European Journal of Legal Studies

Special Conference Issue: "Governance, Civil Society and Social Movements"

Edited jointly by Michael Blecher, Giuseppe Bronzini, Jennifer Hendry, Christian Joerges and the EJLS

Editorial: The Geology of Governing Society

Rory Stephen Brown

VOLUME 1 NUMBER 3 2008
P. 1-8

Editorial: The Geology of Governing Society[♣]

Rory Stephen Brown[*]

It is a privilege to write an Editorial for such a thought-provoking collection but before I get to the thoughts it provoked, the reader will forgive me for expressing my gratitude to the various individuals responsible for its genesis. I write here on behalf of the Editorial Board of the *European Journal of Legal Studies*, which is very happy to host these papers.

Our particular thanks go to Christian Joerges, who, two years ago, during the launch party of the *Journal* suggested to me that it might be a suitable medium for the conference on *Governance, Civil Society and Social Movements*. At the time, I heartily agreed, but it is the incumbent Editorial Board who brought this hopeful talk into reality. They deserve credit for that.

From the offset, the *Journal* was intended to promote academic excellence, and this it does by selecting only the very best work out of the many pieces submitted. However, the *Journal* was also intended to provide a forum for the Law Faculty of the European University Institute to showcase its in-house excellence and the quality it is able to attract; to give something of an insight into our academic activities here in the Florentine hillside. This *Special Issue* is exactly what we had in mind back when the *Journal* was but a sketch on a drawing board. The Editorial Board is, thus, indebted to the Editors of the conference, and in particular Jennifer Hendry, who did the lion's share of the preparatory work.

It is particularly gratifying to see that each paper has been published in two languages, offering the reader an invaluable choice and hopefully extending the discourse across those pesky language barriers so far as translation permits. In this contribution, I shall distil this plurality through the alembic of English for the sake of clarity, to the inevitable detriment of accuracy.

[♣] I am grateful to Brian Fitzherbert, Lucas Lixinski, Ali Ahmad Nobil, Thieu Besselink and Alun Gibbs for their various constructive comments. This paper is better for their input. Responsibility for errors and opinions is my own.

[*] Department of Law, European University Institute

My personal thanks go to Michael Blecher, who, in his introduction, explains the thrust of the three sections of this issue, emancipating me from that responsibility and leaving me free to explore some of the tensions I consider fundamental.

As for the conference itself, there is no need for me to underline the quality of the contributors, but I would like to thank them for writing papers as diverse and challenging as they are unified and inspiring. And, though much can be learned from each contribution in isolation, all the papers can be read in a day – it goes without saying that the whole is greater than the sum of its parts.

What is clear from the collection is that, for those of us (the present author included) who shudder at the mere mention of "technocratic governance" or "comitology", it is not enough to wallow in nostalgia for the mythological (and, in retrospect, blissfully simple) tripartite separation of powers in the nation state. Nor is it satisfactory to succumb to the sense of powerlessness noted by Negri, that sense of impotence created by mass society, the dizzying, contemporaneous growth and shrinkage of our world. In Europe, at least, though I hardly think we are on a runaway train of postmodernity, we might well have bought a ticket for a mystery destination via these queer new locations of power.

This Editorial is not so bold as to draw conclusions but makes a simple request of the reader; and that is to keep three distinctions in mind when contemplating these papers; namely, between (i) *public and private spheres;* (ii) *moral and prudential actions;* and (iii) *law and politics*. I shall refrain from defining these distinctions because, apart from pre-empting my tentative suggestions, they are unstable, and like tectonic plates, they seem to lock together underneath this debate. Even more interesting than the internal instability of these distinctions, is the precarious interface between them. That is to say, when one theoretical fault line shifts, the others shift in compensation, in a seismic reaction. The reader is asked to keep these tectonic dynamics in mind so as to further our understanding of what might be called *the geology of governing society*.

Public and Private

Joerges sets off at a brisk pace, making the counter-intuitive assertion that rather than European-made law suffering from a democratic deficit, it can cure the undemocratic structural malaise of the Member states. How are we to take this? Europe, of course, to some

extent, entails an admixture of democracy with liberality, in that the confluence of cultures dilutes majoritarian politics. Europe makes liberal (and not so liberal) democracies act in a manner *truer* to the constitutional promises they have made to themselves, by promulgating laws (however ambiguous or general they may be) applicable to all. Further, the inclusion of plural societies of different colours and stripes, which inexorably accompanies European expansion and unification, necessarily introduces more points of view: That cannot be bad for democracy, which can only really flourish where different voices can talk and reason it out, reaching conclusions superior to those they would have reached, given their own 'dull natural abilities' (Spinoza), selfish predelictions, and parochial viewpoints. So, yes, in this very pure sense, Europe may well make us all more liberal, and, paradoxically, more democratic.

What is the purview of the political in this liberal democratic utopia? Ciccarelli notes that liberal governments are keen to delimit the ambit of the political, relying on other forms of authority to govern behaviour, such as religion, civil society, and reformers. But to what extent is the private *private* if it is elevated to the status of public good? And how are the activities cited by Ciccarelli non-governmental if they influence and in some cases exert authority?

Frankenberg pinpoints an important issue for contemporary Europe, asking whether organisations of civil society relinquish their civil eminence where they are integrated into state decision-making. Does this question require a "yes or no" answer or does it merely trace a fault line? Can we analytically fence off the public from the private in discussions of civil society or are such distinctions misleading oversimplifications?

Frankenberg tells us that associations of civil society have always besieged public institutions, but can we say that this collective, and, thanks to the media, frequently high profile, activity is not public without involving ourselves in a contradiction? Is pressure not a form of participation? Democracy is much more than the casting of votes.

In the context of new social movements, Allegri develops this point, endorsing Curtin's observation that it is difficult to differentiate between the representation of private interests and the characteristically more public deliberations of civil society. So is the tag 'private' just a fig leaf?

Well, social systems such as the internet, worldwide broadcasting media, and transnational trade constitute what Teubner calls an "accelerated differentiation of society" into "autonomous social systems" that escape from "territorial confines". These changes should cause us to question the utility of naïve notions of public and private that correspond to state and non-state or official and civil.

Dine also locates the superficiality of the neat demarcation of public and private, but this time using the compass of corruption. She questions the World Bank's definition, "the abuse of public office for private gain" and observes that, subsequent to the Enron fiasco, Transparency International began to understand corruption as the abuse of "entrusted power" for private gain. In a complex society where *de facto* power is exercised by a multiplicity of actors, this definition would seem, at the risk of ambiguity, more likely to capture a serviceable, modern understanding of malfeasance. The lesson might well be that a crude categorisation of public and private can, oddly enough, corrupt our sense of corruption.

Sticking with the corporate theme for a moment, Teubner can provide us with a link to the next unstable distinction between morality and prudence; that is between actions undertaken for the benefit of others and actions undertaken for the benefit of the actor. He argues that a business does not exist simply to enrich its shareholders and workers, but to fulfil a broader role in society, for the common good. Bronzini homes in on this fissure between the public and the private, the moral and the prudential. He observes that, due to the spread of capitalism through multinational companies and networks, the welfare state's political institutions are no longer connected to economic decision-making centres. The public and the private, the moral and the prudent have sourly parted company. How are they to be reconciled? I shall return to this in the conclusion.

Morality and Prudence

So entrenched is the contemporary partition between morality and prudence, that casting any doubt on it might attract the criticism of wishful thinking or quackery. Arguments to the effect that elevating one's soul by helping another is preferable to enriching one's bank account are often given short shrift outside of religious and (sometimes) academic circles: Dine explains the corporate mindset according to which considerations other than profit are seen as excess baggage or ballast to be jettisoned. Nevertheless, since Cicero, an above-average statesman and lawyer, considered the then-fashionable philosophical separation of the moral and the

prudent to be the root of all pernicious behaviour in society, the matter might be worth a few lines of consideration.

Here, we can ask whether this corporate mindset is based on a depraved understanding of self-interest, perverted by materialism. That is, the attribution of a money value to all things has the effect of stripping all things of value that cannot be expressed in pecuniary terms: To put it another way, modern capitalism has misappropriated the liberty to allocate value according to non-monetary indices. For present purposes, this might be called the *devalorisation of value*. It is the collapse of the imaginative capacity required to estimate value external to the artifice of a share price. This logic tells us that if money can't buy friendship, friendship must be worthless. When this devalorisation of value is coupled with a belief in the invisible hand, the doctrine according to which pursuit of private gain redounds to the common benefit, the unstable distinction between morality and prudence becomes entrenched.

At this juncture, I would like to distinguish between the belief that self-interested action can benefit others and the belief that moral actions (actions favourable to others) are prudent actions (actions conducive to our own wellbeing). The two are not the same and it is the sleight of the invisible hand that hoodwinks so many depressed capitalists, for whom, after the alleged End of History, purchase has replaced politics, and stock has substituted suffrage. Dine draws our attention to the fact that seemingly pure moral actions may turn out to be prudent too, and that corporate governance based on pandering to shareholders is not only misguided but imprudent, as it might entail heaping intolerable pressures on the company, and, eventually a loss of faith in the markets as companies fiddle and fudge to produce ever buoyant share prices.

Returning to the tectonic relation of the public and private to the prudent and the moral, Blecher, in his contribution appropriately entitled, "*Mind the Gap*" helpfully interprets Bronzini to suggest that we might view legal personality as a privilege that entails social responsibility. This allusion to social justice, to the possible alignment of prudence and morality through balancing public and private interests, sends us toppling into the next chasm, between law and politics.

Law and Politics

Zagato registers the increase in the number of factual entities operational in the horizontal dimension of international law. On the European plane, think of the proliferation of expert bodies, committees, unions, non-governmental associations and so forth. Clearly, these new forms of societal management can blur the line of demarcation between law and politics.

"Governance" is an ambiguous term, and, though I will not go into detail here for want of encroaching on ground already covered in this collection, I will note that it has something of both law and politics about it. Further, international law has been said by some to include a strange "soft" variety of law, which persuades rather than coerces, and is dissimilar to the steel rod wielded by the strong arm with which we are familiar. On the European plane, law has been asked not to "enforce" but to "harmonize" and, moreover, Joerges suggests that the theoretical approach to law required by the European polity is one of "conflicts", of synthesis. He then reins in this concept and restricts the role of law to promoting the "deliberative quality" of European governance. So where, if anywhere, should we draw the line between law and politics, and is the line we draw bound to be faulty?

Correspondingly, are national and supranational courts, who Bronzini says we may regard as competing in a virtuous cycle, now taking political decisions? Are they flexing new diplomatic muscles in their mutual - albeit circumspect - regard or are they learning the political trick of deferring and abdicating from decision-making because of the availability of alternative fora? Claimants should not become victims of political judiciaries, reticent to make a decision simply because of the complexity of the multi-level regulatory context in which they have to reach that decision. Hannah Arendt was right (we can assume this wasn't attributable to the influence of Heidegger's embrace of national socialism) to note that the worst form of governance is not tyranny but bureaucracy, where power is exercised in such an obscure and diffuse manner that nobody can be held responsible for malfeasance. This wariness should colour all our evaluations of judicial behaviour in these new realms.

Much has been made of the dynamism required of law in this collection. Legal rules restrict and enable. Blecher refers to immunisation strategies and strategies against immunisation. I think that another useful way of expressing its paradoxical role, especially in a complex polity like the European Union, is to say that it must both *paralyze* (in the sense of restricting the ambit of permissible behaviour to guide human interaction) and *mobilize* (promote decision-making processes, facilitate the making of new laws, guarantee democracy).

Returning to finance for an example of what I am driving at here, Teubner's advocation of the incorporation of non-shareholder groups into decision-making is geared towards the paralysis of the self-destructive tendencies of businesses and the mobilization of their powers of internal control, to awaken the corporate conscience to non-economic interests, which, as I have gently speculated here, may well turn out to be prudent business too. Private companies, can without damage to their shareholders, act in the public interest, considering themselves limited by contemporary political morality and, where (like today) that political morality is itself somewhat deficient, contribute to it. Surely European businesses (let alone Japanese rice producers) can do more about the global food crisis, for instance.

It would seem that we have to be careful in this realm of novel political modalities, not to pollute our conception of law. The aim of politics is justice, and its tool is the law. Law is not a substitute for, or supplement to, diplomacy, or political disputations and, though the discovery of law might require an adversarial procedure and judicial wranglings, eventually, law is that which is enforced (or can be enforced).

Moreover, this need not restrict law's afore-mentioned dynamism. Both enabling and restricting rules are enforced. A steel rod wielded by a strong arm can paralyze and mobilize.

Conclusion

A word on justice and society before I leave you to enjoy the collection.

Blecher tells us that we must resign ourselves to a continuous and enduringly insufficient process of conflict and cooperation, deconstruction and reconstruction, in our struggle to achieve justice. And, where social power is exerted by an ever-changing cast, I would imagine that the law must be ready to rely on its intrinsic dynamism, to change the scene. We should take care that our law-making organs are not so cumbersome that the law is slow to react to *de facto* shifts in power concentration.

On a positive note, it is worth acknowledging the unique opportunity presented by the Europe of new societies and new forms of governance and identity for recasting the relations of the private and public, refining the relationship between the moral and the prudent, and doing so through new forms of law and politics. Della Porta has much of value to say about the

elaboration of attitudes in European Social Fora, which though they might run contrary to the received wisdom in Brussels, are a clear manifestation of the development of not an alternative but a richer European identity. Allegri is not wrong to note the richness of new public spaces of a post-statal variety, but we should mind that these new spaces do not become occupied with the same, pre-existing and unsatisfactory social inequalities sporting a different guise.

Briefly recalling what I said above about the unstable distinction between the public and the private, we should also recognise that we are constitutive of society, that in choosing our actions, we create our worlds and we govern ourselves. In this narrow sense, there is no such thing as a private interest. Our choice of private interests, our delineation of a sphere as private, is a quintessentially public act.

Returning to Bronzini's insight about the disjointedness of financial and social Europe, it would seem that Europe's passage to social justice requires the marriage of its two bodies, stylized (however unfairly) in the popular imagination as trouserless gay rights marchers in Berlin and well-tailored paper-stackers in London. Teubner usefully highlights that human rights function as interpretive tools in the discursive conflicts between the competing value claims of the potentially totalizing influences of various social systems. "With these rights I do thee wed," said the marcher to the paper-stacker…

In the coda, Hendry tells us that much turns on the coincidence of singularity and commonality. How right she is. Society is nothing but the idea it has of itself. It is sheer self-perception. And civil society, pursuant to Frankenberg, is a *project*; it is the project of justice, and governance, and the generation of a European identity.

So as you survey these papers, please keep in mind the tectonic plates underlying the debate - *the geology of governing society*, because, notwithstanding the quality of this collection, we should always endeavour to build our theories, and our societies, on solid foundations.