

## **The Court of Justice of the European Union as an Institutional Actor**

The EU Treaties bind the Court of Justice of the European Union as an institution of the Union. But what does that mean for judicial lawmaking within the EU legal order? And how might any limits set out in the EU Treaties be effectively applied to the Court of Justice as lawmaker? This book interrogates these fundamental and underexplored questions at a critical juncture in European integration. It argues that the EU Treaties should be considered to function as the principal touchstones for assessing the internal constitutionality, and hence legitimacy, of all Union institutional activity – including the work of the Court. It then examines how far the Court of Justice complies with the EU Treaty framework in the exercise of its interpretative functions. The results of that analysis are striking and offer scholars powerful new insights into the nature and limits of the Court's role within the EU legal order.

**Thomas Horsley** is Senior Lecturer at Liverpool Law School, University of Liverpool. He has published widely in leading international journals and edited collections on EU law and European integration. His most recent work analyses the impact of the UK's exit from the European Union on UK courts. He completed his PhD at the University of Edinburgh (2009–2011), funded by the UK Arts and Humanities Research Council.

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## Judicial Lawmaking and its Limits

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Thomas Horsley  
University of Liverpool



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*The [Union] is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [Treaties].<sup>1</sup>*

<sup>1</sup> Joined Cases C-402/05 P and C-415/05, *P Kadi and Al Barakaat International Foundation v. Council and Commission* EU:C:2008:461 at para. 281. See also, Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament* EU:C:1986:166 at para. 23 and Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights* EU:C:2014:2454 at para. 163.

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## Series Editors' Preface

The role of the Court of Justice of the European Union as an institutional actor is often overlooked; this book by Thomas Horsley should ensure the rectification of that oversight. Horsley applies the Treaty framework to the Court as a means to problematise that institution's role within the EU legal order. Having done so, he asks how the Court and its interlocutors can (and should) respond to the existence of three contemporary problems for EU judicial activity: judicial challenges to constituent authority; judicial challenges to Treaty limits on EU policymaking; and judicial challenges to EU legislative frameworks. On the way, Horsley examines the formal status of Union law and the conditions under which it applies within Member States; the locus of EU political authority within the EU legal order; and the objectives, values and limits governing European integration. He sees the Court's institutional positions on each of these three key issues for EU constitutionalism as offering paradigmatic examples of acts of constitutional contestation. He illustrates well how the Court uses Treaty norms as tools to challenge substantive policy choices made by the Union legislature.

There has in fact been a long history of such challenges – sometimes at the behest of individuals faced with obstacles to the exercise of their freedoms aggravated by inactivity of the legislature, and famous cases like *Reyners* spring to mind. The Court's duty when faced with failures to act by the Council was well set out in a celebrated article by the great judge Pierre Pescatore, '*La carence du législateur communautaire et le devoir du juge*' in Lüke et al. (eds.), *Rechtsvergleichung, Europarecht und Staatenintegration (Gedächtnisschrift für Léontin-Jean Constantinesco*, Heymans, Cologne, 1983) 559–580. The Union legislature may want to take a more nuanced view than one might expect from the Treaties, but it does not mean that it can deprive Union citizens of their rights under the Treaties, or restrict

them without clear Treaty-based authority, something that the Court rightly points out as appropriate.

Horsley does not merely identify problems, he makes four specific reform proposals to strengthen the legitimacy of the Court's institutional role within the Treaty framework as a Union institution. His proposals are both theoretically stimulating and practical in their conception.

For all these reasons we very much welcome this perceptive work as a welcome and indeed timely addition to our series *Cambridge Studies in European Law and Policy*.

**Laurence Gormley**  
**Jo Shaw**

## Preface

The new millennium has not been easy on the European Union (EU). It has gifted the EU and its Member States a series of constitutional, economic and humanitarian crises in rapid succession. Each new crisis has placed enormous strain on the EU's institutional framework and posed renewed challenges to the legitimacy of European integration. The United Kingdom's notification to the European Council in March 2017 of its intention to exit the European Union has added yet another layer of complexity.

Under such challenging circumstances, it is tempting for EU legal scholars to rally instinctively to the defence of the European Union and its institutions. And let us be clear, there are good reasons to do so. More than ever, Europe's citizens deserve to be much better informed about what the European Union does (and does *not* do); how it achieves its objectives; and, most importantly, where they (the citizens) fit within its institutional architecture. The need to strengthen the connection between the EU and the citizens it serves through credible (and accessible) scholarship is more pressing than ever. Recent years have witnessed a proliferation of political movements within many Member States that consciously set out to *misinform* citizens about the relative costs and benefits of European integration.

Nevertheless, even at times of heightened political crisis, it remains the responsibility of EU legal scholars to offer critical perspectives on European integration based on robust, objective analysis. This book is written firmly in that spirit. The critical perspective it adopts with specific reference to EU judicial lawmaking challenges head-on many of the things that EU legal scholars defend (or at least have come to accept) as incontrovertible 'truths' in European integration. This is done not to undermine the Court or, more broadly, to support further denigration

of the European Union and its institutions. The aim is to enhance the legitimacy of EU judicial lawmaking by reinforcing the normative foundations of the Court's institutional role within the EU legal order. This book's intellectual point of departure, core argument and concluding reform proposals all serve that basic aspiration.

## Acknowledgements

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Individual chapters of this book have benefitted from conversations with numerous colleagues working throughout Europe, notably Marie-Pierre Granger and Paul Beaumont. I am also grateful to many others, not least those who have taken time to provide me with feedback on my article, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 *Common Market Law Review*, 931. This monograph is an attempt to develop the arguments advanced in that exploratory article. It would also not have been completed without the hard work and patience of my editor, Kim Hughes, and her team at Cambridge University Press.

Finally, I wish to thank Matt for his love and support and my parents for always encouraging me to learn, achieve more and go further in life.

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