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EDITORIAL COMMENTS

The Critical Turn in EU Legal Studies

Loneliness of the European lawyer

Consider a young lawyer who engages in European Union legal research today: what meets her eyes? A Union in crisis, a body of law accused of producing division, inequality and exclusion, and an academic community that is highly critical of its development and purpose. In these circumstances, it is not hard to feel what Daniel Thym calls "the solitude of European law made in Germany".[1] This is an observation which could probably be extended to all the quarters studying and teaching EU law within and outside Europe. The origin of this sense of loneliness is twofold. On the one hand, the EU jurist is bound to perceive the fragmentation of her discipline by its division not only into innumerable sectoral fields but also into national schools which engage with one another to only a limited extent. In national debates, EU law is often seen as the law that "comes from nowhere", which colonizes and rules over diverse fields of law, sapping their integrity. On the other hand, if the European scholar seeks refuge in the close-knit circle of the community of transnational jurists, as it were, a community which for generations of European jurists represents a comfortable and stimulating shelter, she will find little consolation.[2] She must admit, perforce, that recent events in the process of integration contradict the self-understanding of her discipline: a natural process, rational and of benefit to the greatest number of individuals. The process of European integration is currently undergoing its most acute multifaceted crisis. In this context, the attendant devaluation of EU law results in a downgrading of European legal studies. The reason for this is simple: the discipline of EC/EU law traditionally finds its main raison d'être in a role of support and consolidation of the European integration project.

There is no doubt that the European project has experienced political and economic crises in the past. These crises made clear to legal scholarship the limits of law as an instrument of progress in integration. The "Integration Through Law" project developed in the 1980s exemplifies this change of

1. <www.verfassungsblog.de/en/die-einsamkeit-des-deutschsprachigen-europarechts/>
2. For a fully worked out account of the historical construction of the EU legal community see Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge, 2015).

perspective.[3] It was clearly based on the assumption that the narrative of law and integration standing in a relationship in which they were fused, on identical paths, was over. It challenged the traditional and over-idealistic vision of the European Community as a "remarkable legal phenomenon", "a creation of law… a source of law… and a legal system", according to which the rule of law was supposed to replace force in European politics.[4] For the authors involved in this project, political factors rather than law were essential for the success of the enterprise. Thus, beyond a positivist account of law, the project looks into the political processes by which law is negotiated, interpreted and implemented. Yet, it was maintained that law is an effective integrative instrument: it is a way to control political action and to translate it into mundane daily applications. In this sense, "law has a vital role to play in the process".[5]

What is new, perhaps, in the current crisis is a widespread mistrust of the positive force of law.[6] The legal form – long associated with the success of European integration – is now perceived as an appendage to economic forces and governmental machines which undermine the social structures of the Member States, producing social commodification and cultural standardization. The question of integration has now to be defined as a process that is legally structured not only by alleged homogeneity, equality and inclusion, but also by increased forms of heterogeneity, inequality and exclusion. For a long time we, European lawyers, assumed that the law had generated, channelled and transformed the energy required to create a genuine European Union. Law was not only a functional tool, but the cultural and symbolic form through which a new spirit of cooperation and solidarity could be achieved in Europe. What seems to be emerging is a sense that now that it has been created for real, the Union has lost a large part of its dynamism and homogeneity. The Union has not lost its law, but it looks as if it has lost law as a vector of energy and cohesion.[7]

What kind of form can be given to a collective experience such as European integration, where the law is perceived, by many, as a source of irritation and disruption? This has become a worrying question for EU lawyers today. There

3. Cappelletti, Seccombe and Weiler (Eds.), *Integration Through Law* (de Gruyter, 1986).

4. Hallstein, *Europe in the Making* (originally published in German under the title *Der unvollendete Bundesstaat*) (George Allen & Unwin Ltd, 1972), p. 30.

5. Cappelletti, Seccombe and Weiler, "Integration Through Law: Europe and the American Federal Experience" in id. op. cit. *supra* note 3, Vol. 1, Book 1, at p. 4.

6. See for an early account, Hunt and Shaw, "Fairy Tale of Luxembourg? Reflections on law and legal scholarship in European Integration" in Phinnemore and Warleigh (Eds.) *Reflections on European Integration: 50 Years of the Treaty of Rome* (Palgrave, 2009) pp. 93–108.

7. This well may be the core of the message conveyed by Van Middelaar's book *The Passage to Europe* (Yale University Press, 2013) reviewed in 51 CML Rev. (2014), 311–313.

are, it seems, two kinds of reaction. The first remain steadfast to the ideal of integration through law and attempts to reassert EU law as the main safeguard for European integration in times of crisis. This approach relies on the kind of "perfectionism" typical in EU legal studies.[8] It refers to EU law as a web of structural overarching principles which, to name just a few, are the principles of primacy, effet utile, non-discrimination, proportionality, institutional balance, judicial review or loyal cooperation. These principles are seen as capable of furnishing a solid and coherent basis for the whole construction. They are able to "contain" all the activities carried out by the Union. This approach would then strive to show that the structural principles of EU law are, and should be, preserved by the Member States and the EU institutions, including the ECJ, even when acting outside the institutional and legal EU framework.[9] However, a second, very different kind of reaction is also discernible. There is a growing current of thought which considers the model of integration though law a failure. Let's call it the "critical turn". There seems to be a struggle in progress within the discipline between those aiming to preserve and reassert EU law and those aiming to fundamentally reform if not step away from EU law.

Two forms of critique

The critical current emerged quite late in the history of integration. It was noted that "fundamental (rather than instrumental) critique of the European project [has been] muted, elliptic, concealed" until quite recently in legal scholarship.[10] One can certainly view Hjalte Rasmussen's writings of the mid-1980s as critique. His work on Law and Policy in the European Court of Justice published in 1986, was the first to identify clearly that judicial activism can lead to the erosion of the Court's legitimacy.[11] His argument earned him recognition in the discipline but, also, a form of exile. And yet, the scope of the argument was modest: he called for greater respect for textual interpretation by the Court. At the time he wrote, this line of argument was not widely shared. The Court's teleological case law mirrored a commitment to European integration that was broadly agreed amongst Member States. To the extent that they could expect long-term benefits from the market integration process,

8. Bomhoff, "Perfectionism in European Law", (2013) CYELS, 75–100.

9. See e.g. Lenaerts, "EMU and the EU's constitutional framework", (2014) EL Rev., 753–769.

10. Weiler, "Epilogue" in Augenstein (Ed.), *"Integration through Law" Revisited. The Making of the European Polity* (Ashgate, 2012) at p. 178.

11. Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking* (Nijhoff, 1986).

many of them accepted that individual interpretations might conflict with their self-interest narrowly conceived.

This commitment can, however, no longer be taken for granted. In the context of an expansion in the scope of the Union's competence combined with an enlarged and ever less homogeneous Union, the teleology of legal integration has ceased to be seen as a consensual institutional fact. As a result, Rasmussen's argument has shifted from the academic community to politics. Perhaps the best illustration of this shift is the attack on the ECJ in the press by former German President and former President of the German Constitutional Court, Roman Herzog; in 2008 he wrote "the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law", so that "its decisions are based on sloppy argumentation, it ignores the will of the legislator, or even turns it into its opposite."[12] The argument based on the ECJ's claimed judicial activism has become commonplace in political circles.

The critique that is currently developing and becoming influential in legal scholarship has a more ambitious scope. It has its roots in an approach developed in the mid 1990s, during the period in which the Treaty of Maastricht was being ratified.[13] It is important at this point to distinguish two aspects: there is critique as a social and political movement with roots in the specific context of what is perceived as the dislocating and de-socializing effects of EU law designed to manage the euro crisis, but there is also the analytical perspective that has as its goal a broad and critical reflection on the consequences of EU law for social cohesion in the Member States. While the former view argues that we should no longer focus on law and rather invest our energy in social protest or political mobilization, the latter aims to reform the structure of EU law and, more broadly, the European legal space.

In what is a burgeoning literature, two major forms of analytical critique are emerging.[14] The first claims that EU law fails to achieve its high ideals, notably justice, freedom, democracy and prosperity. It considers that, while EU law is well-designed to serve legitimate interests, especially new forms of individual emancipation, in practice it does not adequately serve these interests. Rather than fully-fledged EU citizens, it produces "de-socialized

12. *Frankfurter Allgemeine Zeitun*g (8 Sept. 2008). See also Editorial comments, "The Court in the limelight – again"*,* 45 CML Rev. (2008), 1571–1579.

13. See e.g. Everson, "The legacy of the market citizen" in Shaw and More (Eds.), *New Legal Dynamics of European Union* (OUP, 1995); Schepel and Wesseling, "The Legal Community: Judges, lawyers, officials and clerks in the writing of Europe", (1997) ELJ*,* 165–188.

14. Compare the two forms of criticism in Honneth, *Das Andere der Gerechtigkeit* (Suhrkamp, 2000), pp. 70–87.

market citizens".[15] EU law is unable to deliver just or democratic outcomes. This is due to institutional and practical reasons, but also conceptual reasons. What is missing is a clear articulation of what has been called the "philosophical foundations" of EU law.[16] The core of this critique is captured by Andrew Williams, who states that "the existing philosophy of EU law rests upon a theory of interpretation at the expense of a theory of justice."[17] "Theory of interpretation" refers to a traditional mode of operation of EU law, relying on teleological methods of interpretation and self-standing instrumental principles. It also refers to a mode of operation which is rather indifferent to the consequences of its interpretation. Of course, the Court may have demonstrated in individual cases a certain concern about the consequences of its action.[18] But the point is that this concern remains superficial and incomplete, as it relies on the inconclusive terms of the treaties themselves. The call for a "theory of justice" broadly refers to the development of clearly articulated foundational principles adjusted to the different contexts in which EU law intervenes (i.e. the national, transnational and supranational contexts).[19] Depending on the diagnosis and contexts of the critique, this "refoundation" develops as political theory, theory of values or social justice theory for the European Union.[20] To make these claims tangible, some authors draw on the toolbox of EU law to design technical formulas adjusted to the expected outcomes.[21]

The other form of critique goes much farther. Its focus is the social and societal injustices EU law creates. On this view, the problem lies in the very nature of the claims supported by EU law, in the forces it favours and the ethos

15. Everson and Joerges, "Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism", (2012) ELJ, at 658.

16. See Dickson and Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law* (OUP, 2012).

17. Williams, "Taking Values Seriously: Towards a philosophy of EU law", (2009) *Oxford Journal of Legal Studies,* at 552.

18. See e.g. Case C-372/04, *Watts,* EU:C:2006:325, para 145 or Case C-127/08, *Metock,* EU:C:2008:449, paras. 71–78.

19. See e.g. F. de Witte, "Transnational solidarity and the mediation of conflicts in Europe", (2012) ELJ, 694–710; Sangiovanni, "Solidarity in the European Union", (2013) *Oxford Journal of Legal Studies,* 1–29.

20. The idea of a political refoundation has been famously developed by Habermas, *The crisis of the European Union. A Response* (Cambridge University Press, 2012). The idea to provide the Union with moral foundations may be found in Williams, *The Ethos of European Integration: Values, Law and Justice in the EU* (Cambridge University Press, 2010). The concern for the social justice deficit of the EU is abundantly reflected in Kochenov, de Búrca and Williams (Eds.), *Europe's Justice Deficit?* (Hart, 2015).

21. See e.g. the "procedural proportionality test" put forward by F. de Witte in "Sex, Drugs & EU Law: The recognition of moral and ethical diversity in EU law", 50 CML Rev., (2013), 1545.

it sustains. EU law is ontologically bound to produce deregulatory and de-socializing effects. To give an example: the problem is not that EU law does not realize the desire of individual emancipation, but rather that any pursuit of this emancipatory aim rooted in EU law is a subterfuge. Alexander Somek, a prominent representative of this trend of thought, powerfully argues that what is presented as "emancipation" by the EU and the legal literature would be better called "empowerment".[22] Alleged emancipation amounts to a form of alienation, by subordinating the individual to imposed economic performance criteria and to the ends of the market economy. This is because EU law lacks any capacity to support, not to say frame, a collective, a genuine political community. This form of critique aims to show that, subject to the influence of EU law, social relations become distorted. By imposing "structural reforms" driven by goals of economic integration, EU law ignores or even subverts the fundamental structures of domestic societies.[23] It promotes interests that displace what makes the value of our life in European societies. It negatively affects the tissue of social relations and forms of life. For instance, standardized product regulation affects tastes which may be part of the identity of a society.[24] This critique calls for a substantial transformation of the European integration project, making its law more sensitive to social interests and local contexts against competition between Member States and global economic and cultural forces. This leads, naturally, to a project of radical institutional and legal reform. It is reflected in various practical proposals, such as the possibility to transfer powers back to the Member States or a new restrictive understanding of freedom of movement.

These two forms of critique share a broad question: how might we avoid law which aims at cohesion and emancipation degenerating and producing division and alienation? However, whereas the first critical trend relies on normative principles which may help consolidate the Union, the second one challenges the current configuration of the Union and suggests a radical new narrative, a new vision of how Europe should be structured. It should be clear, however, that in practice the moderate and the radical critiques may overlap in writing by the same authors, or even within the same publications.[25]

22. Somek, "Europe: From emancipation to empowerment" (2013) LSE "Europe in Question" Discussion Paper Series, Paper No. 60/2013.

23. Menéndez, "Which citizenship? Whose Europe? – The many paradoxes of European citizenship", (2014) *German Law Journal,* 907–933.

24. Davies, "Internal market adjudication and the quality of life in Europe", (2014) EUI Working Paper 2014/07.

25. See this ambivalence reflected in Hartmann and de Witte, "Regeneration Europe: Towards another Europe" (2013) *German Law Journal,* 441–448.

Critique and the future of EU legal scholarship

We must give credit to these critical approaches for helping us become aware of the many distorted outcomes that characterize the integration process. They unmask an assumption which still underlies many approaches: the assumption that integration is virtuous, economically, socially and legally advantageous. In addition, at the heart of their analysis, critical scholars identify possibilities that were for a long time confined to EU social law and policy studies and not considered as core features of EU law in general: its potential for doing or undoing corrective or distributive justice, and its ability to create, preserve or undermine public goods. But, then, the question remains how this should be reflected in our method of analysing EU law.

As a challenge to the traditional approach, which conceives EU legal scholarship as a way to support and advance European integration, criticism is a necessary exercise. As a method of analysis, however, it should be used with caution. First of all, when advancing their argument, critics often ignore large swathes of the developing positive law. They assume, based on the analysis of one set of cases or rules, that they can arrive at a complete vision of EU law, without paying attention to the breadth and complexity of the integration process and its law. EU legal scholarship requires a serious and continuous engagement with the collective of peers working beyond each one's own sphere of competence. Second, critics tend to oppose distinct perspectives (e.g. for the social as opposed to the economic, the political as opposed to the societal, or the cultural as opposed to the technocratic) as if the rules analysed and their rationale were transparent, without being aware of the different meanings these rules may take on in different contexts and depending on the normative assumptions driving the analysis. Instead, what we see is that, as the result of ambiguous or imprecise provisions as well as texts based on political compromises and filled with broad clauses, the substance of EU law constantly accommodates varying perspectives. Consequently and as convincingly argued by Danny Nicol, EU law is inherently "contestable in justice terms", i.e. it may be considered as just or unjust according to the ideas of justice supporting its analysis.[26] Moreover, one should accept that the question of social justice is but one of many perspectives which may be taken on the development of EU law. In any case, the development of EU law bears witness to the fact that many problems can be solved without the need to make strong conceptual and philosophical choices.

26. Nicol, "Swabian Housewives, Suffering Southerners: The contestability of justice as exemplified by the eurozone crisis" in Kochenov, de Búrca and Williams, op. cit. *supra* note 20, pp. 165–175.

Nicol suggests that EU law scholars should assume "a more partisan role", by making clear their underlying philosophical and political conceptions and by making proposals on the shape of the integration process.[27] In other words, he suggests a politicization of academic discourse. Academic discourse would still be distinct from political discourse, simply because it pays attention to the future of integration "in the long term". But while taking into account the long-term future looks like good advice for professional politicians, it seems less so for legal scholars. Assuming a partisan role would inevitably lead to taking sides in the political spectrum and distancing oneself from the actual terms of EU law.

Arguably, the most important and noble task of legal scholarship is non-adjudicatory in nature: it is to develop better descriptions and understandings of the legal materials. This involves, in the first place, a complete immersion in the materials with the aim to make simplistic and partial accounts of EU law complex again, by dissecting the outcomes of any one given solution, by making clear the difference of viewpoints opened up in the course of interpretation, and by contextualizing the issue at hand within the wider framework of the Union legal order. Secondly, this requires making visible to ourselves the conceptual choices by which we analyse EU law. We should always be prepared to test the concepts used to describe legal practices against the development of these practices as a means to revise or refresh our concepts. We should also be prepared to accept that dealing with fields such as free movement, non-discrimination, external relations, fundamental rights or EMU is to take an explicit stand not only in relation to the activity which defines us as an academic community but also in relation to how we make the Union as a whole knowable to others. Our elaborations and doctrines are an integral part of EU law: they should become an object of our investigation. Only if we manage to apply or at least come close to these standards can we, EU lawyers, be called a genuine "community of critics".[28]

27. Ibid. at p. 171.

28. Compare the approach developed in the field of anthropology by Strathern, "A community of critics? Thoughts on new knowledge" (2006) *Journal of the Royal Anthropological Institute*, 191–209.