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# A Cinderella Story: 'Judicial Cooperation in Civil Matters' Meets the Prince. Review Article of Eva Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered*

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A Cinderella Story: 'Judicial Cooperation in  
Civil Matters' Meets the Prince.  
Review Article of Eva Storskrubb, *Civil  
Procedure and EU Law: A Policy Area Uncovered*  
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by Professor Helen E. Hartnell\*

Once upon a time, procedural law in all its peculiarity stayed home in the scullery, while public and even private law went off to attend the European integration ball. The rules of procedural law were seen as quintessentially domestic and inappropriate for the European stage. EU Member States were said to possess 'national procedural and remedial autonomy and competence',<sup>1</sup> and the European Court of Justice (ECJ) averted its gaze discretely from the stay-at-home sib. In its classic formulation, the ECJ declared that 'it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law...', absent 'Community rules on this subject'.<sup>2</sup>

This mythical vision of the relationship between the EU and the legal orders of its Member States has long since vanished, as the glare of the ECJ's emerging Union standards governing the adequacy and effectiveness of national procedures for the enforcement of Union law gradually dispelled the mists surrounding this repository of national sovereignty.<sup>3</sup> Parallel to judicial developments, a growing

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<sup>1</sup> P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 4th edn 2008), at 306.

<sup>2</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, 1997. See also Case 45/76 *Comet v. Produktschap* [1976] ECR 2043.

<sup>3</sup> See, e.g., R. Caranta, 'Judicial Protection Against Member States: A New Jus Commune Takes Shape' (1995) 32 CMLR 703; W. van Gerven, 'Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?' (1995) 32 CMLR 679. For more extended analyses of these developments, see Craig and de Búrca, note 1 above, at 305–43; M. Dougan, *National Remedies before the Court of Justice* (Hart, 2004); C. Kilpatrick, T. Novitz and P. Skidmore (eds), *The Future of Remedies in Europe* (Hart, 2000); J. Lindholm, *State Procedure and Union Rights* (Uppsala: Lustus Förlag, 2007).

number of Union regulatory measures have appeared that explicitly address remedial concerns alongside substantive ones.<sup>4</sup> Pan-European procedural standards have also emerged from Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which articulates the right to a fair trial.<sup>5</sup> Last but not least, the incremental movement towards what numerous authors label a ‘common European law of procedure’ received an enormous boost from Article 65 of the Treaty of Amsterdam,<sup>6</sup> which made clear that ‘private international and civil law procedures just like certain aspects of general procedural law are not national domains completely untouched by Community law.’<sup>7</sup>

Eva Storskrubb’s book – *Civil Procedure and EU Law: A Policy Area Uncovered* – fast-forwards the reader into the ‘Brave New World’ that has sprung into existence in the decade since the Treaty of Amsterdam laid a solid (albeit limited) foundation upon which to erect transnational European procedural and private international law.<sup>8</sup> This ambitious book, which grew out of the author’s doctoral dissertation at the European University Institute, marks an extraordinary contribution to an emerging field by a young scholar, and deserves a place in academic as well as practitioner libraries.

Preliminary remarks about scope are unavoidable, since Storskrubb’s book carves out an important but awkward slice from one subfield of the civil component of the EU’s ‘Area of Freedom, Security and Justice’. The author’s decision to limit her coverage to a fraction of the procedural subset of issues that constitute this rapidly emerging field makes perfect sense in a doctoral dissertation, as well

<sup>4</sup> One early example in the context of approximation of laws is the fancy footwork around a range of procedural and remedial issues found in Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. In recent years, one finds a growing number of measures explicitly addressing the topic of remedies in regard to a particular sector, such as intellectual property (Directive 2004/48/EC), the award of public contracts (Directive 2007/66/EC), and the environment (Directive 2004/35/EC).

<sup>5</sup> Today, Article 6 is applied and interpreted primarily by the European Court of Human Rights, whereas some decisions in the past were rendered by the European Commission on Human Rights. See generally N. Mole and C. Harby, *The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (Council of Europe, 2006). Article 6 may also be applied directly by the courts of some members of the Council of Europe. See, e.g., T. Öhlinger, ‘Austria and Article 6 of the European Convention’ (1990) 1 EJIL 286.

<sup>6</sup> Now Article 81 of the Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty made a number of important changes in regard to civil justice, some of which bear quick mention, even though they are not directly relevant to the analysis of Storskrubb’s book. First, Lisbon largely normalized the decision-making procedure in the field of civil justice, although the TFEU continues to require unanimity in regard to measures in the field of family law. Second, the field of ‘judicial cooperation in civil matters’ is no longer subject to special limitations on the power of the ECJ. And third, Lisbon eliminated Article 293 (ex 220) EC Treaty entirely, thereby driving the final nail into the coffin of the tradition of intergovernmental cooperation in the field of civil justice.

<sup>7</sup> A. Staudinger and S. Leible, ‘Article 65 of the EC Treaty in the EC System of Competencies’ (2000/01) 4 *European Legal Forum* 225–35, at 228.

<sup>8</sup> Peter Hay has described these fields as ‘neighboring vineyards’. R. Freer (2006) ‘Pondering the Imponderable and Other Observations from the Intersection of Conflicts and Civil Procedure’ *Emory University School of Law Public Law & Legal Theory Research Paper Series No. 06/27*, <<http://papers.ssrn.com/abstract=946957>>.

as in the context of demand for titles devoted to new areas of EU law. Yet this decision simultaneously undermines the author's theoretical project and the practical usefulness of the book. This is not a fatal flaw; indeed, the book succeeds remarkably in being both provocative for the academically minded reader and informative for the practitioner. But if the title is to fulfill its potential and become a perennial, then the author would be well-advised to expand the book's coverage to include the full panoply of procedural issues under Article 81 TFEU (ex 65 EC Treaty), if not the entire scope of this still relatively new policy field.

The scope of Article 81 TFEU – like its predecessor, Article 65 EC Treaty – is bounded by the notoriously imprecise and malleable language 'judicial cooperation in civil matters having cross-border implications'. The open-ended and amorphous field opened up by Article 65 EC Treaty was circumscribed by the requirement that a measure in this field may only be adopted 'in so far as necessary for the proper functioning of the internal market'. The Lisbon Treaty appears to have slipped this noose, and Article 81(2) TFEU now provides that the 'European Parliament and the Council... shall adopt measures, *particularly when necessary* for the proper functioning of the internal market' (emphasis added). The addition of the word 'particularly' suggests that necessity is no longer an absolute prerequisite to the adoption of legal measures in the field, as it once was, and thus makes it easier for the Commission to justify exercising its right of initiative in the civil justice field.

The Lisbon Treaty did not, however, alter the uneasy fit between the treaty language that demarcates the EU's competence ('judicial cooperation in civil matters') and the pre-existing labels applied to the diverse issues that have been drawn within the scope of EU competence. This awkwardness stems in part from disagreement among experts about how to characterize particular issues,<sup>9</sup> but also reflects the fact that both Articles 81 TFEU and 65 EC Treaty explicitly include an array of procedural issues under their respective aegis, but are by no means limited to procedural law. Indeed, the bulk of measures communitarized by Article 65 EC Treaty<sup>10</sup> fell more comfortably under the label 'private international law' – defined broadly here to encompass not only conflict of laws but also issues of jurisdiction, recognition

<sup>9</sup> For example, some would assign jurisdiction and the recognition and enforcement of judgments to procedure, while others would relegate these topics to private international law.

<sup>10</sup> Article 65 EC Treaty provided that '[m]easures in the field of judicial cooperation in civil matters... shall include:

- (a) improving and simplifying:
  - the system for cross-border service of judicial and extrajudicial documents,
  - cooperation in the taking of evidence,
  - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.'

and enforcement of judgments, as well as international judicial assistance.<sup>11</sup> For its part, the Lisbon Treaty has expanded the foundation laid by Article 65 EC Treaty by expressly adding three more arenas to the field of civil justice: effective access to justice, the development of alternative methods of dispute settlement, and support for the training of the judiciary and judicial staff.<sup>12</sup> These new arenas include both procedural matters and matters relating to the administration of justice. My aim here is not to quibble over labels,<sup>13</sup> but rather to flag the topics elided and suggest their relevance to Storskrubb's overarching project, before proceeding to a more systematic presentation and evaluation of her arguments.

Storskrubb limits her analysis to ten of the measures taken pursuant to Article 65 EC Treaty: service of documents;<sup>14</sup> obtaining evidence; establishing jurisdiction and enforcing some types of judgments; enforcement of uncontested claims; legal aid; alternative dispute resolution;<sup>15</sup> payment order; small claims procedure; judicial network; and judicial training and other measures. These are important measures, but so are the topics she omits, namely the EU's existing (and in some cases

<sup>11</sup> Like procedural law, the topics historically grouped under the labels 'private international law' or 'conflict of laws' were initially left outside the EU's Treaty framework. Article 220 of the Treaty of Rome directed the Member States 'so far as necessary, [to] enter into negotiations with each other' in order to secure certain benefits for their nationals. The 1968 Brussels Convention (later extended beyond the boundaries of the EU via the Lugano Convention) was the most important result of such efforts.

<sup>12</sup> Article 81(1) TFEU provides that the EU 'shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States'. Article 81(2) adds that the 'European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures... aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff'.

<sup>13</sup> Today the EU institutions tend to use the label 'civil justice' to describe this emerging field. I coined the term 'EUstitia' for this purpose. See H. Hartnell, 'EUstitia: Institutionalizing Justice in the European Union' (2002) 23 *Northwestern J. Int'l Law & Business* 65–138.

<sup>14</sup> Storskrubb's chapter on service of documents ably discusses the 2000 Regulation, along with interpretations by the ECJ, the 2004 study on its operation, and the proposed reforms. However, Regulation 1393/2007/EC on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and repealing Council Regulation 1348/2000/EC, [2007] OJ L 324/79, had not yet been adopted when the book went to press.

<sup>15</sup> At the time the book went to press, Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters had not yet been adopted, so Storskrubb discusses the legislative process that followed the Commission's 2004 initial proposal. Aside from the chapter on alternative dispute resolution, all other descriptive chapters analyse measures in force.

ongoing proposals for) specialized rules in the area of insolvency proceedings,<sup>16</sup> substantive law,<sup>17</sup> choice of law,<sup>18</sup> family law<sup>19</sup> and succession and wills.<sup>20</sup>

While Storskrubb can be readily forgiven for hiving off the huge topic of substantive private law, which in any case is at best tethered to Article 81 (ex 65) by a gossamer thread, it is harder to justify ignoring family law, insolvency, and choice of law. These topics are of great practical significance, and are closely related to the topics she does cover. Even more, they have inspired some of the liveliest policy debates to arise under Article 65 (now 81). For example, the Europeanization of

<sup>16</sup> See generally J. Israël, *European Cross-Border Insolvency Regulation* (Intersentia, 2005); P.J. Omar, *European Insolvency Law* (Ashgate, 2004); Wolf-Georg Ringe (2008) 'Forum Shopping Under the EU Insolvency Regulation' *Oxford Legal Studies Research Paper* No. 33/2008, <<http://papers.ssrn.com/sol3/papers.cfm?abstractid=1209822>>; M. Virgos and F. Garcimartin, *The European Insolvency Regulation: Law and Practice* (Wolters Kluwer, 2004).

<sup>17</sup> At its meeting on 4–5 June 2009, the Justice and Home Affairs Council adopted detailed guidelines on the Common Frame of Reference for European Contract Law. *Council Press Release* 10551/09 (Presse 164), at 26–9. The Stockholm Programme for 2010–2014 invited the Commission to present a proposal, which it did by its Decision 2010/233/EU of 26 April 2010 setting up the expert group on a Common Frame of Reference in the area of European contract law.

<sup>18</sup> The most recent measures in this field are Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'); Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations ('Rome I'); and Regulation 662/2009 of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations. Meanwhile, the Commission's 2006 Proposal for a Council Regulation amending Regulation 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters and the matters of parental responsibility ('Rome III') was greeted by controversy, and ultimately failed to garner unanimous support in the Council. See generally A. Fiorini, 'Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?' (2008) 22 *Int'l J. of Law, Policy & the Family* 178–205; 'Justice and Home Affairs: MEPs Favour Rome III Regulation on Divorce' *European Report* (17 September 2008).

Not to be deterred, ten Member States informed the Commission in 2008 and 2009 that they wished to establish enhanced cooperation among themselves in the area of applicable law in matrimonial matters. The Commission obliged them in March 2010 by presenting a Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 105 final. On 12 July 2010, the Council adopted Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, making this the first case of 'enhanced cooperation' in EU history.

<sup>19</sup> The EU's key measures in the field of family law include (1) Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ('Brussels II bis'), which repealed Regulation 1347/2000 ('Brussels II'), and (2) Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The Rome III regulation (noted in note 18 above) would also have altered the rules (currently found in Brussels IIbis) on jurisdiction in matrimonial matters and matters of parental responsibility. Finally, the EU has moved ahead to conclude agreements with third countries in the field of family law. See Regulation 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.

<sup>20</sup> In October 2009, the Commission presented its Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009)154 final.

family law has received sustained critical attention, alongside the ‘bandwagon’ (i.e. pro-Europeanization) literature,<sup>21</sup> while the Rome I Regulation on the law applicable to contractual obligations set off a firestorm among French academics.<sup>22</sup> Any effort to uncover the policy area implicated by Article 81 TFEU (ex 65 EC Treaty) is incomplete if it sidesteps these occasionally searing debates.

And yet, despite these limitations, Storskrubb does a great service by bringing many dimensions of the EU’s Area of Freedom, Security and Justice (AFSJ) into the limelight. After years of being largely overlooked by the bulk of publications that examined the AFSJ (or before that, the Third Pillar) as such,<sup>23</sup> the author does more than just bring this Cinderella topic to the ball, which in itself is cause to rejoice. Storskrubb also gives civil justice a spin around the dance floor with the Prince – with apologies to Machiavelli – by exploring in some depth the policy implications of this emerging field.

Storskrubb’s approach to this complex field is clear, as are her stated goals. The book consists of two sets of overarching chapters,<sup>24</sup> which bracket ten detailed

<sup>21</sup> See, e.g., M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe* (Intersentia, 2007); D. Bradley, ‘A Family Law for Europe? Sovereignty, Political Economy and Legitimation’ (2004) 4(1) *Global Jurist Frontiers*, art. 3; K. Boele-Woelki, *Brussels II bis: Its Impact and its Application in the Member States* (Intersentia, 2007); C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006); J. Meeusen, M. Pertegás, G. Straetmans and F. Swennen (eds), *International Family Law of the European Union* (Intersentia, 2007); H. Stalford, ‘Regulating family life in post-Amsterdam Europe’ (2003) 28 *European Law Review* 39–52. See also The Law Society of Scotland (2008) ‘Freedom, security and justice: what will be the future? European commission consultation on priorities for the next five years (2010–2014)’, <<http://www.lawscot.org.uk>>.

<sup>22</sup> See V. Heuzé, ‘Lettre ouverte au Président de la République’ (2006) JCP G, act. 586 (signed by 39 other law professors); P. Lagarde, H. Gaudemet-Tallon and C. Kessedjian ‘Observations sur la lettre ouverte au président de la République intitulée “L’Union européenne, la démocratie et l’État de droit”’ (2007) JCP G, act. 18 (signed by 74 other law professors).

<sup>23</sup> I do not mean to equate these civil procedural issues with the more politically salient issues that the Treaty of Amsterdam added as Article IV EC Treaty – notably visas, asylum, immigration, and other matters related to the free movement of persons – or with the EU’s expanding activities in the field of police and judicial cooperation in criminal matters. Still, the issues covered by Article 81 (ex 65) are not value-neutral, and have significant social and politico-economic implications. In this sense, I wish to argue that they deserve more attention than they received in the first wave of leading books and symposia on the AFSJ as such. Compare S. Peers, *EU justice and home affairs law* (Longman, 1st edn 2000) with S. Peers, *EU justice and home affairs law* (Oxford University Press, 2nd edn 2006) (the author notes that the second edition is three times as long and only carries forward about 5% of the original text; both mentioned civil cooperation, but neither provides in-depth coverage). The *European Law Journal* devoted vol. 10(2) to Article IV EC Treaty in 2004, but no article in that issue analyses civil justice. See also R. Bieber and J. Monar (eds), *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (European Interuniversity Press, 1995) (out of 23 chapters, the barest mention of civil justice in a 6-page chapter); N. Walker (ed.), *Europe’s Area of Freedom, Security, and Justice* (Oxford University Press, 2004) (no discussion of civil justice). Naturally one can find substantial discussion of the civil justice issues in specialized journals devoted to procedural and private international law. For recent book-length treatments see M. Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing, 2006); A. Jokela, L. Ervo and M. Gräns (eds), *Europeanization of Procedural Law and the New Challenges to Fair Trial* (Europa Law Publishing, 2009); and P. Stone, *EU Private International Law: Harmonization of Laws* (Edward Elgar, 2006).

<sup>24</sup> Chapters 1–5 lay out the author’s basic analytical framework and the background of developments pursuant to Article 65, while chapters 16 and 17 contain her conclusions about the ‘legitimacy of the policy area’ and discuss the way forward.

chapters in which the author describes and analyses each of the measures (listed above) individually. The book also boasts numerous appendices that contain the texts of the specific measures analysed and a few key EU policy documents, as well as an extensive bibliography. As such, the book provides an excellent starting point for anyone interested in Article 81 TFEU (ex 65 EC Treaty). It is detailed and accurate enough to bring any reader up to speed quickly,<sup>25</sup> and is endowed with enough historical, statutory and academic resources to provide all readers with confident guidance for future research. That particular audiences – practitioners, academics, policy-makers – might wish for more is not so much a weakness of this particular book as it is a limitation of the book form itself, particularly in such a fast-moving field.

In addition to its dogged thoroughness, Storskrubb's book has a number of strengths. The book is meticulously well-organized, which allows the reader to follow a long path through complex materials without ever having the sense of being lost. The book is readable and well edited, and the author makes outstanding use of French, Swedish and Finnish language sources, in addition to the ubiquitous English. The Nordic contributions are particularly intriguing, notably her discussion (pp. 295–301) of theories about the functions of procedure and her remark (pp. 11–12) that 'legal cooperation in civil matters' is a more accurate translation of the terminology found in the Finnish and Swedish texts<sup>26</sup> than the more limited 'judicial cooperation' found in English. I wish that the Nordic literature – indicated by her citations to works by Knuts, Lindell, Ervasti, Lindblom and Virolainen – were available in more widely accessible languages, but it suffices here to appreciate Storskrubb's enrichment of the comparative debate.

Storskrubb aims to provide a 'holistic evaluation' of the policy field. This she achieves ably, subject to the scope limitations noted above and the methodological reservations expressed below. Her analysis of the particulars is not only precise and detailed, but also contextualized, insofar as she links her micro-level analysis to macro policy debates and themes in European integration. Finally, Storskrubb explores the broader implications of this emerging field, and offers a wealth of insights, arguments, and critiques, along with constructive suggestions for the way forward.

In discussing each of the ten measures, Storskrubb follows a standard template: first legislative history, followed by substantive content, and finally the normative implications. Her concise analyses of content are in many respects original, and combine close textual analysis with analysis of relevant case law, if any, and key underlying debates. She does an excellent job of presenting both sides of the issues, although some chapters (e.g. service of documents) are stronger than others (e.g. evidence).<sup>27</sup> Overall, the author demonstrates not only a high level of skill at handling a countless array of technical issues, but also a fierce commitment to fac-

<sup>25</sup> The book covers developments through to 31 August 2007.

<sup>26</sup> The terms '*rättsligt samarbete*' and '*oikeudellinen yhteistyö*' are used in Swedish and in Finnish respectively.

<sup>27</sup> This occasional unevenness appears linked to the presence or absence of academic commentary upon which her highly synthetic analysis draws.

ing difficult issues head-on, rather than steering a safe middle course. In short, the book suffices as, but also surpasses what one would expect to find in a practitioners' manual.

In terms of context, Storskrubb provides a multi-faceted and nuanced discussion of institutional and structural features of the EU field (chapter 4). Her analyses of the problems surrounding Article 68, preliminary reference, and the evolution of the Commission's role are particularly good. She provides a basic but serviceable overview of the ECHR and the Charter (pp. 85–6, 200) and the tensions surrounding their relationships to the emerging EU field of civil justice, and notes parallel developments in the domestic context (pp. 284–89) and in the field of international civil procedure (pp. 289–95). However, her analysis of these broader contextual issues is sketchy, and a more searching examination of their relationship to EU developments would be welcome. If these questions get short shrift, it is because Storskrubb is more concerned to explore the meaning of the EU developments themselves.

The book enriches discussions about EU civil justice – or, in her narrower terminology, procedural law – by linking the topic to broader theoretical and policy debates on integration, including subsidiarity, proportionality, and governance. The author's analysis of citizenship and its relationship to civil justice builds on a competent (if not comprehensive) synthesis of legal and political science literature of citizenship, and is one of the strongest interdisciplinary contributions of the book. By promoting the realization of rights in practice, civil procedure is a practical tool that 'might in fact provide the true core for creating the justice facet of the civil part of citizenship in Europe' more effectively than 'bland policy statements' (p. 86).

Storskrubb is at her best when writing about the 'European Judicial Network' (chapter 14) and about 'Judicial Training and Other Measures' (chapter 15). These truly interdisciplinary chapters build admirably on early work exploring the broader significance of these developments using new institutional theory.<sup>28</sup> She bucks the common tendency to ignore these 'soft' institutional measures when writing about developments pursuant to Article 65, and grasps their transformative potential. Storskrubb rightly sees these 'holistic' structural innovations as the key to the success of the European Judicial Area: they are 'not an adjunct to the [specific single practical measures] or a further step on the road, but... an important preceding step to make the policy field work effectively' (p. 253). Thus, notwithstanding the decentralization that characterizes measures in the field, these innovations paradoxically Europeanize Member State courts by establishing new organized fora in which European discourse and policy coordination will occur, and constitute an 'institutional shift from the purely national to the supranational level' (p. 239). These new cooperative structures, despite their stated goal of serving as a mechanism to foster diversity, offer 'several incentives for convergence in a process which creates trust and cooperative orientations among participants and encourages learning dynamics' (pp. 239–40). Storskrubb argues that they 'resem-

<sup>28</sup> See Hartnell (2002), note 13 above, at pp. 112–38.

ble the centralization features of the comitology system' and are tantamount to 'new governance in procedural law' (p. 240). Moreover, the European Judicial Training Network, where the aim of creating European judicial culture has been most explicit, has the potential to overcome 'insurmountable obstacles' rooted in 'the diverse organization of justice in the Member States and the ideological antagonisms between procedural systems' (p. 252).<sup>29</sup>

Storskrubb's chapters on the European Judicial Network and the European Judicial Training Network do more than just join a transdisciplinary discussion about integration. They also articulate a forceful critique of the weaknesses in the structure as it currently exists – i.e. its participatory deficiency and lack of openness – and offer explicit recommendations for overcoming them (p. 244–5). The author not only encourages more participation by stakeholders, but recommends expanding the European Judicial Network into a 'general coordinating structure for civil procedural regulation,' so that it may become a 'real tool for building a genuine European area of justice' (p. 245).

As this conclusion suggests, Storskrubb embraces the project of building the European Judicial Area. This does not mean, however, that she greets developments uncritically. Her overall approach is to take this new policy area as a given and then seek to perfect it, rather than extending her critique to the decision to Europeanize civil justice in the first place.<sup>30</sup> After laying out a detailed diagnosis, the author makes numerous concrete suggestions for improvement. While Storskrubb's argument is complex and at times difficult to unravel, the diligent reader will be rewarded by her final chapters, which pull the threads together.

Storskrubb's 'holistic' approach proceeds by assessing the 'functionality' (or effectiveness) and the 'legitimacy' of the policy area. Given her premise that 'functionality is the key to legitimacy' (p. 301) and her meticulous identification of flaws that impede functionality, it comes as no surprise that the author's conclusions are negative and indicative of a 'legitimacy crisis' (p. 304). Storskrubb especially bemoans the 'ideological or visionary weakness' in the policy field (p. 302), which leads to an overemphasis on 'purely negative' forms of integration and on market values such as efficiency, at the expense of other values also implicit in the procedural field.

Despite the author's warm embrace of many of the principal characteristics of the new policy area,<sup>31</sup> her preliminary conclusion is that the current system is riddled with 'dark characteristics' (p. 262) that threaten the success of the EU's civil

<sup>29</sup> Here Storskrubb borrows an apt analogy to technological hardware and software from K. Kerameus, 'Procédure civile nationale et exigences communautaires' in M. Bandrac et al. (eds), *Justice et droits fondamentaux. Etudes offertes à Jacques Normand* (Litec, 2003), pp. 253–9, at 256–7 (observing that the upgrading of software can sometimes be prevented by older hardware).

<sup>30</sup> As explored further below, the author's approach to the desirability of the new policy area is prospective rather than retroactive, insofar as she notes that 'once there is at least the beginning of a truly European judicial space, it is pertinent to consider its effects and whether or in which direction we support its further development, i.e. to discuss its appropriateness' (p. 271).

<sup>31</sup> In particular, she welcomes the trend towards decentralization and the establishment of direct cross-border cooperative channels; the concomitant abolition (or streamlining) of the traditional diplomatic mechanisms found in international civil procedure; the efforts to avoid delay, simplify procedural mechanisms and improve access to justice; the introduction of minimum standards and

justice policy area.<sup>32</sup> Notably, the decentralization that characterizes most of the measures appears destined to produce further diversity (discriminatory treatment) and fragmentation (incoherence), given the different levels of court resources and ability prevailing in the Member States and the overall complexity of the new rules (pp. 262–3). Storskrubb concludes that ‘transparency, simplicity and legal certainty’ will be difficult to achieve, and sees ‘the potential for abuse and injustice’ that threaten to curtail defendants’ rights (p. 263). These flaws were magnified by the limits imposed on the use of the preliminary reference procedure in this policy area (pp. 264–5), i.e. only courts from which there is no appeal could refer questions to the ECJ under Article 68 EC Treaty.<sup>33</sup>

In her prospective exploration of the appropriateness of further development of the policy area (pp. 272–84), Storskrubb neatly fingers the dilemma that bedevils the field and threatens to hamstring progress toward achieving EUstia. In the cautious regulatory atmosphere that has emerged in the EU since the ECJ’s 2000 decision in the *Tobacco Advertising* case,<sup>34</sup> the author sees a ‘constitutional conundrum’ surrounding further incursions into national regulatory autonomy in the field of civil justice, which appears most overtly in contests over interpretation of the crucial language ‘matters having cross-border implications’ found in Article 81 (ex 65). This situation tends to ‘weaken the drive of the policy area and . . . its practical implementation, thereby impacting negatively on legitimacy’ (p. 283). Given her assessment that the policy area is both flawed and incomplete, Storskrubb fears that any general reluctance to forge ahead will stunt needed growth.

Rather than being discouraged by her negative assessments, Storskrubb offers concrete prescriptions. First, she urges a move away from ‘mere negative’ and towards more positive integration (pp. 283, 304–5). She argues that efficiency must not be the only goal, and proposes to enrich the EU’s vision by attending to the social functions of procedure.<sup>35</sup> Second, to temper the introduction of mutual

the principle of mutual recognition; and the introduction of techniques that promote transparency, such as the duty to cooperate and share information (pp. 260–1).

<sup>32</sup> She also identifies a number of missing pieces needed to complete the policy area, including procedural sanctions, enforcement procedures, interim remedies, and measures pertaining to the transparency of the debtor’s assets (pp. 265–6). Along these lines, the Commission presented a Green Paper on improving the efficiency of the enforcement of judgments in the EU: The Attachment of Bank Accounts, COM(2006) 618. A proposal for a Regulation on a European system for the attachment of bank accounts is planned for late 2010.

<sup>33</sup> Article 68(1) EC Treaty, which was deleted by the Lisbon Treaty, provided: ‘Article 234 [EC Treaty, now Article 267 TFEU] shall apply to [Title IV EC Treaty] under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.’

<sup>34</sup> Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-8419.

<sup>35</sup> ‘The function of dignity and participation, as well as the political legal debate function, underscore procedural human rights and the importance of the adversarial process itself in upholding certain values and resolving disputes in a larger sense than just the case at hand. These concerns as well as a more searching concern for consumers of the civil justice system are reinforced in the therapeutic function’ (p. 302).

recognition – which entails the abolition of *exequator* and some limits on using the *ordre public* defence – she insists that minimum procedural guarantees must be set in order to foster mutual trust, which is the *sine qua non* of the European Judicial Area. In particular, she calls for ‘harmonization of rights of the defence or centralization’ to address the challenges facing litigants in cases having cross-border implications (p. 309). Third, Storskrubb proposes a ‘consolidation strategy’ aimed at counteracting fragmentation and improving coherence in the policy area (pp. 305–7).<sup>36</sup> And finally, the author notes that EU developments are not taking place in a vacuum, and suggests that global regulation might be more appropriate than ‘solely Eurocentric’ measures (pp. 284–302, 311). While one might quibble with the viability of these proposals, the author makes a strong case for each of them, and deserves to be read seriously.

While it is impossible to do justice here to the subtlety and comprehensiveness of Storskrubb’s analysis, I have sought to summarize her key arguments and identify her major contributions. My remaining task is to offer some critical perspectives on this ambitious and largely successful book. Below I explore three problematic issues, all of which have a methodological slant and are thus potentially of general interest, insofar as they are endemic to much legal writing about European integration.

The first problem relates to the matter of voice. In a work that aims to provide ‘normative’ assessments relating to the ‘legitimacy’ of a policy area, it is incumbent upon the author to explicate the criteria upon which her judgments rest. In many instances, this author applauds a decision by the ECJ (pp. 105–7), or describes some ‘very welcome’ reform (p. 125) or innovation (p. 141), without hinting at the criteria that undergird her opinion. While these do become more apparent in the final chapters of the book (p. 279 ff.), the reader wishes to know earlier on why the author stakes out particular positions. This problem is accentuated by the highly synthetic nature of Storskrubb’s chapters analysing individual measures. In numerous instances, the reader cannot tell if the author is expressing her own views, or paraphrasing arguments advanced by EU institutions or other scholars.<sup>37</sup>

The second problem is potentially more troubling. The book contains numerous assertions that lack supporting evidence or argument. While this is common in legal scholarship, one wishes for more in a work that proclaims its historical and interdisciplinary ambitions. To be fair, Storskrubb’s main goals are analytical and normative rather than causal or historical. Still, her frequent resort to the language of causality had me lurching like a Pavlovian dog in repeated vain attempts to sniff out the foundation of her claims.<sup>38</sup> In some cases, the author’s language is puzzling and leads the reader to wonder what (if any) argument hides below the

<sup>36</sup> In this context, the author notes ‘an interesting proposal to secure coherence and further transparency . . . , namely to consolidate the various measures into a ‘code’, which might counter the piecemeal nature of the numerous existing legislative measures and . . . be more accessible to users’ (p. 306).

<sup>37</sup> For example, the author’s assertion that the ‘business community should be offered some degree of legal certainty’ (p. 145) disorients the reader, who wonders who is speaking.

<sup>38</sup> I am peculiarly susceptible to the stimulus of causal language, since my current research focuses on explaining how Article 65 and the Tampere program came about. See H.E. Hartnell

surface, such as where she notes the ‘historical coincidence between the genesis of Union citizenship and judicial cooperation in civil matters’ (p. 83), or where she observes that ‘supranational rules within the EU are not the only emanation of international procedural development that mirrors the trends and themes of domestic procedural reform’ (p. 289). Both of these statements hint at some relationship among events beyond sheer coincidence, but stop short of exploring what they might be.<sup>39</sup>

This second problem appears harmless in some instances, but becomes serious in others. For example, Storskrubb’s failure to look more deeply into the relationship between developments in the EU and those in the framework of the Hague Conference on Private International Law casts a shadow over her recommendation that regulation at the international level might be more appropriate than at the regional level (e.g. pp. 301, 310). However welcome her recommendation may be, it begs the question whether difficulties encountered in the Hague framework may be causally related to the decision to communitarize civil justice issues in the first place.

Even more troubling is the use of causal language without explicating the underlying argument. In one instance, Storskrubb asserts that certain policy concerns ‘no doubt influence the Community institutions’ (p. 135) and that the ‘principle of judicial protection elaborated by the Court of Justice... precipitated’ the emergence of the new policy field (p. 309), while elsewhere she speculates that the White Paper on Governance may have influenced the (chronologically prior) European Judicial Network (p. 238). Although rarely necessary to her overall analysis, such statements raise difficult questions that are of great concern to many – particularly social scientists and historians – who seek a deeper and more precise understanding of the process of European integration. Overall, these feints lead to a quasi-causal mode of analysis that makes it impossible to challenge her assertions and impedes transdisciplinary communication.

Many legal scholars write solely for their own discipline, but this, I believe, is less viable in the field of European studies, where some issues – such as the institutional implications of Europeanized civil justice – are also relevant for scholars outside the narrow confines of legal discourse. In such cases, legal scholars should make a greater effort to build bridges to facilitate transdisciplinary communication. One step in this direction would be to refrain from using causal language, unless we intend to follow through and make the argument.

‘Institutionalizing Civil Justice in the EU: Legal Elites and Ideologies in Transnational Governance’ (forthcoming).

<sup>39</sup> To be fair, the author does press a bit further in regard to the first of these assertions. In connection with parallel reforms of domestic civil procedure taking place in some EU countries (pp. 284–9), she claims that there is a ‘clear interaction, which at first was only one-way, with domestic trends being carried over to the supranational level’ (p. 289). While it may in fact be true that the EU is parroting Member State developments, Storskrubb does not provide enough background or historical data to back up her argument. Worse, two of the examples she cites – domestic civil procedure reform in Austria and Germany – postdate developments at EU level, which cast doubt upon her claim.

My third and final quibble pertains to another technique for building bridges that could facilitate transdisciplinary communication and avoid unnecessary confusion. Caution is needed when using terms – like ‘Rosebud’ – that appear innocuous but are in play and freighted with meaning. For example, Storskrubb mentions ‘spillover’ often, but her meaning is not always clear. In some cases, she is referring to the spread of innovations from the EU to the Member States,<sup>40</sup> but elsewhere her meaning is less obvious.<sup>41</sup> What is clear, however, is that she does not use the term to mean expansion of tasks within the EU from one policy field to another, as the term has been used in political science literature commencing with Haas.<sup>42</sup> My aim here is not to insist that one usage is correct and the other incorrect, but rather to suggest that such concepts are loaded and should be used to build channels of communication between – rather than impermeable walls around – disciplinary discourses. To take another terminological example, the concept of ‘legitimacy’ is vital to Storskrubb’s analysis, as it is to broader debates about democracy in the Union. Her frequent invocation of the term leads the reader to wonder first, how she would know legitimacy when she sees it, and second, whether there is any common ground between what she has in mind and broader academic debates on this topic. At one point, the author argues that the harmony between developments in Member States and the EU ‘undoubtedly increases the political legitimacy and acceptance of supranational action’ (p. 301), but this is a claim that calls at the very least for further explication, if not for empirical evidence as well.

To conclude, I neither disdain<sup>43</sup> nor argue for abandoning the traditional enterprise of legal scholarship. But I do believe that legal scholars can (and should) play a larger role in discussions about European integration and globalization, and that enhanced dialogue based on a *two-way* conversation across disciplinary boundaries is desirable. Just imagine how much richer political science literature would be if scholars in that discipline had a deeper appreciation for the nuances of the EU’s legal system.

<sup>40</sup> For example, she notes that ‘with the rapid expansion of the policy area, [the EU] may speed ahead of domestic reform processes and become the source for the domestic level of the goals of simplification and procedural economy and may create spillover potential in the aims as well as in the elaborated rules’ (pp. 288–9; see also p. 185).

<sup>41</sup> For example, she uses the term to characterize Denmark’s belated agreement to participate in some of the civil justice measures (p. 274).

<sup>42</sup> E.B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957* (Stanford University Press, 1958).

<sup>43</sup> See A. Arnall ‘The Americanization of EU Law Scholarship’ in A. Arnall, P. Eeckhout and T. Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), pp. 415–30.