



European Journal of Legal Studies

Title: Editorial

Author(s): Benedict S. Wray

Source: European Journal of Legal Studies, Volume 4, Issue 1 (Summer 2011), p. 1-6

Stable URL: <http://www.ejls.eu/8/97UK.pdf>

EDITORIAL

FROM GOVERNMENT TO GOVERNANCE: REFLECTIONS ON CHANGE

BENEDICT S. WRAY*

It is an exciting time to be writing my inaugural editorial as Editor-in-Chief of the EJLS. All around us, sea-changes in governance structures, so long discussed, are taking shape, developing and metamorphosing all over the globe. This evolution is also mirrored in academia on both the doctrinal and institutional levels, and I wish to offer some brief thoughts on what these changes may mean for the future, before turning to the very concrete cases which play out in the pages of this issue, both in terms of how we publish and what we publish at the EJLS.

1.1 Academia and Globalization: The Old Story

The latest generation of aspiring academics could be forgiven for a certain jaded attitude towards the phenomenon of globalization and the host of new vocabularies that have grown up around it. Increasing economic interdependence, the so-called retreat of the nation-state, and the shift from nationalism to globalism and regionalism on the one hand and the countervailing trend of localism on the other, have become stock items for debate. One only has to look to the books under review in the present issue for examples: one book on the European Court of Human Rights, a regional endeavour, another on the interaction between human rights law and general international law, two books on the changing role of business in global affairs, and finally a contribution to the burgeoning jurisprudence of transnational law. The newcomer, confronted with apparently vast interlocking literatures that cross disciplines in ways hitherto unprecedented, might ask where on earth we go from here.

1.2 Methodological Tectonics

Predictably, substantive attempts to examine globalization initially fell along the well-known fault-lines of the nation-state and the international community. For example, it is a familiar theme for law and political science students to write essays on the democratic deficit in the European Union, essentially using the lens of a democratic nation-state to critically examine a supranational phenomenon. Ulrich Beck has famously warned against this type of “methodological nationalism”, by which our national academic culture provides implicit assumptions which affect our approach to methodology. An excellent example of an area where such implicit bias is a particular risk is in the multitudinous attempts to grapple with the changing nature of the public-

* Ph.D. Researcher, European University Institute (Italy); Editor-in-Chief, European Journal of Legal Studies; LL.M.; Maîtrise en droit; LL.B.. I wish to thank Andrea Talarico for comments on an earlier draft. Any errors or omissions are entirely my own. © Benedict S. Wray.

private divide, concepts which in their present form are as intrinsically national as popular sovereignty, something that has led to much mutual incomprehension and academic talking past each other, as authors rely, without explanation, on the words to do work that is no longer within their capability. And, while some conflate private with “non-state”, others see national private entities as having become dislocated from their state-derived origins, without exploring whether this affects the label private per se.

But there has been a shift, and academia has been right to make it. As we move from the paradigm of government to governance in regulatory structures, with transnational corporations becoming simultaneously the regulatee and enforcers of global supply-chains, alongside an increasing reliance upon supranational or intergovernmental structures to harmonise, regulate and prescribe norms, academia has witnessed a similar progression. Doctrinally, this can be seen in the constructivism of research agendas such as Global Administrative Law, or the Transnational Private Regulation project, as much as in moves in jurisprudence towards understanding and theorizing an emergent transnational law. Institutionally, it is visible in the proliferation of centres for global governance, human rights and development, law and cosmopolitan values, transnational regulation, and so on, which may come to play an important role in disseminating ideas beyond the academic sphere and into the executive and political arenas, but which owe a corresponding responsibility to ensure the intellectual rigour of any ideas thus transmitted.

1.3 Internal Frontiers?

The tendency, in the globalized world of norm-proliferation, has been towards increasing specialization. Thus the EU began as an economic enterprise, similar to the WTO; Human Rights, as a similar “self-contained regime”, to use the words of Bruno Simma. A more recent example is given by International Investment Arbitration, which has a comparable methodological bias derived from investors’ rights regimes contained within bilateral investment treaties and customary international law. Yet the EU has fairly consistently moved towards increasing integration of non-economic issues, culminating in the Charter of Fundamental Rights, while Ernst-Ulrich Petersmann and Philip Alston famously fell out over the issue of whether human rights considerations should be similarly integrated at the WTO. Some litigation creep in arbitration regimes is discernible in the increasing acceptance of *amicus* briefs, but some commentators oppose the use of such devices to introduce inappropriate considerations into the investment fora.

One can see a similar trend to specialisation in academic disciplines, maybe in response to the increasingly globalised and pluralist nature of academic dialogue. The rise of English as the *de facto* language of international communication has been accompanied by an enormous multiplying of the forums for debate on a given issue, while previously isolated debates now find themselves inescapably drawn into the heaving global morass of doctrine. Perhaps inevitably, there has led an increasing fragmentation of academic disciplines into interloping and overlapping sub-disciplines; the rise of the “law and ...” approaches providing but one celebrated example.

Without wishing to denigrate the importance of highly detailed study on specific areas and points of interest, this trend carries with it potential risks. I would point to three in particular, although this is not intended as in any way an exhaustive list. The first is isolationism, where a particular sub-discipline artificially shuts itself off from others, and becomes purely self-referential. While perhaps not a problem in itself, it risks creating widely divergent notions and missing key innovations from its neighbours which could lead to mutual advancement. The second is rock-hurling, whereby debate is weakened by a tendency to talk past one another and misunderstand the essential tenets of the other. The third is extreme path-dependency, whereby a particular (sub-) discipline becomes set along a track which is fundamentally unsound, or which cannot adapt to changing circumstances, but which thanks to self-interested behaviour and interdisciplinary competition, mean that it is often difficult for the discipline itself to adapt.

My humble reflection is that, as we move away from national methodologies to post-national ones, we take time to reflect on the globalization of academia itself and adapt our methodologies accordingly. For, I would argue, not only have methods gone global in the geographical sense, escaping their national contexts and constraints, but many objects of study have also escaped the bounds of their original discipline. It is no longer enough, as it once was, to be “just” a private lawyer or political philosopher. We need research design, and training, that grounds research in its wider context while avoiding the risk of literary overload. Becoming a successful multidisciplinary, it is often said, is overly ambitious to the point of impossibility. My plea is rather for a return to limited poly-disciplinarity. Bentham’s political philosophy is almost inseparable from his legal theory, and even H. L. A. Hart’s work is infused with the political and the sociological in his discussion of primitive to complete legal systems. Today, the academic mileage of Amartya Sen’s work on capabilities provides a roadmap for similar cross-disciplinary approaches, while interactions between economists and lawyers are pointing out fundamental weaknesses or omissions in each discipline’s model of the firm/corporation. Private international law can both learn from and inform jurisprudence, while human rights and economic integration cannot fail to take account of one another without leaving accountability gaps in their wake. And, I would argue, even the specialist study must show a sensitivity to, and awareness of, the wider context and effects of a particular regime.

Nowhere is this truer than in the case of Climate Governance, which beyond being a pressing issue across the academic sphere, must confront a wide range of considerations, among them economic and social development, issues of inequality and the global south, the rights of indigenous peoples, migration, human rights, investment, the role of non-state actors, the nature of harm and remedy, sovereignty, rights and duties in respect of exploitation, property, and responsibility towards future generations. The cost of ignoring any one of these is potentially disastrous, and finding the way forward can only come from cooperation and understanding across disciplines, and research agendas which leave room for mutual learning and understanding.

2. In this issue

Our symposium on Legal Aspects of Climate Governance opens with an exhortation from Massimiliano Montini to better analyse the ‘reality’ of the climate change regime, arguing that better protection can only come in the context of significant reform of the present climate governance framework. This reform, it is suggested, could go down two tracks, the first with international legal backing and UN architecture, and the second envisaging the G-20 as guiding and overseeing political agendas.

Beginning the substantive articles, Rafael Leal-Arcas continues in a similar vein, examining the failings of the UN-led negotiations and examining approaches based on cooperation between the major greenhouse gas emitting states. Anastasia Telesetsky, in the next contribution, takes a different tack, arguing that current interstate negotiations fail to acknowledge the necessity for collaboration from non-state actors. Instead, she proposes a hybrid, or co-regulatory solution and takes the Dutch covenant model as a case study. Although co-regulation has limits, which she rightly acknowledges, it provides an avenue as yet unexplored in transnational climate governance which may bring benefits.

In his study of REDD (Reducing Emissions for Deforestation and forest Degradation), Sean Stephenson makes the case for using official development assistance as a source of REDD financing. He argues that this is consistent with both development and environmental goals, and provides a potential “win-win” situation for contributor states.

The last piece in our climate governance series comes from María León-Moreta, takes a critical look at the biofuels regimes, in particular the production of agrofuels, from the point of view of its environmental and human effects on local populations. She examines in particular the risks for the rights to land, water and food, and concludes with some interesting reflections on biofuel production and sustainability.

Our general articles come in two flavours this issue: jurisprudential and European. In the first, Alexander Green takes down an aggressively Dworkinian road, arguing for an interpretivist theory of legality. However, his thesis attempts to overcome some of the limitations of Dworkin’s concept of law as integrity by instead holding that – properly understood by interpretivists – true propositions of law never conflict with morality. Davide Strazzari, on the other hand, looks at the often neglected area of cross-border cooperation, focusing on harmonizing trends within the EU and Council of Europe legal orders, as well as the role of national states.

Finally, there are some interesting and varied book reviews. Vesselin Paskalev reviews List and Pettit on Group Agency, and offers some interesting conclusions on the rationality gaps between individual and collective personality. Axelle Reiter, meanwhile, critically appraises *The Impact of Human Rights Law on General International Law* by Profs. Kamminga and Scheinin. The fruits of a report by the Committee on International Human Rights Law and Practice at the International Law Association, it is rightly described as an ‘ambitious’ undertaking which inevitably raises new questions to which we must seek answers. Sticking with the human rights theme, Alba Ruibal reviews Anagnostou and Psychogiopoulou’s ‘landmark analysis’ of the European Court

of Human Rights and Minority Rights, while last but not least, Marco Rizzi offers some considered reflections on the trials and successes of *Rough Consensus and Running Code*, an incursion into the legal theory of transnational law by Calliess and Zumbansen.

3. Changes at the EJLS

I want to conclude with a discussion of changes that are underway at the EJLS. It is currently in vogue to lay bare the inner workings of some journals in a bid for transparency, but I would like to underline that the EJLS is, and always has been, committed to the highest standards of independence and transparency. Our peer review system involves anonymized, double-blind review for all articles that fall within the purview of the journal, whether commissioned or not. It has been exciting taking over at what is such a crucial stage in the development of a young journal, and inevitably there are ongoing challenges which must be met.

We have recently taken the decision, however, to change our governance structure to a tripartite one involving smaller, more efficient decision-making and consultation bodies, but a much wider pool of available editorial expertise. I am delighted to announce the creation of the new Editorial Advisory Board, made up of former members of the editorial board and the rest of the EUI scientific community. Similarly, the old Academic Advisory board has been streamlined, and now consists of four Departmental Advisors who meet regularly with the executive to discuss policy and provide guidance. Details of the membership of both these bodies, along with the current Editorial Board, may be found in the opening pages of this issue and on the website.

Parallel to the governance reforms have been changes to how we publish. In broad keeping with the old policy of three issues a year, we now aim to run two main issues, in summer and winter, with one special conference issue per year. Meanwhile the main issues are split into a section for general articles, and a themed section, or symposium, following a call for papers. The symposia thus continue our tradition of inviting inquiry and debate on noteworthy issues, while the general section opens up the doors for excellent articles on any subject within our core subjects. Thanks to change instigated by my predecessor, general articles can be submitted at any time, and will be advance published on our website as soon as they are processed, before being included in the next forthcoming issue. This, we feel, provides a real benefit in allowing authors to disseminate their work as soon as humanly possible, while retaining the benefits of definitive publication for citation purposes. Finally, we have integrated the oxford standard, OSCOLA, for the citation of authorities into our formatting. While not an enormous shift in terms of footnoting style, we believe it will help authors in submitting their articles to us, in particular given the OSCOLA support for footnote engines.

I hope you find the new-look EJLS agreeable, and will continue to follow and support our publication. In addition to our website, we can now be found on Facebook and LinkedIn. Our next issue, in December, will contain a symposium on Citizenship and Migration, the Call for Papers for which may be found on our website.

Benedict S. Wray