Creative Disagreement about Legitimacy in the European Union' (2004) *Journal of Common Market Studies* 183; A. Menon and S. Weatherill, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the EU' LSE Working Paper 13/2007, available at www.lse.ac.uk/collections/law/wps/wps1.htm#13; and V. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', paper