

# 1. Introduction. National courts vis-à-vis EU law: new issues, theories and methods

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Ever since the European Communities were created, it has been well understood that national judges play an essential role in the legal system of the European Union (EU) by acting as decentralised Union judges who enforce EU law and contribute to the process of legal integration within the Union.<sup>1</sup> In this capacity, they are considered essential to the European legal order and the European Union judiciary, functioning as ‘foot soldiers’<sup>2</sup> of enforcement even against executive and legislative resistance to complying with EU law.

Over the years, the Court of Justice of the European Union (hereinafter the CJEU or the Court) has played a crucial role in configuring the role of national judges within the EU legal order by shaping the terms on which national courts must deal with EU law. The CJEU’s development and constitutionalisation of the jurisprudence that engaged national courts in monitoring and enforcing EU law in the national realm has been very broadly discussed by academics and practitioners. The move towards constitutionalisation of the EU legal order was fostered by the preliminary references system that enhanced the cooperation between the CJEU and the national courts.<sup>3</sup> The role of national courts as decentralised EU

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<sup>1</sup> Joseph H. H. Weiler, ‘The Transformation of Europe’ [1991] 100 *Yale Law Journal* 2403; Anne-Marie Burley and Walter Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ [1993] 47 *International Organization* 41; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

<sup>2</sup> Imelda Maher, ‘National Courts as European Community Courts’ [2000] 14 *Legal Studies* 226.

<sup>3</sup> Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001); Joseph H. H. Weiler, ‘A Quiet Revolution: The European Court of Justice and Its Interlocutors’ [1994] 26 *Comparative Political Studies* 510.

courts has been partly constructed on the strength of the EU mandate that follows from the EU Treaties, but predominantly built through the Court's jurisprudence in which the Court made national judges responsible for reviewing the national implementation of EU law and for correctly enforcing it.

However, this empowerment of national courts would not have been possible without the active collaboration of national judges acting as intermediaries between the CJEU and local judiciaries. Over the years, national courts have sent their questions concerning EU law to Luxembourg. The CJEU has often responded with revolutionary and pro-integrative judgments<sup>4</sup> regarding the use of preliminary references<sup>5</sup> and, *inter alia*, the application of principles of supremacy,<sup>6</sup> direct effect,<sup>7</sup> indirect effect<sup>8</sup> and State liability.<sup>9</sup> These doctrines have created tools and criteria for helping

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<sup>4</sup> Alter, *ibid*, 17.

<sup>5</sup> Case C-283/81 *CILFIT v. Ministero della Sanità* [1982] ECR I-3415; Case C-343/90 *Lourenço Dias v. Director da Alfândega do Porto* [1992] ECR I-4673; Case C-26/62 *Vand Gend en Loos v. Administratie der Belastingen* [1963] ECR I; Case C-320/90 *Telemarsicabruzzo and others v. Circostel and others* [1993] ECR I; Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981; Case C-104/79 *Foglia v. Novello* [1980] ECR 745; Case C-244/80 *Foglia v. Novello II* [1981] ECR 3045; Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>6</sup> Case C-6/64 *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] ECR 585; Case C- 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case C-35/76 *Simmenthal* [1976] ECR 1871; Case C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

<sup>7</sup> Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I; Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455; Case C-57/65 *Lütticke* [1966] ECR 205; Case C-36/74 *Walrave* [1974] ECR 1405; Case C-43/71 *Politi* [1971] ECR 1039; Case C-93/71 *Leonasio* [1972] ECR 293; Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981; Case C-11/70 *SACE* [1970] ECR 1125; Case C-41/74 *Van Duyn v. Home Office* [1974] ECR 1337; Case C-148/78 *Ratti* [1979] ECR 1629; Case C-152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723; Case C-188/89 *A. Foster and others v. British Gas plc.* [1990] ECR I-3313.

<sup>8</sup> Case C-14/83 *Von Colson v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] 1 ECR 4135; Case C-334/92 *Wagner Miret v. Fondo de Garantía Salarial* [1993] ECR I-6911; Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

<sup>9</sup> Joined cases C-6/90 and C-9/90 *Andrea Francovich and Daniela Bonifaci and others v. Italian State* [1993] ECR I-5357; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v. Federal Republic of Germany and R v. Secretary of State for Transport*

national courts to assess whether EU law should be given primacy over national legislation and enforced directly. From early in this process, then, the CJEU has been prepared to adopt the role of a constitutional court exercising judicial review over national law in the Member States.

In spite of this rather controversial move, the primacy of EU law was sooner or later acknowledged by the national legal orders. Yet this did not occur without creating tensions regarding the mandates of national courts to enforce EU law in the national legal orders.<sup>10</sup> In particular, national high courts reacted to the CJEU's expanding powers by attempting to demarcate the limits of CJEU jurisprudence and EU mechanisms of cooperation through judgments that countervailed the pre-eminence of EU law. Such judgments were noteworthy for: (1) establishing limits and conditions to the application of EU law supremacy<sup>11</sup> and the exercise of

*ex parte Factortame Ltd.* [1996] ECR I-1029; Case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239; Case C-173/03 *Traghetti del Mediterraneo SpA v. Repubblica italiana* [2006] ECR I-5177; Case C-129/00 *Commission v. Italy* [2003] ECR I-4637; Case C-453/00 *Kühne & Heitz* [2004] ECR I-837; Case C-166/73 *Rheinhöfen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR-33; Case C-173/09 *Georgi Ivanov Elchinov* (especially, the opinion of the Advocate General) ECR I-8889; Case C-119/05 *Lucchini* [2007] ECR I-6199; Case C-2/08 *Fallimento Olimpiclub Srl* [2009] ECR I-7501.

<sup>10</sup> Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006).

<sup>11</sup> Judgments of the Italian Constitutional Court in *Frontini* [Decision No. 183 (1973)], *Granital* [Decision No. 170 (1984)] and *Fragd* [Decision No. 168 (21.04.1989)]; Judgments of the German Constitutional Court (BVerfGE) *Solange I* [BVerfGE 37, 271 (29.05.1974)], *Solange II* [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)], *Brunner case* in Maastricht [BVerfGE 89 (12.10.1993)] and Lisbon Treaty [BVerfGE, 2 BvE 2/08 (30.6.2009)]; Belgian Cour d'arbitrage's judgment No. 12/94, *Ecoles Europeenes* (01.02.1994); French Conseil Constitutionnel in *Maastricht* (02.09.1992), in *Amsterdam* (31.12.1997) and in the Constitutional Treaty [Décision No. 2004-505 DC (19.11.2004)]; British House of Lords *Factortame* judgments: 1st judgment [*Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others* (18.05.1989)] and 2nd judgment (11.10.1990); Danish Supreme Court of the Maastricht Treaty in *Carlsen v. Rasmussen* case (06.04.1998); Greek Council of State decision in *Bagias v. DI KATSA* [Decision No. 2808/1997]; Judgment of the Spanish Constitutional Court in Maastricht [Decision n° 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004]; Polish Constitutional Tribunal judgments on the Polish Accession Treaty [Case K 18/4 (11.05.2005)] and on the European Arrest Warrant [Case P 1/05 (27.04.2005)]; Czech Constitutional Court's decision on Post-Accession Decision [Pl. ÚS 50/04 (08.03.2006)], Decision on the ratification of the Lisbon Treaty by the Czech Constitutional Courts [Pl. ÚS 29/09 (03.11.2009)]; Cyprus Supreme Court (Ανώτατο Δικαστήριο Κύπρου), Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest Warrant Law.

judicial review; and (2) constraining the cooperation between the CJEU and ordinary courts.<sup>12</sup>

An inheritance and a current context of this nature renders it unsurprising that the functioning of national judiciaries in the context of European Union law remains a point of enormous academic interest. Academics from different disciplines have provided hypotheses, theories and explanations which have sought to account for the complex determinants that influence national courts' behaviour when functioning as EU law courts in the process of European integration. Most have emphasised and described national judges' attitudes and reactions to EU law, and have scrutinised the way judges use the EU law mandate when dealing with EU law. This interdisciplinary stream of scholarship has also paid attention to issues such as the judicial co-operation between the CJEU and national judiciaries and the role national judges play in this process.

There are three prominent publications which adopt a comprehensive approach to the topic outlined above. The first, from 1997, is edited by Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler;<sup>13</sup> the second, from 2010, is edited by Adam Łazowski;<sup>14</sup> and the third, from 2010, is edited by Giuseppe Martinico and Oreste Pollicino.<sup>15</sup> The first publication offers invaluable insights into the functioning of national judiciaries in the founding Member States and their relationships with

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<sup>12</sup> Some high courts established the possibility of revoking the orders for preliminary references sent by national courts. This practice varies among Member States and there are four possible situations, ranging from a clear revoking process of orders for preliminary references to a total freedom of choice for courts. Michael Bobek, 'Cartesio – Appeals Against an Order to Refer Under Article 234(2) EC Treaty Revisited' [2010] 29 *Civil Justice Quarterly* 307. The question of appeal against orders asking for a preliminary reference was questioned by the CJEU and Advocate Generals from the very beginning in several cases: Case C-13/61 *De Geus v. Bosch* [1962] ECR 45, and followed in Case C-127/73 *BRT v. SABAM* [1974] ECR 51 and Case C-146/73 *Rheinhöfen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 139. In the Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641 case, the Court questioned the limits to cooperation, vindicating the right to have a direct relationship with the referring judge.

<sup>13</sup> Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing 1998).

<sup>14</sup> Adam Łazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (T-M-C-Asser Press 2010).

<sup>15</sup> Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010).

the European Court of Justice. The contributions in this volume build a theoretical framework and provide new analytical tools and concepts which have aided subsequent researchers in describing and interpreting the successive steps towards the legal integration of Europe. Łazowski's edited volume from 2010 examines the application of EU law by the judiciaries in the New Member States,<sup>16</sup> disentangling the ways in which these new incorporations affected our understanding of the dynamics of legal integration and the relationship between national courts and EU law. In the volume edited by Martinico and Pollicino, the contributors made an important effort to depict the status of the EU legal order and its governing principles in the diverse legal systems in EU-27 by describing how national courts and constitutions assessed the integration of EU mandates. These three prominent collections have been developed and complemented by a prolific number of publications which it is impossible to list here. This steady stream of work has come from several disciplines and has incrementally increased our knowledge about the role of national courts and EU law judges.

The aim of the present edited volume is to build upon these contributions and to develop a set of fresh, contemporary thematics in order to revise, wherever necessary, some older understandings of how national judges apply EU law. In doing so, our study of these issues is not limited to a purely normative, legal, black-letter law analysis. Rather, the contributions included in this volume employ different disciplinary approaches (originating from law, political science, sociology, law and economics) and proffer theories such as law in context, constructivism, institutionalism, Europeanisation, among many others. Contributors also enrich the scope of our analysis through diverse methods and research tools such as case-law analysis, citation network analysis, interviews, surveys and statistics. The authors bring new legal and empirical insights to the discourse in order to comprehensively address the question of the functioning of national courts as decentralised EU courts.

The chapters in this volume are divided into three major topic areas. The first group of contributions addresses issues relating to judicial dialogue and EU legal mandates. These scholars examine recent developments and discuss the potential and the limitations arising from the use of judicial dialogue by national judges. The second group of chapters is broadly dedicated to the topic of EU law in national courts (i.e. the reception of EU law in old and new Member States, but also in

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<sup>16</sup> The term 'New Member States' refers to those States that joined the European Union in 2004, 2007 and 2013.

non-EU States). The last group of contributions studies national courts amid the contemporary dynamics of legal integration which exist in the EU – more precisely, national courts’ different roles in protecting fundamental rights and their roles in the area of freedom, security and justice.

## 1. JUDICIAL DIALOGUE AND EU LEGAL MANDATES: RECENT DEVELOPMENTS ALONG WITH THE POTENTIAL AND LIMITATIONS ARISING FROM ITS USE BY NATIONAL JUDGES

This first part is devoted to those contributions which analyse the set of CJEU mechanisms designed to promote the active involvement of national courts in EU law and in the construction of the EU legal order. As a starting point, Bruno de Witte’s contribution, ‘The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts’, explores the current use of preliminary references by national courts and its consequence for the judicial dialogue scenario. Three types of questions sent by national courts are identified: questions concerning the mere interpretation of EU law; questions asking whether EU law has direct effect; and questions about the compatibility of national norms with EU law. It was in the *Van Gend en Loos* decision<sup>17</sup> that the Court of Justice decided about the direct effect of EU law and consequently turned the preliminary procedure into a judicial procedure in the hands of European citizens to challenge national legislation. This became one of the more frequently asked questions and an effective instrument to secure the application of EU law. The author identifies how this type of question, and the divisive potential it holds for challenging national legislation, also has an effect on the responses of the CJEU. De Witte argues that the CJEU adopts more deference rulings where it reviews EU law, leaving the final decision of the case to the national referring court. As such, De Witte concludes that this strategy of the Court may discourage national courts as they will assume that no proper guidance will be offered by the Court to solve the disputes.

In her chapter ‘The *Simmenthal* Revolution Revisited: What Role for Constitutional Courts?’ Darinka Piqani looks anew at the debate about the mandate of national courts to review the compatibility of national leg-

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<sup>17</sup> Case C-26/62 *Vand Gend en Loos v. Administratie der Belastingen* [1963] ECR I.

islation with EU law and to set aside conflicting national law as initiated in *Costa v. Enel*<sup>18</sup> and clarified in the *Simmenthal* case.<sup>19</sup> Specifically, Piqani investigates the application of this duty to national constitutional courts. We are invited to consider the consequences which ensued when the mandate to review the compatibility of national law with EU law was left to ordinary courts without the necessity of raising constitutionality issues before their constitutional courts. The *Simmenthal* case changed not only the relationship between national judges and EU law, but also the relationship between national courts by empowering ordinary courts with the ability to set aside conflicting national legislation, and at the same time placing constitutional courts at the margin of the everyday application of EU law. In her study, the author conducts an empirical-legal analysis of the case-law of constitutional courts in order to trace the attitude of the courts, contrasting this with the expected approach under EU law. What emerges from this case-law is a portrait in which constitutional courts invest a lot of effort in defining the borderline between constitutionality review, which falls within their original jurisdiction, and review of compatibility between national law and EU law, which according to the *Simmenthal* mandate is left to ordinary courts. Despite the fact that several constitutional courts resorted to the preliminary ruling procedure to solve the conflict between EU and national law, the author concludes that they are still reluctant to apply the *Simmenthal* mandate to test compatibility between national law and EU law.

Urszula Jaremba in 'Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure: In Search of a Mid-Range Theory' analyses the persistent question about the motivations that underpin the use of preliminary references. She does this from an innovative socio-legal and empirical perspective which is concerned with the relevance of national judges' knowledge, experiences and profiles for the application of EU law. Employing an extensive empirical analysis based on a quantitative and qualitative methodology applied to Polish courts and judges, the author identifies how various legal and extra-legal factors may determine the (un)willingness of national judges to resort to the preliminary ruling mechanism. Her qualitative study based on interviews with judges shows how the daily operational context, social psychology and personal attributes of judges may bear on the way they resort to a judicial dialogue with the CJEU. Daily caseload and workload seem the most serious obstacles for the use

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<sup>18</sup> Case C-6/64 *Flaminio Costa v. Enel* [1964] ECR 585.

<sup>19</sup> Case C-35/76 *Simmenthal SpA v. Italian Minister for Finance* [1976] ECR 1871.

of preliminary references and engagement with EU law, as the preparation of a preliminary reference is seen as a time-consuming activity. As one of her conclusions, Jaremba brings additional nuance to the well-known narrative that there is a correlation between sovereignty-preserving national judges and their use of preliminary references. Jaremba's account reveals more pragmatic motives, focusing on the way in which judges try to find the most efficient ways to deal with their workload.

The section's last contribution, 'National Courts and the Effectiveness of EU Law' by Urška Šadl, studies 'effectiveness' as an instrument of juridical governance that the CJEU uses to enforce its rulings and to increase compliance by national courts. From a social network standpoint, she focuses on the CJEU's role, effectiveness and development in relation to: (1) the principle of liability of Member States for damages for breaches of EU law; and (2) ensuring the application of EU law in national courts. Here, Šadl identifies a distinctive instrumentalisation by the Court. An examination of the case-law shows that the CJEU will use the argument of effectiveness for the breach of EU law to selectively justify 'important' rulings and support the achievement of some European norms and goals, but it also reveals that the Court shows a strong strategic interest in interacting with national courts when effectiveness pertains to the judicial protection of EU rights. In both cases, the CJEU seems to highlight the notion of effectiveness when important EU constitutional and central issues are at stake in the case-law. For national courts, the demands that effectiveness places on them vary in accordance with the centrality of EU law cases within the EU legal order. This implies that their role as EU law courts in central cases is limited to the implementation of CJEU guidelines. According to Šadl, however, this is problematic with respect to proclaimed national procedural autonomy and the 'no new remedies' rules.

## 2. EU LAW IN MEMBER STATE COURTS: THE RECEPTION OF EU LAW IN OLD, NEW AND NON-EU STATES

The contributions in this part examine the ways national courts receive and apply EU law in their daily practice. These studies shed light on such national practices by adopting a bottom-up approach. The authors focus on the various institutional infrastructures and the conditions within which the European mandate is operationalised in diverse Member States, touching upon the application of EU law by national courts of the *Old* but also the *New* Member States of the Union. In addition, the scope

of this section goes beyond the EU Member States by studying national courts from countries which are part of the Free Trade Agreements with the EU.

The first contribution in this section is entitled 'Operationalizing the European Mandate of National Courts: Insights from the Netherlands' by Monica Claes, Maartje de Visser and Marc de Werd. It examines the efforts undertaken by Dutch courts to operationalise their European mandate. As the authors note, ever since the creation of the Communities, the Netherlands has been a paradigmatic Member State in the reception and application of EU law due to its institutional 'fitness' in relation to the EU legal system and its pro-European approach. The chapter shows how the Dutch judiciary has continued to work along these lines to improve the implementation of its European mandates. Illustrative of this process is the way in which the Dutch Judicial Council managed to introduce new idiosyncratic initiatives, such as the creation of the Court Coordinators for European Law and the establishment of special EU chambers in Dutch Courts, which complemented the measures suggested. Also notable are the efforts made by EU institutions and judicial networks to increase knowledge of EU law among national judges. These promising institutions are critically analysed from an insider's perspective in order to illustrate the potential, note the limitations and identify the possible reforms which could turn it into a best practice worthy of emulation by other Member States.

The next two chapters cover recent developments in the application of EU law in Poland and Estonia – two of the EU's New Member States. The contrasts which emerge in these two chapters help us to comprehend why the respective national courts have behaved differently vis-à-vis EU law despite the simultaneous accession of Poland and Estonia to the EU. In the Polish case, Marcin Górski's 'European Union Law before National Judges: The Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' contends that, apart from some limitations and doctrinal struggles, the Constitutional Court and the Administrative Courts have integrated the idea of effectiveness of EU law. Yet this happened while ordinary courts, including the Supreme Court, were somewhat reluctant to accept EU law. In contrast, Tatjana Evas' 'Judicial Reception of EU Law in Estonia' shows how the whole judiciary, including lower Estonian courts, had an EU-law-friendly attitude and followed the approach of the Estonian Supreme Court. In both contributions, the authors emphasise the importance of the higher courts' constitutional doctrine in integrating EU law into their national legal system.

Finally, Allan Tatham's "Emulate Thy Neighbour?" How Dialogues between the CJEU and Non-EU Courts could be Explained through

International Relations Theory' provides a new perspective on the Europeanisation of national courts. He looks at the application of EU law and judicial dialogue in States not belonging to the European Union. By applying a constructivist approach, this contribution analyses the extent to which 'free trade agreements' (FTAs) with the Union have acted as means for integrating EU law and CJEU case-law in their national legal systems. The case studies on the European Economic Area agreement (EEA), bilateral agreements with Switzerland and the Europe Agreements (EAs) and Stabilisation and Association Agreements (SAAs) serve to trace the diffusion of EU norms and CJEU jurisprudence outside the Union. The findings show how courts beyond the Union might act as local agents for diffusion of EU norms. Moreover, the author illustrates how the effectiveness in the application of EU law by non-EU courts relates to the specific characteristics of each EU-FTA.

### 3. CONTEMPORARY DYNAMICS IN THE LEGAL INTEGRATION OF EUROPE: NATIONAL COURTS' ROLES IN PROTECTING FUNDAMENTAL RIGHTS AND IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

The final group of chapters engages with the problem of judicial implementation of fundamental rights and EU immigration law at the national level. This topic area should be seen in the light of the Lisbon Treaty, which created new mechanisms for the consolidation of an area of freedom, security and justice while simultaneously empowering citizens' fundamental rights by turning the Charter of Fundamental Rights into a legally binding document. Additionally, the Treaty placed an obligation on the EU to sign up to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this context, these chapters scrutinise the extent to which national judges, when acting as EU judges, have played a relevant role in the EU policy-making process and in the reception of EU law nationally. The chapters are also focused on how such a role might have been enacted in national legal systems. This scope leads these studies to deal particularly with issues related to criminal law, immigration and race discrimination.

The first contribution to this section, 'A Predicament for Domestic Courts: Caught between the European Arrest Warrant and Fundamental Rights', is provided by Aida Torres Pérez. The chapter focuses on the implementation of the European Arrest Warrant (EAW) – which is one of the most important mechanisms for judicial cooperation in the area

of freedom, security, and justice – and considers its potential clash with Member States’ constitutional rights. The study analyses case-law from several national higher courts and the relevant CJEU jurisprudence, and it furthers our understanding of the cooperation techniques developed by national courts in order to approach and solve the potential conflicts between constitutional rights and the EAW.

Rosa Raffaelli’s ‘Immigration and Criminal Law: Is there a Judge in Luxembourg?’ examines national judges’ perceptions of the role of the CJEU in the context of criminal immigration law. She studies the different behaviour of Italian and French judges with regard to the Returns Directive (Directive 2008/115/EC). While Italian judges immediately referred a number of questions to the CJEU to ensure full implementation of EU legislation, their French counterparts only requested the Court’s intervention after its first decision was published. Based on an analysis of existing literature, and on a study of documents recording the activities carried out by relevant actors such as NGOs and lawyers’ associations, Raffaelli explains how judges’ policy preferences are shaped, and shows how these may conflict with the legislator and the government. The author also illustrates how extensive advocacy campaigns played a role in shaping the behaviour of Italian and French judges.

In this book’s concluding chapter, Costanza Hermanin’s ‘Whither Judicial Europeanization? The Case of the Race Equality Directive’ offers an assessment of the dynamics of domestic judicial implementation in the area of anti-discrimination law. Hermanin’s case study begins by noting the meagre application of the Race Equality Directive (RED) in national courts. Through an analysis of the case-law in Germany, France and Italy, the study focuses on the factors that hinder the intervention of national courts in race anti-discrimination law. The conclusions show, on the one hand, the relevance of provisions when it comes to easing access to judicial redress and to creating sufficient space for EU law litigation; while, on the other hand, the discussion shows how redress models tend to favour ‘those already empowered’, leaving only smaller openings for the RED to be utilised by racial and ethnic minorities in Europe.

