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PRESS

Process-Oriented Federalism in EU Law

EDITED BY

XAVIER GROUSSOT
DARREN HARVEY

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Introduction

Xavier Groussot and Darren Harvey

This book brings together contributions from EU legal scholars who are interested in process-based approaches to navigating the federal balance of competences within the European Union. At the heart of the theory of process federalism lies the assertion that because it is so difficult in contemporary federal systems like the United States and the EU to formulate and enforce substantive limits upon the *existence* of federal powers to legislate in areas like interstate commerce, procedural and institutional checks take on paramount importance. If federal power is to be meaningfully limited, reliance must instead be placed upon doctrines that restrain the *exercise* of legislative power within the scope of enumerated powers, rather than seeking to place hard, substantive limits on the *existence* of power in the first place.[1] To this end, the courts' powers of judicial review should be "directed toward maintaining a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy."[2] The objective is to ensure that the political process on the federal level "operates in a fashion that is responsive to federalism concerns."[3] Process federalism directs judicial scrutiny towards the procedural means through which legislation is enacted, forcing the federal legislature to consider and explicitly state the implications that legislation will have for the federal balance of powers. In this way, substantive judicial policing of enumerated powers is kept to a minimum. "Judges properly referee the national political process by enforcing its procedural rules, but appropriately defer as to the substantive distribution of national–state power embodied in congressional enactments."[4]

Against this background, the following nine chapters engage with process-oriented approaches to federalism in the European Union. In so doing, an attempt is made to understand and critically assess the contribution that an increasingly process-based approach to adjudication

[1] Ernest A Young, 'The Rehnquist Court's Two Federalisms', 1 *Texas Law Review* 83, 2004, p. 116.

[2] Ernest A Young, 'Two Cheers for Process Federalism', 5 *Villanova Law Review* 46, 2001, p. 1349, p. 1351.

[3] Calvin R Massey, 'Etiquette Tips: Some Implications of Process Federalism', 18 *Harvard Journal of Law & Public Policy* 18, 1994, p. 175, p. 211.

[4] Tuan N Samahon, 'No Praise for Process Federalism: The Political Safeguards Mirage and the Necessity of Substantial, Substantive Judicial Review', 3 *Villanova Law Review* 61, 2016, p. 605, p. 609.

in the European Union is having on age-old questions of federal theory and practice, including: (i) the existence of EU legislative competence to act in a given instance; (ii) the substantive legality of exercises of EU legislative competences; (iii) the powers of the Member States to legislate in policy fields that are directly or indirectly covered by the scope of application of EU law, and (iv) the division of law-making powers between the EU institutions themselves, have all been considered through the lens of federalism.

In Chapter 1, Prof. Xavier Groussot and Dr. Darren Harvey examine process federalism as a particular theory of federalism that has garnered increasing attention in the academic literature in recent years. In essence, process-based approaches to federalism seek to ensure that the balance of competences within a given system is respected, whilst simultaneously addressing many of the well-known difficulties associated with trying to draw bright line distinctions between federal and state levels of competence. The Chapter notes that, in the post-Lisbon Treaty era, the increased deployment of process-oriented review by the CJEU in cases where the EU's federalism principles and/or fundamental rights are at issue has given rise to greater interest in the doctrine of process federalism in the European Union. According to the authors, it is this conceptual link between process-oriented judicial review and its deployment in contemporary federalism and fundamental rights disputes that is crucial to developing methodological and theoretical approaches to process federalism in the EU.

In Chapter 2, Prof. Takis Tridimas examines substance and process in EU law. After providing an overview of what he terms the 'EU process universe', Prof. Tridimas revisits the boundaries of process and substance and synergies between the two. His chapter then moves to analysing the importance of process for the purposes of the exercise of judicial review by the CJEU. In recognising that the distinction between substance and process remains elusive in much of the Court's case law, the chapter concludes that procedural requirements may affect substantive outcomes and, even where they can be conceived as purely procedural, their conceptualization and interpretation is driven by ideological tenets that betray substantive preferences. In exercising judicial review, the CJEU takes process seriously but also goes well beyond process-based review. In most cases, procedural and substantive requirements operate as convergent, self-reinforcing elements of the rule of law which serve both remedial and prophylactic functions.

In Chapter 3, Dr. Anna Zemskova examines the ways in which questions of substance and procedure play out within the context of judicial review. Through an engagement with many of the main strands of academic literature on judicial review, Dr. Zemskova provides an overview of procedural and substantive theories of judicial review, before noting an increased presence of process-based approaches being utilised in the judicial reasoning of national, supranational and international courts. The chapter concludes by reflecting on some of the benefits that may be said to flow from courts adopting a proceduralist approach to judicial review, with a particular emphasis being placed on the contribution that this can make to navigating the balance of competences and rule of law disputes in the EU legal order.

In Chapter 4, Prof. Patricia Popelier takes a closer look at process-oriented approaches to judicial review within the context of a broader examination of federalism in the European Union. Prof. Popelier draws attention to some of the flaws found in traditional federal theory before presenting some of the tenets of a more dynamic theory of federalism. The aim of the chapter is to explore a broader approach to federalism disputes– one that regards such disputes not merely as a matter of de/centralization, but also one which reflects on the extent to which the CJEU is able to promote cohesion in the EU through its case law. The chapter concludes that whilst the case law does show a concern for cohesion, this is not particularly prominent in the Courts' reasoning, which, for the most part, is more interested in the member states cooperating to fulfil EU objectives, rather than the EU taking due account of member states interests. That said, recent judgments do push the European Union towards greater respect of Member States' interests and the promotion of common values.

In Chapter 5, Dr. Giulia Gentile provides a conceptual analysis of judicial federalism in the EU. Dr. Gentile begins by noting that an often neglected aspect in the study of EU federalism is the relationship between the EU judiciary and the national courts in the member states. Whereas much of the scholarship on EU federalism has focused on the exercise of legislative and executive powers in the EU, less attention has been paid to the EU judicial federalist arrangement. To the extent that this has been examined, it tends to do so through the lens of judicial dialogue – a vague term, according to Dr. Gentile, which characterises the general cooperation (or competition) between the EU and national courts. In seeking to remedy this gap in the literature, Chapter 5 chapter posits that the forces and tensions of judicial politics influencing the evolution of the EU judicial space, including the phenomenon of process federalism, can be more precisely dissected by adopting a judicial federalist lens. Judicial federalism provides a multi-dimensional framework through which this doctrine and its implications for EU multi-level governance can be studied.

In Chapter 6, Prof. Janneke Gerards turns to the European Court of Human Rights (ECtHR) and analyses the various ways in which procedural review has been conducted by the Strasbourg court. By systematising the Court's case law on procedural review and providing an in-depth analysis, in particular, of the case law of the past eight years, Prof. Gerards provides a typology of the functions of process-based reasoning as applied by the ECtHR. In so doing, attention is drawn to the fact that the ECtHR's uses of process-based reasoning are informed by its procedural context. The 'feedback loop' that is intended to be created by means of procedural review fits well with the view of the ECHR system as one of shared responsibility between the Court and the States in guaranteeing effective protection of fundamental rights. Although the Court must respect the national authorities' primary responsibility to protect the Convention rights, it is up to the ECtHR to supervise how the national authorities – including the courts – comply with their obligations. The chapter points to various signs in the Court's reasoning that the Court regards procedural arguments and different types of procedural review as suitable and

useful instruments in giving shape to its overall argumentative approach and in dealing with the inherent tension between effective protection and its own subsidiary role.

In Chapter 7, Dr. Araceli Turmo adopts a federalist analysis of the CJEU's case law pertaining to the judicial systems of the Member States. Dr. Turmo begins by noting, in agreement with Prof. Tridimas, that process can be used to constrain the discretion of the Member States of the EU. The Union's competences are expanded into new areas by establishing checks over national decision-making procedures and, more generally, the way in which national authorities operate, even in areas in which the Union has no competence to create and enforce its own policies. An essential part of the Member States's competences in the implementation of EU law and, therefore, of the control exercised by EU institutions over them, is judicial procedure. Against this background, the chapter examines recent changes in the case law of the CJEU dealing with *res judicata* and *ne bis in idem*. Dr. Turmo notes the shift to a review of domestic procedural rules based on EU procedural standards, affirming the unity of the judicial system and the role of the Court of Justice as its supreme court upholding constitutional norms. The chapter contends that the Court's case law on these two principles illustrates a trend towards greater involvement with domestic judicial systems and bolder statements regarding the requirements placed on the procedural law of the Member States. While the CJEU clearly relies increasingly often on fundamental rights standards to justify an oversight over domestic judicial systems, it is still using the long-established framework of effectiveness and equivalence in order to set the boundaries of the disputed procedural autonomy of the Member States. Recent judgments nevertheless show that the ECJ is increasingly comfortable setting (more or less explicit) standards for procedural norms, as well as a shift towards a fundamental rights-based review of domestic judicial systems.

In Chapter 8, Angelica Ericsson shifts the focus away from an increased willingness by courts to review the processes by which EU and national laws have been enacted and focuses instead on how process is reviewed in the general framework of EU legal analysis applicable to national pre-authorisation schemes. Ericsson draws attention to deference as being a key feature in any federal legal order that is built on the division of powers and where dividing lines run not only between functional but also geopolitical lines. Through a procedural turn in its case law, the CJEU is able to avoid second-guessing the merits of the national discretionary policy choices regarding the substantive risk-assessment. Instead, the Court can focus its normative power towards streamlining national processes and structures, ultimately fostering effective judicial oversight whilst also affording due deference to the expertise and institutional capacities of national institutions. In this sense, the development of said model can be seen as an expression of the Court's institutional choice; finding a way of upholding the EU's federal balance of competences, in line with a concept of process federalism that allows for national policy discretion while streamlining administrative process, in order to avoid arbitrary restrictions on EU rights and fundamental freedoms.

In Chapter 9, Prof. Xavier Groussot and Prof. Giuseppe Martinico examine constitutional conflicts within the context of process-oriented federalism in the EU. In a wide-ranging

examination of various different aspects of federalism in the EU and further afield, the chapter contends that constitutional conflicts have developed even in mature federal contexts and how the explosion of conflicts is actually a confirmation of existing federal dynamics in the European Union. The authors analyse the implications of judicial review for constitutional conflicts and its impact on the theory of process-oriented federalism in the EU. A broad spectrum is adopted in the analysis since the authors book at both the judicial review of EU legislation and States' legislation falling within the scope of EU law. The theory of process-oriented review tells us thus about the role and place of the judge in a democracy. When applied specifically to the EU law context, it should also profoundly inform us about the place and role of the judge in the EU constitutional (liberal) and representative democracy as defined by the common provisions and democratic principles enshrined in Title 1 and Title 2 of the TEU. It also results from the analysis conducted in this Chapter that the place and role of the EU judge is undoubtedly significant in applying the so-called trust-enhancing constitutional principles (of limited governance) affiliated to process-oriented review. This conclusion is verified by the explicit mandate granted to the EU judge by the Treaties when it comes to judicial review. This situation contrasts sharply with the US Supreme Court, which is not expressly mandated by the US Constitution to conduct judicial review, and where its mandate rests in fact on the jurisprudential principles established a long time ago in *Marbury* v *Madison*. But the similarities between the two systems should also be emphasized. One of them (studied in detail in this book) being the existence of process-oriented review of legislation in both the US and EU judicial system.

To conclude this introductive Chapter, we would like to underline that constitutional conflicts between the center and its periphery are inherent to any federal system of the world and are always concretized by conflicts at the judicial level between the state courts and the federal court. This is indeed so in relation to both the judicial review of federal legislation and states' legislation. In that sense, the EU law system is not fundamentally different from its US counterpart. Therefore, it is essential to try to draw comparisons between the two systems and to try not to read too much into the 'sui generis' nature of EU law. In any case, it appears difficult to deny that process-oriented review has grown significantly in EU law to the point that it has led to a fundamental reconceptualisation of the principle of proportionality. The most recent case law of the CJEU in 2023 and 2024 clearly confirms this trend. This reconceptualisation has also led to challenging the scope of this theory. Should we adopt a broad or narrow reading of the theory of process-oriented review? This book refrains, however, from giving a clear-cut answer to this question and considers that both readings are valid.

This book brings together contributions from EU legal scholars interested in process-based approaches to navigating the federal balance of competences within the European Union. The book discusses the relationship between the procedural and substantive aspects of judicial review in EU law, and offers a comparative perspective on these matters, using the US and the ECHR systems as examples. In so doing, the contributions in this book also analyse the scope of application and limits of the theory of process-oriented federalism in EU law. With procedural dimensions to EU law constantly growing, this book seeks to develop doctrinal and theoretical frameworks which help to explain and comprehend this evolution, thus filling a gap in EU legal research.

Jean Monnet, Robert Schuman, Jacques Delors and Altiero Spinelli in Mount Rushmore
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