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Introduction and overview

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I

The volume title *A Transatlantic Community of Law* is designed to provoke an immediate question – what *is* a Transatlantic Community and *why* formulate it as a Community of Law? Can law be said to have a normative relationship with the integration of an 'Atlantic Area'? Is there a strict territorial understanding of legal interactions? Is law objectively understood to be part of the formulation of transatlantic relations, in a dynamic sense or simply 'functionally'? Is there a strict territorial understanding of legal interactions? Can law only play a meaningful role in distinct forums and areas? Can we readily deploy the term 'Community',[1] given the overarching tendency in global geopolitics as well as global legal theories of integration to explore only unions, associations, partnerships and regionalised territorial spaces, and little else below – or between – this?

The reason that the title of this volume might provoke such questions is most likely because there is much disagreement in scholarship about the main scientific characteristics of the relationships between the European Union (EU) and the United States (USA). However, non-legal scholarship on transatlantic relations is generally unambiguous about the extent to which bilateral transatlantic relations are 'institutionally light'. This specific thesis is one that this volume aims to explore, and to some extent contradict and question. It is suggested in a number of chapters that there are various formal and informal institutional dimensions to transatlantic relations that suggest that they are at least quasi-institutional – or beyond this, veer towards 'institutionalisation', both normatively and descriptively. More generally, institutionalisation gives greater depth to the idea of the 'Community' behind this book. Transatlantic 'rule-making' – that is the development of rules by the EU and USA together – is

[1] In our formulation as such, we draw inspiration loosely from B. Anderson, *Imagined Communities* (London: Verso Books, 1991) and R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

conventionally conceived as having a modest legal component. Yet as a case study, its rule-making and its substantive legal dynamics have both inspired and informed leading theorisations of governance, for example networks,[2] global governance and the democratisation of international trade.[3] As the subject and object it remains a stimulating and worthwhile enterprise to be subjected to provocative and questioning reflections.

This volume resulted from a workshop held early in 2013 in Amsterdam, and the publication includes some additional contributions expanding the momentum of the initial event. The volume is formally structured around the legal dimensions of the interactions between the EU and the US legal orders in three domains: (1) legal perspectives on emerging institutional characteristics of transatlantic relations; (2) legal perspectives on contemporary transatlantic rule-making, largely but not exclusively centred upon trade; and (3) legal perspectives on contemporary rule-making in security. It has attempted to draw together novel perspectives of EU law, governance and rule-making scholarship on the use of law and institutions involved in contemporary transatlantic relations. The volume includes many legal scholars working in the field of European law generally, in various sub-fields, with a specific focus in their work on forms of interactions, including processes, instruments and communications, as well as formal and informal relationships – in varying degrees – between the EU and US legal orders. The editors have not sought to 'reinvent the wheel' and provide a comprehensive policy-based field-by-field assessment of transatlantic relations. While not detracting from the merits of such scholarship, such a publication would inevitably have a rather modest legal component or would perhaps focus substantively upon the uses of international law. This volume has not sought to provide a complete historical overview of transatlantic relations and instead has sought to depict the nature of specific dynamic contemporary interactions through law between the two legal orders. As a result, leading new socio-legal and empirical research on interactions between the EU and US legal orders is captured. Insights from judicial and political practices are also covered

[2] A. M. Slaughter, *A New World Order* (Princeton University Press, 2005).

[3] E. U. Petersmann, 'Dispute Prevention and Dispute Settlement in the EU–US Transatlantic Partnership' in M. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham, MD: Rowman & Littlefield, 2001); K. Nicolaidis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 *Law & Contemporary Problems* 263; R. Howse, 'Transatlantic Regulatory Cooperation and the Problem of Democracy' in G. Bermann, P. Lindseth and M. Herdegen (eds.), *Transatlantic Regulatory Cooperation* (Oxford University Press, 2000).

in the volume. Given the approach of the volume to its subject, the editors nonetheless felt that experts from the more traditional but non-legal transatlantic relations scholarship also had to be involved. Their contributions add a rich variety and depth to its focus overall. They identify new and established themes and perspectives and sometimes (but not always) endeavour to understand legal perspectives on the same developments.

II

Part I highlights questions of institutionalisation. Many of the contributions in the first part can be considered, we think, as innovative and novel scholarship on the themes they traverse. They might be said to be not necessarily well represented in existing literature and provide a striking range of empirical, socio-legal and theoretical ideas, drawing at times from the *Trias Politica* (or not), on the institutionalised nature of transatlantic relations or phenomena of relevance to considering its institutionalisation. Parts II and III attempt to capture two specific policy-based themes: transatlantic trade and transatlantic security. Does security place an Atlantic-sized 'schism' between the two legal orders or does it simply show its impossibility in a particular period? Does trade offer the prospect of a deeper institutionalisation of transatlantic relations? What should that entail? They undoubtedly play a very significant role in any analysis of contemporary transatlantic relations. But their selection and the cross-cutting concentration of the scholarship in these sections are deliberate. There is an effort here to include governance, legitimacy and accountability issues in the policy-themed sections, so as to provide and provoke a richer depiction of these types of interactions between the two legal orders.

In the middle of the writing and later the editing process of this volume, the EU–US surveillance affair involving the National Security Agenda, PRISM and Snowden was unfolding – and continues to do so – and the European Parliament began an inquiry on many aspects of transatlantic security covered in this volume, issuing a notable resolution on 24 October 2013. Also, negotiations on a Transatlantic Trade and Investment Partnership were suspended seemingly temporarily due to the US government shutdown, in respect of the funding of the US federal government. These events provided a vivid context in which to complete a project such as this – a context of high politics, much hope and despair, and a constant exposure of the boundaries of the use of law and governance. The editors hope that this volume demonstrates the virtues of the European law

perspectives. This voice shows how law plays a tangible presence in contemporary transatlantic relations, which may provide useful insights to other disciplines concerning the state of transatlantic relations.

III

In Part I, Jančić depicts parliamentary diplomacy as an international politico-legal phenomenon and explores how the European Parliament performs less visible diplomatic activities in EU–US relations that contribute to an informal constitutionalisation of its powers. He explores the Transatlantic Legislators Dialogue (TLD) as part of an examination of parliamentary politico-legal diplomacy as a research agenda.

Gutierrez-Fons conducts a comparative study of transatlantic adjudication techniques, examining how the Supreme Court of the United States of America has applied the principle of enumerated powers in the context of the Commerce Clause, and how the ECJ has interpreted the EU's internal market harmonisation clause, Article 114 of the Treaty on the Functioning of the European Union (TFEU). He considers high-profile contemporary case law, including the Roberts Court adjudication of the so-called ObamaCare Law[4] and the analysis of the European Court of Justice on the EU Roaming Regulation.[5] He argues that they should both take into account the values of federalism and proposes that the right balance between different levels of governance can only be struck if courts go beyond the borderline federalism paradigm.

Based upon socio-legal research and also targeting the 'in-between' theme of this volume more carefully, Mak probes the actual nature of transatlantic judicial communication and its impact on judicial decision-making in the US Supreme Court and the ECJ qua judicial dialogue. She explores how no systematic approach exists regarding judicial communication between the US Supreme Court and the ECJ, and yet develops a most insightful account of the significance of these communications for our understanding of 'in-between' interactions between legal orders.

Van Zeben considers the current and potential role of sub-central entities in external affairs in the form of sub-national authorities (SNAs) as a future research agenda, thereby looking beyond conventional

[4] *NFIB* v. *Sebelius*, 132 S.Ct. 2566 (2012).
[5] OJ [2007] L 171/32. Regulation No. 544/2009, OJ [2009] L 167/12, amending Regulation No. 717/2007 so as to extend the imposition of maximum wholesale and retail prices to SMS and data roaming: Case C-58/08 *Vodafone and Others* [2010] ECR I-4999.

typologies of actors in transatlantic relations.[6] She explores the lack of any formal infrastructures for entities under EU law and policy in EU–US relations. She considers the risks of engaging sub-federal and sub-state entities in international relations and the possible impact of local civil society upon EU–US relations.

In Part II, Fahey, building upon the themes of Part I on institutionalisation, considers a series of recent interactions and rule-making exercises between the EU and US legal orders, suggesting institutionalisation or proximity between the legal orders of the EU and USA. She considers the concept of an Atlantic Community of Law, and also tentatively some questions of its legitimacy, and argues that the examination of the 'non-bilateral' 'non-multilateral' context of transatlantic relations via law may reveal more about conceptions of institutionalisation in transatlantic relations and the conduct of two major global governance actors.

Mathis considers the type of technical instrument required to address non-tariff barriers to trade in goods and services in a transatlantic regional trade agreement, one that could be both intensive and effective. He examines in detail the agreements both the EU and USA have recently negotiated with Korea and focuses upon the idea that the transatlantic standard could be adopted more universally.[7]

Takács offers a review and assessment of transatlantic regulatory initiatives and policy instruments in trade as well as their defined objectives since the New Transatlantic Agenda in 1995 and their structural frameworks. She suggests that regulatory cooperation must build upon achievements such as the understanding on Regulatory Principles and Best Practices as well as the Regulatory Cooperation Best Cooperative Practices. She suggests that the limitations of sector-specific regulatory convergence show that legal harmonisation is less realistic. However, she notes, with the advent of the Transatlantic Trade and Investment Partnership (TTIP), there is real political commitment to address the issues. Bartl and Fahey consider who has set the normative agenda in the negotiation of the TTIP, reflecting upon both the actors and processes thereof. They focus on the questions of participation in crafting the TTIP, the role of knowledge in justifying this enterprise, the objectives of the TTIP and the institutions that should underpin it. Bartl and Fahey argue

[6] Pollack and Shaffer (eds.), *Transatlantic Governance*.

[7] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (EU Korea agreement) OJ L 127/6, 14 May 2011.

that parliamentary legitimation, including approval and information rights, is inadequate in light of the institutionalisation process that forms the goal of the TTIP.

The themes of Part III are opened by contributions from both political practice and politics from in't Veld and Rees, followed thereafter by academic contributions from the perspective of European Law. In't Veld provides highly critical but also candid and insightful reflections derived from her many capacities in contemporary transatlantic relations, primarily as a Member of the European Parliament. In particular, she gives a vivid account of the wide-ranging sets of litigation taken to procure EU transparency and openness in transatlantic relations, initially before the General Court. Her individual instigation of high-profile litigation made her an obvious invitee to participate in the workshop on which this publication was based, a contribution that is now readable as a critical account, which we think is of much public interest. It is one that may eventually be of much historical value.

Rees explores from the perspective of politics and international security the reordering of the transatlantic relationship in counterterrorism. He focuses upon four specific foreign policy tensions between the EU and USA, and provides a clear yet forceful overview of the failings and also more generally the nature of the phenomenon of Homeland Security that has emerged in recent times.

Penultimately, Santos Vara charts the use by the European Parliament of its powers in transatlantic personal data agreements and considers how it has used its accountability powers in recent times. He considers how the National Security Agency (NSA) surveillance affair will compare as an exercise in accountability. He argues that the European Parliament is now significantly part of the process, but concerns itself more with negotiations and concluding agreements rather than attempting to radically alter the substantive core content. Finally, Mitsilegas considers the idea of coherence in the promotion of EU values globally as a means to move beyond narrow understandings of 'consistency' between EU external and internal action in security. He offers a typology of counterterrorism cooperation agreements and examines the mechanism put forward to ensure coherence, including coherence via oversight, coherence via regular monitoring, coherence through the presumption of adequacy and coherence through reciprocity.

PART I

Institutionalisation and transatlantic relations from a legal perspective

2

The US Supreme Court and the Court of Justice of the European Union

Emergence, nature and impact of transatlantic judicial communication

ELAINE MAK

1 Introduction

Do the judges of the Court of Justice of the European Union (ECJ) and the US Supreme Court communicate with each other and, if so, what does this communication consist of? This question has become pertinent in the globalised legal context, where legal systems and actors within these legal systems are increasingly interconnected.[1] These interconnections have brought an increasing number of cases with international or foreign aspects to the courts on both sides of the Atlantic Ocean. Moreover, systemic changes, such as the development of the legal order of the European Union (EU) and the increase in the number of international legal instruments, have obliged the courts to develop expertise concerning the application of legal sources elaborated outside of their national legal systems. At the same time, meetings in transnational judicial networks and the

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[1] Mark Tushnet has defined globalisation in the legal sphere as the 'convergence among national constitutional systems in their structures and in their protection of fundamental human rights'; M. Tushnet, 'The Inevitable Globalisation of Constitutional Law' in S. Muller and S. Richards (eds.), *Highest Courts and Globalisation* (Hague Academic Press, 2010), p. 130. Patrick Glenn has defined globalisation in the legal sphere in a more general sense as the 'trend toward world domination of specific regimes'; H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 3rd edn (Oxford University Press, 2007), p. 49.

availability of foreign legal sources, for example through internet databases, have made it easier and natural for judges to take an interest in developments outside of their national borders.[2]

Starting from these observations, this chapter explores the relations between the highest courts in the USA and in Europe, and the impact of these relations on judicial decision-making in the US and European legal orders. What kind of contacts exist between the US Supreme Court and the ECJ, and how do these contacts influence judicial decision-making in the US and EU legal orders? This central research question can be divided in several sub-questions: what examples of transatlantic communication can be identified in the relations between the US Supreme Court and the ECJ? What motives do the two courts have for engaging in this communication? Does the communication between the courts constitute a real 'dialogue', involving an aspect of deliberation? To what extent does this communication have an influence on the decision-making of the courts?

Based on a socio-legal research approach, this chapter will probe the actual nature of transatlantic judicial communication and its impact on judicial decision-making in the US Supreme Court and the ECJ. This comparative and empirical study of judicial practices is representative of a relatively new field of research, in which concepts, theories and methods from different disciplines are combined to obtain a better understanding of judicial decision-making in a changing legal, political and societal context.[3] Publicly available information about the practices of courts and individual judges is a first relevant source of information for the analysis in this chapter. In this regard, the publications of judges of the US Supreme Court and the ECJ as well as available academic studies provide insight into the views of individual judges on judicial interpretation and concerning the influence of individual judges on decision-making in

[2] Concerning this development, see inter alia A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law* (Abingdon: Routledge-Cavendish, 2006); Muller and Richards, *Highest Courts and Globalisation*; A. Hol and others, 'Special Issue on Highest Courts and Transnational Interaction' (2012) 8(2) *Utrecht Law Review*.

[3] See further inter alia B. Flanagan and S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 *International and Comparative Law Quarterly* 1; T. Nowak and others, *National Judges as European Union Judges. Knowledge, Experience and Attitudes of Lower Court Judges in Germany and the Netherlands* (The Hague: Eleven International Publishing, 2012); U. Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Leiden: Brill, 2014).