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Law and European Integration: Socio-Legal Perspectives

EUROPEAN UNION LEGAL INTEGRATION has been the subject of a rich, interdisciplinary literature. Studies on the powers of the European Court of Justice (ECJ) and the dynamics of preliminary rulings, on the constitutionalization of the Treaties, and the reach of EU law into national legal systems, abound. Scholars have theorized that the ECJ and EU law have been a driving force of integration, perhaps the driving force in times of eurosclerosis as suggested by Cassis de Dijon and other famous rulings. It is all the more surprising then that we know little about the professions that partake in the process, the judges, jurists and lawyers that are implicated. We now have many studies on the Commission or the Parliament and on Brussels interest groups. EU policy studies tend to focus on actors within these institutions, only mentioning in passing the relevant jurisprudence in their area. Legal expertise is often seen as key in pushing policy agendas yet it is taken for granted rather than analysed. Yet, if EU law is so important in the history of European integration, a promising research agenda would be to take EU legal studies and EU lawyers as an object of study. How has the EU changed the teaching of law in member states' universities? What is its reach in the various sub-disciplines of the field? Is a European doctrine emerging? What is the trajectory of those that specialize in EU law? What is the ECJ judges' vision of the role of the law? These are among the questions that a sociology of EU law could answer. As EUSA brings together many disciplines including legal scholars and other social sciences, this issue should be of interest to most of us. To help develop a sociology of EU law, this forum brings together two legal scholars that reflect on the ways that the community of EU lawyers conceives EU law. The lively debate between Harm Schepel and Damian Chalmers suggests that there is a plurality of position in the legal field as to the role of EU law and its relationship to European society, politics and economics.

-Virginie Guiraudon, EUSA Forum Editor

Law, Lawyers, and Legal Integration *Harm Schepel*

LAW HAS BEEN A POWERFUL INTEGRATING FORCE in Europe. Indeed, very few students of European integration would deny the paramount role law has played in the partial transformation of the Community into a supranational polity of sorts. Legal scholars know this to be true, but rarely make explicit why it should be so. Lawyers 'do' law, they do not particularly care to stand back from it. Social scientists have no such qualms, and have taken to the task with gusto. Usually, they see the role of law as the representation of something else, of some other deeper integrationist force. Maybe it is an instrument of capitalist expansion, the expression of a hegemonic neoliberal ideology. Maybe it is a reflection of social life spilling over national borders. Maybe it serves as a mask for political preferences, a source of technocratic spillover. Probably it is a combination of some of these things. I, for one, suspect it is a combination of all of these things. And yet, I would be very surprised indeed if the legal scholars, officials, lawyers and judges involved in the construction of the Community legal order would consider their work to have been a mask for anything. The legal community 'does' law.

Perhaps law should be taken a little more seriously in the social sciences. Perhaps we should not be looking so much what lies *behind* law and a little more at what lies within the realm of legal thought. Perhaps the legal community distinguishes itself not so much by its shared commitment to something else, but by its shared commitment to law itself. Or rather, it distinguishes itself by a shared commitment to a certain conception of law, and a certain conception of the role lawyers play in society. My claim about the import of these shared understandings is not, to my mind at least, shocking or even controversial. Lawyers implicated in matters of Europe form an elite, a fairly closely knit group of people moving in a field of institutions and practices which have a natural tendency to exalt their craft and so maintain the power of law as an autonomous force in European integration. Their collective understanding of their art and of themselves informs in meaningful ways the extent to which the field succeeds in upholding its autonomy. This is hardly a conspiracy theory—just an assumption about people taking their professions seriously and having their worldviews determined in part by

the way their professional lives are shaped and structured.

I will try to identify and sketch some elements of these shared understandings underlying European Community law. I hasten to add that it really is not more than a rough sketch. It overlooks important distinctions, generalises beyond what is reasonable, undoubtedly distorts ideas and even lumps together contradictory assumptions. Overall, however, I do think it gives a fair idea of certain aspects of dominant legal thought in matters European.

“Emancipatory Functionalism”

The principle of direct effect, one of the twin pillars under the constitutionalisation of the Treaty, has famously been described- by the late Federico Mancini, one of the most influential ECJ judges in the history of the institution- as a way of taking law out of the hands of bureaucrats and politicians and giving it ‘back’ to the people. It is a stunning assertion of the power of European law liberating civil society from the shackles of parliamentary democracies. It is also at odds with what most people would consider to be signified by ‘the rule of law.’ Made as a rather transparent warning to the politicians of Europe not to curtail the powers of the Court of Justice, it was accompanied by an effort to locate hostility towards Europe and its law in the self-preserving interests of the political and bureaucratic elites of the Member States. As such, it was merely a spectacularly unsubstantiated claim to the loyalties of Europe’s citizenry. Yet I am sure there was more to it than mere self-interested posturing: Mancini- and hundreds of lawyers with him- truly believed it. The idea is ‘emancipatory functionalism.’ The Community is placed at the end of an evolution in ‘the history of law’, call it ‘modernisation’, towards ever bigger units of organised social life: from the family to the clan to the region to the State to the Community. As social life expands, so does its legal institutional framework. The rise of the nation-state was but a stage in this evolution. The identification of law with the nation-state, or even the idea that law is properly promulgated only by political institutions, is an unfortunate bump on the road of legal evolution. Law belongs to civil society, and civil society finds in European law the framework for its cross-border dynamism. The question is how we get from the notion of law ‘belonging’ to civil society to the reality of law belonging to a class of lawyers and legal experts.

Law-as-culture, Law-as-science

At the risk of simplifying, one can distinguish two extreme positions on the nature of law. One would see law as essentially tied to a particular society and a particular culture. Law, here, grows organically from a society’s evolving norms and traditions. Two consequences flow from this immediately: first, differences across different legal systems are not just tolerable, they are inevitable. Second, imported or imposed law which doesn’t reflect a particular society’s culture will at

best be dysfunctional and more likely will lead to all sorts of legitimacy problems. The other would see law as an artefact, a tool which can be sharpened by lawyers and legal experts, that can be improved and made more efficient by technical means. The ‘best’ solution is equally viable and desirable in different societies; indeed, law, in this conception, can be transferred from one place to another without much trouble. Almost no one, I suspect, would actually take either position- most legal scholars would introduce distinctions and differentiations and ultimately take some middle position. As a heuristic device, they may serve some purpose.

In European legal thought, law-as-culture collapses into law-as-science. There are two different mechanisms to make this happen. In the first, European legal culture is *defined* by law-as-science. The idea here is that one of the underlying structural similarities between different societies in the Union is a cluster of cultural practices associated with ‘the rule of law’: the authority of general abstract rules, administered by legal experts under exclusion of laypeople, the systematisation of law by legal science. Abstraction, legalism, *amor intellectualis*: these are not mere features of a particular legal system in a particular stage of history, they are constitutive of the very identity of Europe. The common assertion that the Community is a ‘Community based on the rule of law’ should be, at least in part, understood in this way, and not just as describing a stage in, or even the culmination of, a process of constitutionalisation. If this is what you think about law, there are several implications for what you think about European integration. First, law is a source of integration, not merely an instrument of integration. Second, the ‘legalisation’ of Europe is not about unelected technocrats transforming Europe into something more and more remote from the wishes and needs of the people of Europe, quite on the contrary: the ‘legalisation of Europe’ is about constructing a mode of governance that is more closely attuned to the culture of European civil society than national politics can ever aspire to be. If this is what you think about law and you are a learned jurist, there are several implications about your own role in Europe. Like the 19th century German jurist Savigny, you picture yourself uncovering and unveiling the *Volksgeist*, “the spirit of the people.” Like a modern day Savigny, your faith is in your profession and your craft, not in the legislature.

The second mechanism is evolutionary: as society evolves inevitably to liberal capitalism, law evolves inevitably to law-as-science. In Weberian terms, capitalism presupposes rational social action which in turn presupposes a calculable legal system and administration bound to rational rules of law. Formal legal rationality substitutes substantive legal rationality. With the legal system thus in place, crafted and administered by a highly specialised legal profession, law detaches itself from its socio-cultural grounding and becomes perfectly exportable. I suspect that this mode of thinking lies behind

much talk of how European law is 'rationalising' market regulation; I am quite sure that this mode of thinking informs much of the pressure put over the past decade on the newly acceded Member States to suspend with cumbersome procedures to legislate the *acquis* into their legal systems and just import the lot, wholesale and verbatim, from Community law. If there is one thing that the Copenhagen criteria have accomplished, it is the accumulation of air miles for a whole army of Community lawyers travelling all over the new Member States teaching the craft and trade of building a liberal market democracy. The implications of this mode of thinking for European law are relatively straightforward: as if by magic, the conditions for legal harmonisation are congruent with the conditions for economic development. What's more, one empowers the other. For the legal profession, the Weberian logic generates a dynamic where increased formal rationality leads to a very peculiar distinct body of knowledge which leads to increased specialisation and power for an elite of jurists.

Conclusion

As if by stealth, European law has largely transformed the nature of European integration. An ECJ judge once famously said that its judges entertained a certain idea of Europe. This has largely been interpreted as a sure sign that European law has been constructed in function of a political strategy, a set of ideological preferences or commercial interests widely shared on the bench, in academia, in law firms, and in the Rue de la Loi. I think that there is a certain idea of Europe inherent in a certain idea of law. This is not a mere detour. Law structures discourse validates some lines of argument and discards others, and limits world views. This *certain idée du droit* deserves a little more attention from social scientists.

Law transcends borders by its very 'lawness.' It is an autonomous force of integration, not the mere reflection of political imperative or economic necessity. With many a variation, and based on many different strands of thought and ideology, my guess is that most people in the field of Community law would subscribe to at least this much. It is a powerful idea widely held by a powerful group which has enjoyed an epistemic monopoly over many aspects of European integration for decades. It is an idea that has underpinned the cohesiveness and autonomy of the field.

As the Union is expanding in all ways imaginable, the field of Community law is being reconfigured. No longer the province of a relatively small group of specialised experts, the field is growing in sheer numbers and diversifying significantly as criminal lawyers, private lawyers, constitutional lawyers and then some are being drawn in. Whether the autonomy of the field will be maintained will depend in large part on the strength of the common loyalty and commitment of the expanding field to the idea of law. Yet, as the debate on

a code of European contract law exemplifies, we still have decades of legal formalism and detachment from social life ahead of us.

Harm Schepel

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EU Law and the Failure of the 'European' Social Scientific Imagination Damian Chalmers

IS IT POSSIBLE TO REVISIT DEBATES which have never been had? Harm Schepel's penetrating piece would suggest that, paradoxically, it is. His piece is a reconstruction of a well-worn and heated debate in socio-legal studies between 'law and society' and 'law in society' approaches to the study of law. The former looks at the impacts of law on its subjects. Society is presented as the external environment on which law intervenes asymmetrically and unpredictably. It is the task of the socio-legal scholar to discover, after the events, the effects of these interventions. 'Law in society' approaches consistent with developments in sociology that are dismissive of reified, romantic ideas of the 'social' look at the epistemology of the law, its vision of society: what image does it draw of human relations; what ideologies, justified true-beliefs does it draw on; how do the internal, formal structures of the law reconstruct these; how do legal visions of society compete with other collective visions, notably those provided by statistics.

With some notable exceptions, of which Harm Schepel is one, this debate is absent from EU studies. To be sure, there are some 'law in context' approaches, but these tend to see EU law as the hand maiden of the policy-making process. Debate centres on how it constructs or alters national government preferences; how it provides windows for non-governmental and supranational actors to intervene in law-making; how it allows court and legal professionals into policy-making. These are all valuable and interesting debates, but law's power derives from its capacity to link the world of the political with the worlds of economy, society, family. There is contestation for law-making powers precisely, because it allows government both the power to exercise influence over these worlds and the power to generate conditions which enable new types of relations to develop within these worlds. There has been very little socio-legal work, however, on EU law's impact on family relations; its transformation of working patterns; or the creation of new forms of natural environment. To be sure, this is difficult because of the scale and diversity of the Union, but the lack of work is disappointing, nonetheless. More so, because, for the Union, other central

instruments of rule of the nation-state over the individual – force, money, education, welfare – are not available: making integration through law all the more central to EU government.

In this regard, Harm Schepel suggests that one of things that EU lawyers identify EU law as doing is ‘emancipatory functionalism’. They argue EU law generates new entitlements for individuals through doctrines such as direct effect, which these can invoke before courts. For myself, I think they elide the hidebound ideologies of legal professionals who go before courts - and who therefore, inevitably, say EU law is all about them and the rights they litigate - with the wider praxis. For EU law generates very few individual rights. If one looks at the European Court of Justice, for example, 22 EC Treaty provisions, 7 Directives and 3 Regulations accounted for 50% of its case law between 1998 and 2003. The position is no different with national courts. In the period up until the end of 1998, just 5 Directives accounted for 73% of all the instances of Directives being invoked in reported cases before British cases.¹ Of course, it may be possible that EU law generates a series of individual entitlements that are never litigated or only appear in unreported cases, but until some evidence, I, for one, will remain sceptical. If the 70,000 + pages of EU law do not generate many individual rights, then what do they do? Even a brief perusal of the *Official Journal* suggests an alternate narrative. They codify, extend and discipline administrative power. Every area of life governed by EU law is replete with the creation of new regulatory agencies, new regulatory standards and new responsibilities on private undertakings to report on and police public goods. In short, EU law’s mission is not emancipatory functionalism, but ‘utilitarian managerialism’. Its central exponents are not lawyers, but administrators. Its central teloi are not individual liberal values, which provide only an ephemeral sheen over its bulk, but the depersonalised public goods of the welfare and regulatory State, with all its corollary dangers of perverse side-effects, excessive intrusion in local life and cultural alienation.

The other claim is a ‘law in society’ claim. The argument is that the professionalisation of EU law and its ties to the ideals of liberal capitalism have resulted in its no longer being able to be viewed as ‘law as culture’. It cannot be seen as the organic product of any society linked to its evolving norms and traditions. For me, the interesting thing about EU law is that, unlike national laws, it has never made any serious claim to do this. The central ties of repressive conformity identified by Durkheim and his successors are that national law creates the central symbols for a society’s collective self-identification – nationality law, immigration law, criminal law, religious law. Yet, these are not claimed, in any significant way, by EU law. Indeed, at Maastricht and Edinburgh, it was clear that these matters should not be touched by EU law and that EU law would not transgress onto matters of national citizenship. To be sure, in recent times, asylum and immigration law have

begun to be harmonised. But, even here, when one looks at the central symbols - acquisition and loss of nationality, long-term residence, expulsion – there is either very “lite” regulation or, in the case of the long term residence rights directive, an EC instrument that does little more than shadow pre-existing national practices.

That said, one of law’s fates is that it cannot be ‘a-cultural’: it cannot escape creating notions of community. The problem with EU law is that because ‘law as science’ renders ‘law as culture’ opaque in its epistemologies, the communities that it creates have an unattractive edge. Its central bias is the protection of the institutions and communities of the European market society. The market society here is not some abstract supply and demand curve or set of liberal rights to trade and own property, but rather a set of EU and national institutions, which include governance regimes, contract and property rights, supporting welfare and policing institutions. One acquires rights in EU law only when one either actively contributes to or does not disrupt the working of these. In this, of course it has an ethnocentric tinge. Non EU nationals, in particular, do not have the same rights as EU nationals. EU law only exposes its fangs in the most sinister way, however, where non-EU nationals threaten the institutions of the market society. EU law allows the detention, impoverishment and stripping away of family rights of asylum seekers or illegal migrants precisely because of the threat these pose to welfare institutions and labour markets and because asylum is the bracket of the poor and dispossessed. If in the United States it is increasingly dangerous for foreigners to be perceived as politically threatening, economic threat is fast becoming the mantra of European legal repression. One can identify EU law as ‘law as culture’, if one wants, but the cultures it constructs are not cosy pre-political communities, but rather market hybrids whose pervasiveness requires extensive internal responsibilities, policing and protection.

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NOTES

¹ For more on the incidence of EU law see Chalmers, ‘The Satisfaction of Constitutional Rhetoric by the European Judiciary’ located at http://www.jeanmonnetprogram.org/conference_JMC_Princeton/NYU_Princeton_Chalmers.rtf.