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"Spaces of Normativity"

Editorial: In Normative Space

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This issue of the European Journal of Legal Studies opens up the second volume of the periodical. In many ways, it is very convenient that an issue that marks a new beginning for the publication is dedicated to emerging areas of law or new 'spaces of normativity'.

Before I move to discussing the topic and the contributions to this issue, I would like to focus on some new features of this new volume of the EJLS. First, we have developed a new website that improves on the strengths of our previous website and incorporates some new features, such as a search engine to enable readers better to explore our growing archive of cutting-edge scholarship.

Secondly, the Board of Editors of the EJLS has changed its linguistic policy. While in the first volume we ensured that each article was published in two European languages, at least one being in English or French, an assessment of the cost-benefit of this feature of the EJLS has led us to reformulate our policy. From this issue onwards, the EJLS will still accept submissions in all European languages (subject, naturally, to the linguistic abilities of the Board), but translations will only be provided in case the languages in which the articles have been submitted are not understood by large portions of the EJLS readership.

The third feature is the addition of a book review section to the Journal. Through these reviews, our aim is to offer intellectual dialogue, by fostering the discussion of new book releases. More than simply describing new books and calling attention to them for our readership, our aim is to discuss claims and ideas, and offer new critical perspectives on ideas advanced in the books, as a means to offer a supplementary tool to those reading the books reviewed.

In this issue, we have two book reviews. The first is written by David Baez Seara and it reviews a book by one of the European Journal of Legal Studies's authors, David Ordóñez

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Solís. Ordóñez Solís's book is in many ways inspired by the content of his contribution to the EJLS,[1] as well as by other articles published under the same issue, testifying to the importance of gathering scholarship in issues each dedicated to exploring the several dimensions of a single topic. Baez Seara examines Ordóñez Solís's book by investigating the concept of legal pluralism, one of the core concepts in it.

Another book review is written by the present author and it is a review of a collective work, edited by Francesco Francioni and Federico Lenzerini, commenting on the 1972 World Heritage Convention for the protection of cultural and natural heritage. The review looks at the growth of the area of cultural and natural heritage law, and the importance of the system created by this 1972 instrument, the reach of which has extended much beyond what was originally devised. It is a portrait of the development of a living instrument of international law over more than three decades of practice.

Thinking of spaces of normativity in contemporary law implies not only looking at the emergence of varying spaces of normativity in positive law but also considering them from non-legal perspectives. Two non-legal ways of looking at normativity appear in the contributions you will find in this issue.

The first way is to look at the idea from a theoretical perspective, which may be either political or adopt a more general philosophical take on the question. This first non-legal way to address the matter -that is, the political dimensions of normativity and the spaces created thereby- is represented by Antonio Estella's article. He looks at the relationship between credibility and flexibility in the political process and the way this affects law-making. Using the case of presidential term limits as a background for his discussion, Estella examines the choice between law and politics as different tools to encapsulate commitments. Law, according to him, offers the maximum of credibility actors in the political process can hope for, even though choosing the defined, binding set of rules offered by law over the open-ended, fluid solutions one can find through politics implies a certain loss of flexibility. It is the motivations of the political actors when making the commitment that determines whether law or politics will be chosen, either at the moment of making the commitment or at the moment

[1] **D. ORDÓÑEZ SOLÍS**, "Los Jueces Europeos en una Sociedad Global: Poder, Lenguage y Argumentación"; "European Judges in a Global Society: Power, Language and Argumentation". *European Journal of Legal Studies*, 2007, Vol. 1, No 2.

of implementing it. Estella's contribution looks therefore at how the political process constitutes a new space for legal action, but also at how the very same political process can engulf law. Politics is, thus, a space of normativity and law a space of politicisation.

A more general philosophical take on normativity, addressing the legal effects of changing self-perceptions human beings have, can be seen in Rostam Josef Neuwirth's paper. Neuwirth analyses the changes in human perception brought about by technological innovation and how these changing perceptions have affected the regulatory process. He looks at law as mnemonics or, more generally, as a cognitive process. He argues for a cognitive approach to law, through which legal scholarship should look less at the periphery of legal process and more at its core, at how the human mind operates in the understanding of core norms and applies them. He argues that territoriality, sovereignty and other key concepts for the understanding of the notion of 'spaces of normativity' -discussed below- should be taken as secondary to mental processes, as mere projections of the mind to fill *lacunae* created by a lack of self-understanding. He further argues that the current tendency towards over-regulation is a product of this lack of self-understanding, and that fundamental concepts must be reassessed in light of new technological advances that allow for a better understanding of the human mind and how it works.

In this sense, the mind is the primary space of normativity and all other emerging spheres of legal action are incomplete and insufficient responses, which fail to acknowledge the role of the human mind in constructing reality. This resembles Plato's myth of the cavern, in the sense that it promotes an ideal reality that exists on a perfect plane and can only be partially perceived by our senses; becoming thus our imperfect, over-regulated reality. As long as the change in scientific paradigm that Neuwirth proposes does not happen, one must still look at the currently existing normative spaces and their treatment by the law.

When one thinks of 'spaces of normativity' from a legal perspective, one necessarily thinks of areas in which the law is applied. This idea is loosely grasped by two different notions, one that is connected to both legal and political theory and the other more strictly legal. The first notion is that of sovereignty, addressed by Marinus Ossewaarde's article in this issue. He looks at the Westphalian and ancient Greek or Attic conceptions of statehood, investigating the role of sovereignty in these two types of states. He argues that the notion of sovereignty is restricted to the Westphalian and post-Westphalian states, by looking at Carl

Schmitt's "poetics of space". Analysing the "poetics of space", he infers that the *nomos* of Schmitt's theory bases normativity on boundaries and delimited spaces, whereas the same was not true in Attica. In Attica, sovereign will was not the basis for law, as in the Westphalian legal space; on the contrary, it was the equivalent of lawlessness. The rule of law in the city-states of Attica derived from the rule of reason alone, and not from some extraneous idea of sovereignty.

While Schmitt prophesises that the future of the European *nomos* goes beyond the boundaries of the nation state, he is incapable of offering an alternative. The idea of sovereignty has been reinvented, as Ossewaarde reminds us. This has led to eclipsing Schmitt's *nomos*, approaching the Attica ideals of the rule of reason, while not discarding the role of sovereignty. Sovereignty has been expanded and new, supranational global actors have come into play to replace the nation state as the key actor in people's lives. One alternative would be to offer the return of the rule of reason. In this sense, Ossewaarde's reading, by suggesting that the rule of reason -that is, the product of the human mind- can construct and legitimate normativity, refers back to Neuwirth's paper. However, Ossewaarde's conclusion suggests a much darker scenario; one in which, in order to exist, post-Westphalian normativity requires a common enemy and constant war -citing as an example the US-led war against terrorism-, or its reinvention by the simple re-drawing of national boundaries, such as the creation of the European Union as a new state-like enterprise.

The strictly legal approach is illuminated by the concept of jurisdiction. Jurisdiction draws the limits of the application of law according to some pre-defined criterion; be it spatial, temporal or personal. New developments in the operation of the legal order have, however, altered the notion of jurisdiction.

Much of this is attributable to the phenomenon of globalisation. For instance, if one looks at territorial jurisdiction -and, thus, to a territorial space of normativity- as the dominant form of jurisdiction, one must consider that, while there have always been exceptions to strict territoriality, the emergence of a world in which territorial boundaries lose much of its meaning -at least to the extent that they are perceived as limitations upon human activity- casts 'jurisdiction' in a whole new light. As such, analysing 'spaces of normativity' implies asking some questions related to the very core of the notion of jurisdiction and the application of the law.

First, one has to inquire into the extent to which there can be territories beyond the reach of law. Guantánamo Bay is the most common example, but there is also the case of an oil platform outside of the British coast and on international waters, which has been bought by a private individual who soon after proclaimed the independent state of New Sealand. The platform, being on international waters, evades national jurisdictions and is used for hosting gambling and pornography websites. The ambiguous territoriality of these places puts them into a particular position regarding their capacity to 'evade' normativity or create black holes in which law does not apply or, at least, where the application of law is not a given.

Another question is that of new jurisdictional links based on 'personal' characteristics. The protection of vulnerable parties is one example. The paradigmatic example of a vulnerable party in a private law relationship being the consumer, one can look at new legal developments aimed at consumer protection precisely as instances of new spaces of normativity. The idea of the consumer as a subject of rights is spurring legal action at the domestic, regional and international levels; one of the most recent and remarkable developments in this regard is the elaboration of an Inter-American Convention on Private International Law on the Law Applicable to Consumer Contracts and Transactions, that shifts the goal of regulation of private international law from the convenience of the municipal judge to that of protecting the individual consumer.

The contribution by Christian Nick deals with aspects of private law as emerging areas of normativity. He contends that the revision of international private law at the European level necessarily leads to reassessing the concept and the role of 'space' in private international law. While 'space' as the constituent factor in the choice of the law in international private law in the past is eroding, party autonomy becomes paramount. This does not only apply to 'substantive' private international law areas, like international contracts, but also extends to legal sectors where party autonomy has not traditionally played a role in private international law, such as family law and succession law. Family and succession law have long been considered to be part of the *ordre public* and, for this reason, party autonomy was very limited, if not absent. In this way, subjective private 'will' elements in international private law prime over the objective 'space' element and, once again, the state is not the exclusive source of normativity; the power to create normativity shifting in favour of the affected parties.

In the international legal space, one can look at emerging areas and types of normativity from three different angles. One possible angle is that of supra-nationalism and the way international and supra-national law influences national law- and policy-making, directing even the actions of private actors in a rather direct way. Jürgen Friedrich and Eva Julia Lohse's contribution is very telling in this regard. They look at the emergence of new forms of governance in international law that do not derive from the work of states, but from the direct work of international organisations, on a level that is rather technical yet vital for policy-making. Through three case studies -namely, the Food and Agriculture Organisation Code of Conduct for Responsible Fisheries, the FAO Pesticide Code, and the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises-, they describe how these technical measures adopted at the international level by low-profile organisations have an impact in domestic policy design and implementation. As new forms of governance blur the distinction between the domestic and the international normative spaces, as new normative space is created, or at least reconfigured, out of this blurring of barriers. While Nick's contribution focuses on the emergence of normative spaces in the blurring of the public - private distinction, Friedrich and Lohse look at how yet another classic dichotomy of law, that of national *versus* international, is reassessed and gives rise to new spheres of normativity.

Friedrich and Lohse's core argument is that there is a need to increase the accountability and legitimacy of such emerging mechanisms of governance. While in the past the traditional international law of treaties ensured legitimacy, as treaty law required municipal incorporation, these emerging forms of governance dispense with such requirements and an alternative way must be found for them to be appropriately checked. The authors look at instruments of what they call 'sustainable governance'; that is, instruments related to sustainable development issues, particularly international codes of conduct, and the way they influence administrative and private action at the national level. In this sense, their piece offers an innovation by looking not only at the international administrative space created by these regimes, but also to a new, differentiated administrative space created nationally. Their work then evidences how one single phenomenon -that of global administrative law- can give rise to multiple new spaces of normativity, which derive precisely from the interaction between multiple levels of legal ordering, and how a single normative instrument

can cut across these different levels and affect all of them; international law, municipal administrative law, private ordering.

A second angle in international law is the notion of jurisdiction without borders; that is, of universal jurisdiction. Universal jurisdiction can be applied mainly in relation to violations of traditional *ius cogens* and *erga omnes* rules and obligations; even though there have been debates on the possibility of implementing universal civil jurisdiction with respect to the internet, as a space without borders. Marjan Ajevski's and Axelle Reiter-Korkmaz's contributions address these issues from different angles.

On one hand, Marjan Ajevski examines the work of the United Nations' International Law Commission on state responsibility as crystallised in the Draft Articles on Responsibility of States for Internationally Wrongful Acts and the way they relate to the concept of universal jurisdiction. He investigates how normativity is born out of spaces where no framework is clearly and immediately applicable or, at least, not exclusively. He investigates the intersections between the general public international law of state responsibility and the specialised field of international criminal law, particularly with regard to the responsibility for violations of norms of *ius cogens*. A space of normativity is, thus, found precisely in the merging of borderline rules of two areas of law.

Ajevski argues that the notion of 'serious breach' of the ILC Draft Articles can help reinforce and expand the reach of universal jurisdiction as an adjudicative tool for international justice. Communitarianism, or the idea that the international community is in fact a community bound by certain fundamental rules, helps create arguments that enforce the obligations of the members of the international community towards each other. Normativity comes from a new type of bond between states. This fosters the growth of a new, unified sphere of normativity, which in many ways is related to the project of the so-called 'transnational constitutionalism'.[2]

On the other hand, Axelle Reiter-Korkmaz's project is more ambitious than Ajevski's. Her article still deals with transnational constitutionalism. Yet, she does not limit herself to

[2] I borrow this expression from the title of the book edited by Nicholas Tsagourias; **N. TSAGOURIAS**, *Transnational Constitutionalism: International and European Models*, Cambridge, Cambridge University Press, 2007.

offering new tools that can serve as examples of an emerging space of normativity. On the contrary, she contends that human rights and *ius cogens* rules lay the foundations for an "overarching hierarchy of international law", as the title of her article suggests. She claims that the lack of centralisation of the international legal order gives rise to an order composed mainly of customary rules that have crystallised over time, with the exception of the Charter of the United Nations; which, in her view, reverts the paradigm of international law from a sovereignty-based Westphalian approach to an universalistic conception that goes beyond and above the state. As the universal order acquires an objective existence, it turns into a social contract for the world. And human rights are, precisely, at the centre of this revolution.

Axelle Reiter-Korkmaz's reading of the post-Westphalian order can be compared to Marinus Ossewaarde's. While the latter's view is a bit gloomier, though, the former finds in human liberty and human rights the new logic that can reinvent, reorient and transcend post-Westphalian sovereignty. The fact that human rights obligations are 'integral' -and, thus, that they do not require reciprocity for states to be bound by them- actually creates a trend towards a truly objective legal order that no longer depends solely on the coordination of interests among states, but also subordinates states to certain sets of values. Human rights are the new 'world public order' and, as such, recreate international normativity by providing the tools for a new space of normativity. In that new order, states are no longer the almighty subjects of Westphalian normativity, but rather the humble participants of an order aimed at protecting individual human beings in their autonomy.

Yet another issue is that of competing jurisdictions in international adjudication or the existence of plural jurisdictions to address the very same issues. From the perspective of the parties involved in the cases, it creates *forum* shopping. This phenomenon is known in the spheres of international trade law[3] and international human rights law;[4] it is also bound to

[3] A particularly interesting example of this is the poultry dispute between Argentina and Brazil, which was first presented before the MERCOSUR dispute settlement mechanism and, then, re-presented before the World Trade Organisation; **MERCOSUR**, *Laudo do Tribunal Arbitral ad hoc do MERCOSUL Constituído para Decidir sobre a Reclamação Feita pela República Federativa do Brasil à República Argentina sobre a "Aplicação de Medidas Antidumping contra a Exportação de Frangos Inteiros, Provenientes do Brasil (Res. 574/2000) do Ministério de Economia da República Argentina"* [*Award of the ad hoc MERCOSUR Arbitral Panel Constitute to Decide on the Complaint made by the Federative Republic of Brazil to the Argentinean Republic on the "Application of Anti-Dumping Measures against the Export of Poultry coming from Brazil (Res. 574/2000) of the Ministry of Economy of the Argentinean Republic"*], 21 May 2001; **WTO Dispute Settlement Body**, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, DS241, Panel Report, 22 Apr. 2003.

[4] One recent example is that of the Norwegian religious education cases, in which the victims were divided into two groups, one presenting the case before the European Court of Human Rights and the other before the United

occur in cases of international environmental law. From the perspective of general international law, this multiplicity can be seen as creating not necessarily fragmentation but a counter-movement, to the extent that these multiple *fora* communicate amongst each other for one reason or another; creating, in fact, much more uniformity than it is suggested at first sight. This also relates to transnational constitutionalism.

The phenomenon of transnational constitutionalism -and the normative spaces created by it- are by no means restricted to international law and it extends to European Community law. The contribution by Aurélien Raccah offers an interesting insight on the European dimension. Aurélien Raccah looks at how EU legislation makes its way into national legal orders, focusing on the direct application of EU law by regional and local authorities in three EU member states; the United Kingdom, Germany and France. To a certain extent, this recalls the exercise by Friedrich and Lohse -mentioned above- to the extent that the direct application of non-national law by local authorities, without municipal implementation, gives rise to a new sphere of normativity. But Raccah's argument goes beyond that; partly because of the nature of European Union law, which is meant to have direct application by the national judge. He looks not only at how national authorities have incorporated and applied EU law at the central level of administration, but also at the local and regional levels; fragmented and diverse, yet united by the application of a single body of law that has not been laid down by the central authority of their states.

Oreste Pollicino's article examines the European arrest warrant as an example of the new phase of European constitutionalism, based on the third pillar; namely, police and judicial cooperation in criminal matters. Looking at the German, Polish and Czech constitutional reactions to the European arrest warrant, Pollicino discusses how the European Union is increasingly walking towards being a more unified order, much in the way that Ossewaarde talks in his article. While constitutional courts in many of the member states still worry about losing their power of 'last word' in all legal matters concerning that specific country, others have embraced European constitutionalism in all of its dimensions.

European constitutionalism is also the topic of a one-day high level conference that took place at the European University Institute earlier this year. In a heated debate, Mattias

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Nations Human Rights Committee; **H.R. Committee**, *Unn and Ben Leirvag et al. v. Norway*, req. No 1155/2003, 23 Nov. 2004; **E.C.H.R.**, *Folgero et al. v. Norway*, req. No 15472/02, 29 June 2007.

Kumm, Julio Baquero Cruz, Miguel Poiares Maduro and Neil Walker offered four competing visions of European constitutionalism. This debate evidences that, while the European constitutional space is a tangible -if yet still emerging- sphere of normativity, there is still room for much debate as to what one expects to accomplish with such a space. Accordingly, when one speaks of spaces of normativity, the discussion should aim not only at proving their existence, but also at uncovering their goals.

This awareness colours the contribution of Pauline Westerman's article to this issue. She also looks at the contribution of the European Union in creating new forms of normativity, but she looks at them from a more general perspective; examining how legal orders tend to exclude some people or, at least, to create obstacles to individuals who are deemed 'unwanted' by society. As a matter of fact, instead of saying that the legal order legitimates pre-existing social prejudices, she comes to the point of affirming that it is the unequal legal order that gives rise to these prejudices. She argues that the European Union's changing legal structure accentuates this exclusion, while at the same time expanding and covering terrains that had previously escaped formalisation, by proscribing states of affairs instead of only regulating relations involving people. A relational view of law -regulating rights, duties and institutional arrangements- is no longer there; instead, what one finds is goal-oriented legal discourse.

Pauline Westerman's article is a sad reminder of how spaces of normativity, even though they can take up more areas of regulation, are by no means automatically promoting justice and human well-being; at least, not for all. The fact that expansion of legal reach is not necessarily accompanied by greater inclusion must always be borne in mind when devising spheres of normativity.

This set of articles does not tackle all the possible issues related to 'spaces of normativity', but it is an interesting and rich collection. And it proves us all that normativity can take on many forms and operate in multiple spheres. This serves as a reminder of the power and the limits of law. These texts show how law can make its presence felt in multiple spheres of human activity, some of which were originally outside the reach of the law. While this might be encouraging for lawyers all around the world -because it means that law is effectively present everywhere and that, hence, there will always be a need for lawyers-, it is also important to keep in mind that law is supposed to operate as a fallback mechanism to

control abuses in human interactions and not as a master plan for them. Such a ‘legalistic empire’ can only keep human beings apart from each other, from finding solace in spaces filled with mandates other than normativity. These law-free spaces are important and the reader should bare this in mind while going through these texts. On behalf of the Editorial Board of the European Journal of Legal Studies, I hope you will enjoy reading them.