

Editorial

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Each year, in late summer, a colourful mosaic of names decorates the Florentine sky. Alun, Marinella, Ounia, Anna, Rory, Franck, Lúcio, Matej, hailing from the four corners of Europe and beyond, meet and learn to work together at the European University Institute. Perched on the hillside, these new surroundings will become their home for the next four years. The Institute constitutes, in reality, more than simply a kind of training college for aspiring doctors of law. Above all, it is a magical site of European alchemy, and a living place of exchanges, where ways of understanding ourselves, each other and the law germinate and bloom. United in diversity, these researchers have chosen to shed their familiar national garb to pursue a common goal, that of pushing the boundaries of their knowledge and knowledge itself, harnessing the greatest resource which the Institute has to offer, its diverse cultural, intellectual and human capital.

If one day you encounter someone who has studied at the Institute, its mere mention will light up their eyes with the golden undulating Florentine hills. This should be the reaction that Europe evokes, iridescent looks of hope, desire and willingness. Europe should be a confluence of individual and collective destinies into the river of shared aspiration, a common future. Europe must be, above all, a project. To become this it must learn to appreciate and love itself, and to engage in dialogue. In the academic field, one initiative has become reality, that of a European research arena, where arguments jostle for position and ideas come to fruition. It is in response to, and in furtherance of, this movement that the European Journal of Legal Studies (EJLS) was conceived. Its goal is clear: to thrash out contemporary and future legal problems together, harvested from the field of Europe's greatest asset: its scientific and cultural diversity, and to create a community of research communities, virtual but actual, based on exchange, sharing and dissemination of knowledge.

In facilitation of this vision, the EJLS takes part in the 'Open Access' and 'Open Archives'

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initiatives, offering free access to its resources. Moreover, in the tradition of Europe's multilingual heritage, all articles are published in two languages. Their impartial selection, based on peer-review by renowned specialists, is guided by one criteria: quality. Innovation and in-depth understanding of law are the two principles which undergird the editorial policy of the EJLS.

Is Europe to be an 'Eldorado'¹? Which one? This is a challenge for each and every one of us. The members of the Editorial Board of the EJLS cordially invite you on the voyage of European legal research. They have chosen, for its first leg, a theme situated at the convergence of different disciplinary currents: 'Cross Perspectives', in order to juxtapose channels of thought and foster dialogue and reflection between celebrated professors, veteran practitioners and young talents, be they authors and/or readers of the contributions of this maiden voyage.

The positions expressed in the section dedicated to **international law** cross swords in an ongoing battle over the unity or fragmentation of international law. They confront the very sources of this problem and numerous pretenders to its solution: the nature of international law, and of the international jurist. In fact, both the diagnoses and remedies proposed possess a somewhat chameleon-like air, changing according to the colour of the surrounding conceptions of law.

Those who adopt of a definition of law based on a system of legal norms place emphasis on the unity of international law both as a legal reality and a desirable order of legal things. In this way, Pierre-Marie Dupuy does not shy away from denouncing what he considers to be the myth of 'self-contained systems', which casts a shadow over the phenomenon of growing complexification of international law, which only the concept of the legal system, in which the notions of imperative norms and/or *jus cogens* are taken seriously, would seem capable of illuminating. Without discounting such a view of the nature of international law, Enzo Cannizzaro for his part develops a vision of the reality of international law defined by the fragmentation of international jurisdictional spheres, perceived as a temporary (?) and necessary lesser evil with respect to a certain international rule of law.

Those who, on the other hand, focus their attention on actors do not try to deny this fragmentation, but in fact attempt to transcend it, seeking to find therein a textured position in line with the author's concerns. As such, Martti Koskenniemi advocates the overcoming of the

1 Cf. L. GAUDÉ, *Eldorado*, Paris, Actes Sud, 2006.

functional compartmentalisation which structures international law into separate ultra-specialised boxes, hermetically defined by the defence of a kind of international-style constitutional republicanism. Tony Carty, for his part, attacks what he sees as the illusion of the unity of international law, whereby the main error is the obfuscation of the basic nature of inter-national law. The republican image shies away before the portrait of the legal interpreter stood at the centre of the eminently dialogical dialogue which goes on between different national legal cultures.

The debate thus seems laced with both multiple conceptions of international law, and, to say the least, diverse definitions of the purported unity or fragmentation. However, beyond these still fundamental disagreements, the basic question of classical international law resurfaces for consideration, burdened by the deification/reification of the great State monoliths, leaving behind them in their trail of destruction, the very questions they provoked unvoiced and unanswered. From afar, arrive the echoes of the voices of the great international scholars all seem to be calling for a reimagining of international law and the international community. This revival may take the guise of a Sysiphean jurist or derive from higher intangible principles. We can be guided down this path towards an international law for the twenty first century by Philip Allot's appeal for a reiventent international society.

The contributions gathered together in the section dedicated to **European Law**² restore the logic of complementarity, featuring, first and foremost, the complementarity of legal and political theory, in a field which has yet to be fully explored, and secondly the complementarity of the themes developed in each article, stirring a desire to further integrate our approaches, which can only enrich our understanding of this area. The pieces in this section all grapple with the issue of the public/private divide as it is recast by European alternative methods of regulation, seemingly redrawing the dual-sided “paradigm of regulation”, revisiting “on the one hand, the analysis of the processes by which all social groups manage to maintain their cohesion and ensure survival, despite the diversity of interests which exist within them, and, on the other hand, the analysis of the processes of change which contemporary societies are experiencing, in which the growing complexity of problems demands recourse to more supple mechanisms of coordination and integration.”³ Pertinently, in the European context, the French and Dutch rejections of the Treaty

2 The choice of title was deliberately left wide, in order to accommodate issues which cover both the European Union and the Council of Europe.

3 **J. CHEVALLIER**, “La régulation juridique en question”, *Droit et Société*, 2001, N° 49, pp. 827-846, at p. 830.

Establishing a Constitutional Treaty for Europe - eerily reminiscent of the Irish 'No' which in its day inspired the resurgence of the European Commission with its White Paper on Governance⁴ – bring new life to the questions of the legitimacy and efficiency of the European Union. We must consider the path which the Open Method of Coordination and self-regulation are taking, given their key role in bringing the European Union closer to its citizens⁵ and in an incremental constitutionalism. Philippe Schmitter, an expert in European governance thinking, reminds us of the democratic stakes of the debate regarding the interweaving of the links between the European Union and organised civil society. Law appears here as the compass of democratic European governance. “Openness, participation, accountability, effectiveness and coherence”⁶ become the core of good governance, be there a common framework of legislative instruments or not. It has become necessary to examine how these grand formulations are applied on the ground and to juxtapose different methods in order to understand the logic of the European (legal) system. At a time when the coherence and integration of policies and legal instruments seem to have become Europe's leitmotifs, an intriguing question for the lawyer is whether we are witnessing a change in legal phenomena. Are alternative methods of regulation contributing to recasting law's role and image? Do they mark the passage from a law which is imposed to one which is negotiated? To attempt to answer these questions, Caroline de La Porte reveals to us the unique experiences of the Open Method of Coordination, evaluating its use in the fields of employment and social exclusion. Fabrizio Cafaggi meanwhile sheds a refracted light onto different forms of self-regulation in the creation of a European contract law. The counterpositioning of these different modes of alternative regulation, usually examined in isolation, will certainly stoke the fires of the debate regarding the nature of European legal normativity.

The section on **comparative law** offers the reader the chance to consider, through the lens of experts, certain questions regarding the most basic tenet of comparative law: a methodology for

4 **Commission of the European Communities**, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25 July 2001, in particular p. 3.

5 Cf. *Ibid.* in particular pp. 4, 8, 24. See also **European Parliament, Council, Commission**, *Interinstitutional agreement on better law-making*, JO C 321, 31 december 2003, pp. 1-5 concerning exclusively coregulation and self-regulation; More generally, **Commission working document**, *First progress report on the strategy for the simplification of the regulatory environment*, COM(2006) 690 final, Brussels, 14 November 2006, and *Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions – A strategic review of Better Regulation in the European Union*, Brussels, COM(2006) 689 final, 14 November 2006.

6 **Commission of the European Communities**, *European Governance. A White Paper*, *op. cit.*, at p. 11.

developing an understanding of the law. The chosen topic, the guarantee of due process in the war on terror affords us the opportunity to reconsider the *summa divisio* of comparative law, along the lines of domestic systems of private law: the placing of legal systems into families. The section looks at two legal systems – American and British – which ostensibly belong to the same common law family, by examining the key notions of constitutional law, be they objective (the institutional architecture of the legal systems through the separation of powers), or subjective (the status and protection of fundamental rights within those systems).

Furthermore, the reader is confronted with the basic question of the comparatist: which method(s) should be used in order to draw the link between points of comparison.

If a cultural approach is followed, it is best to concentrate on understanding American and British law for what they are in their own terms, to grasp their profound originality. Reconnecting legal systems to their cultural identity and societal roots serves to underline their intrinsic differences and diversity.

Contrariwise, from a functional perspective, what is at stake in comparative law is the analysis of the legal means used by the American and British legal systems in search of a response to a common problem: balancing an effective fight against terrorism with the protection of fundamental rights such as the prohibition of arbitrary detention and the respect for due process. This quite pragmatic approach is often underpinned by the conviction that there exists a core of values and principles among legal actors, whatever legal system they might find themselves in. In this way, this approach tends towards a convergence rather than a divergence of legal systems.

Finally, if the epistemological method is preferred, one needs to focus on the study of “the internal structures of legal knowledge.”⁷ The key to understanding and setting up an appropriate comparative relationship between legal systems is “located in epistemological constructions that are both historically determined and structurally significant,”⁸ which reflect those legal systems. In this case, the analysis could, for example, seek to identify the legal functions which determine the structure of both the British and American systems – the executive, the legislature and the judiciary – and to examine the differences which exist in their relationships.

Thus, thematising the very nature of comparative law places the reader in the driving seat in this section of the journal. We invite them, guided by Mark Elliott and James Nickel, who consider, respectively, the British and American legal systems, to combine or choose between

7 G. SAMUEL, “Comparative Law and Jurisprudence”, *I.C.L.Q.*, 1998, vol. 47, p. 817, at p. 827.

8 *Ibid.*, p. 821.

these different methodologies in order that a fruitful comparison may be undertaken relevant to the questions raised by the campaign against terrorism.

After plunging into the heart of legal systems, the EJLS wishes to conclude its first issue by taking the reader through the juridical looking glass. The section devoted to **theories of law** offers a reversed perspective. The emphasis goes from what the individual, as the protagonist in the legal theater, brings to the law, to what the law brings to the individual, and the way the latter perceives it. This is a question of seeking to define law from both the outside, incorporating sociological and anthropological outlooks on legal phenomena, as well as from the inside through the experience of individuals. The societal reality of the law is revealed in its combination of individual and collective practices. To try and capture this cultural essence, Chantal Kourilsky-Augeven takes us on an inductionary meander through the field of legal socialisation, the result of a recursive interplay between the construction of the subject's identity by the law and the construction of the law's identity by the subject. In this way, she clarifies for the lawyer the relationship between the individual and the legal norm, a key tenet that must be addressed in considering the effectiveness of law. Though Baudouin Dupret also places the individual at the centre of his inquiry, he chooses not to follow the path offered by a cultural approach, but instead sticks resolutely to a praxiological inquiry, considering the law in action and in use *in situ*. Consequently, the understanding of the law is not tackled through the representation and understanding of the law which certain collectives develop but rather by virtue of how or what individuals experience. This writer seeks to make use of an outline of the law from a socio-anthropological perspective through a critique of the dilution of the *legal* quality in the social field amid pressures from certain schools of legal pluralism. This constitutes a valuable return to the origins of the doctrine of legal pluralism at a time when its protean and polysemous usage seems to be seeping ever deeper into the vocabulary of legal science. The lawyer is thus offered a new vista from the perspective of the other, a path often apposite in seeking to understand oneself. This is the reason why we have chosen to conclude this first issue with the joined contribution from the legal ranks, Roderick Macdonald and Thomas McMorrow, who illustrate just what such extra-legal analysis can bring to our understanding of law. Basing their approach on a critical legal pluralism, the authors develop a splendid deconstruction and subsequent rare reconstruction of legal normativity in all its complexity. Bringing this issue full circle, therefore, this closing piece offers interesting synergies with other

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contributions – evoking for example the essential inter-subjectivity of law emphasised by Tony Carty, the actor's centrality in the elaboration of legal grammar underlined by Martti Koskenniemi, or the importance of man's responsibility in the creation of law and law's creation of its world highlighted by Philip Allot – and also between the different central themes – the burning conundrum regarding forms of legal normativity in Europe which the frame proposed by Roderick Macdonald and Thomas McMorow (norms combining, in different ways, an explicit / implicit, canonical / referential character) could well contribute to resolving.

As such, the separate sections of this first issue each in their own way shed light on different facets of law. They outline the features of cross perspectives in which we hope cross fertilisation will occur. Finally, I would like to add a personal touch to this first editorial. I would like to thank everyone who has worked on transforming this journal into a reality, who have contributed their effort, their talent and their belief in this human adventure: first of all the members of the Editorial Board, the Professors of the Law Department at the Institute, who have also made up the journal's corps of experts, the entire administration of the Institute, in particular the library staff for their fruitful collaboration, and finally and, most of all, the contributors to this first issue, for their kindness, their availability and most simply their skill. All this can only herald a great future for European scholarship.

All the members of the Editorial Board of the European Journal of Legal Studies wish you an enriching journey through the articles of this first issue, in anticipation of future rendezvous in further debates. In this vein, our second issue will be dedicated to a fascinating and intriguing theme: “Judging judges.” The call for papers is launched...