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Democratic Empowerment through Euro-Law ?

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More than in any other sub-fields of European studies, the study of law-and-politics in the European Union owes a great deal to U.S. scholarship. Given the differences in structure of the academic fields on both sides of the Atlantic, and the early development of socio-legal studies in the United States (which still has no equivalent in Europe), American scholars have been the first to challenge the “legal-only-based” narrative of the ECJ’s role (see Cohen, Vauchez, 2007). At a time when European law professors were busy discussing whether the nascent body of EC law was indeed an authentic and autonomous legal order, U.S. scholars were already engaging in empirical studies on the political role of the European Court of Justice. After the initial stream of research initiated in the early 1960s by Stuart Scheingold’s *Law and politics in Western European integration* (Ph.D, University of Berkeley, 1963), a second wave spread in the 1980s with Joseph Weiler’s seminal contributions. Those were twofold. First, they suggested the ECJ’s normative supranationalism was an alternative to the shortcomings of inter-state decision-making (1981); second, they insisted on the importance of the Court’s various “interlocutors” in strengthening this judicial path of integration (1994). In a context in which the classic IR opposition between neo-functionalists and inter-governmentalist was still vivid within American scholarship, Weiler’s insights became instrumental to the renewed interest of neo-functionalist scholars in the European Court. After Burley-Slaughter and Mattli’s paper on the political theory of legal integration (Mattli, Slaughter), a whole stream of scholars (Alter, Caporaso, Conant, Mattli, Stone, etc...) have investigated the judicial contribution to Europeanization processes. Strikingly enough, this now important sub-field of European studies (see de Burca, 2005; Conant, 2007) has to this day remained heavily dominated by American political scientists. For sure, many European legal scholars have contributed to the study of European law-in-context (Chalmers, Joerges, Schepel, Shaw...). But as far as political science is concerned, most of the methodological innovations –particularly the construction of large-n data set of judicial decisions- and of the theoretical ambitions have come from the other side of the Atlantic.

Beyond the many nuances and differences, this rich literature has been integral to the building of one of EU’s most established narrative, that of “Integration-Through-Case-Law” (Vauchez, 2008a). For the sake of simplification, one could synthesize it as follows. Step 1, the starting point : the "constitutional" doctrine of the Court produced in the early days of the EEC. Through a series of judicial coups, the Court has built the conceptual (direct effect, supremacy of EC law) and procedural (preliminary rulings) frameworks of genuine legal federalism. Step 2, the driving forces : on the one hand, the mobilization of the European jurisprudence by multinational companies, transnational interest groups and EU institutions that seize this institutional opportunity ; on the other

hand, the national courts' progressive - yet turbulent - acknowledgement of the general principles established by the ECJ (K. Alter : 2001). Step 3, the dynamics: In turn, this support granted by private and national actors to the EU legal order offers the Court new opportunities of expanding the precision, scope, and enforceability of its case-law. This triggers an implacable iterative mechanism that catches altogether interest groups, multinational companies, EU institutions, States and the ECJ in a (allegedly virtuous) circle of "judicialisation", which has not been designed by any specific actor, but to which everybody contributes in its own way (A. Stone : 2004). Although it claims to sketch an "alternative approach", Cichowski's *The European Court and Civil Society* clearly stands in the continuation of this neo-functionalist line of research, perfecting and enriching some of its classic hypotheses. In the particular case, the richness of the empirical data, the relevant mobilization of classic concepts of political science often neglected in the study of the ECJ (e. g. structure of political opportunity, institutionalization processes...) help sophisticate the here above presented narrative (I). However, by pushing it further into classic issues of political science, the book also makes some of the shortcomings of this well-established trend of scholarship more apparent. First of all, an exclusive interest in the dynamics ("Europeanization") and in the balance of powers among institutions (the "supranational" versus the "national", the "political" versus the "legal", etc...) and its related disinterest in the power relationships and the various social and professional fights that structure these processes. Second, a very optimistic vision of the contribution of law and of Courts to the emancipation of citizens from the allegedly close and exclusive circuit of majoritarian institutions. This over-emphasizing brings us back to the American origins of this Euro-law-in-context body of literature. Just as this U.S. look has been crucial in un-veiling what most European legal scholars could not see or what most European political scientists were not interested in seeing, it is importing an American context where courts have a strong democratic underpinning as one of the forum, and where courts (and particularly international courts) have been at the core of a heated political over the last ten years (II).

I/ Neo-functionalism refined

To be sure, Cichowski's research agenda ("how an international treaty governing economic cooperation became a quasi-constitutional polity granting rights and public inclusion?", p. 1) as well as the results she reaches are consistent with the neo-functionalist account of the EU polity-building. Ultimately then, the two main questions she asks, in line with her illustrious predecessors, are: "what are the underlying forces of Europeanization ?" and, relatedly, "who decides in the EC domains of regulation ?". Starting with the fact that the scope of EU regulation has gone way beyond the black letter of the treaties in two specific policy domains (women rights and environment), Cichowski illustrates the dramatic changes that have affected the balance of powers in EC decision-making between supranational and inter-governmental forces. Called upon by various interest groups, the Court was instrumental to this strengthening of the supranational level of regulation, therefore confirmed the fact that the Court "does not function to preserve national practices compared to EU laws" -even when powerful Member States take part to the case. In line with neo-functionalist analyses, Cichowski's book evidences that mobilized interests and supranational institutions (such as the

Commission and the ECJ) mutually support each other and play a significant role in pushing the Europeanization processes way beyond what had ever been intended by the treaty-makers.

Not only does the book unfold the abovementioned “integration-through-case-law” paradigm; it further refines it. Contrary to the purely incremental narrative where legalization and Europeanization reinforce each other in an ever-increasing dynamic, Rachel Cichowski explores the variations in the *timing* and *scope* of the legalization process. This, she achieves by breaking down her data by policy domains and by national settings. To be sure, various authors had expressed some sense of frustration over the exclusive emphasis put by neo-functionnalists on wide-range macro-processes. It had previously been intuited by many that the puzzle of legal integration was less the overall correlation between the amount of ECJ preliminary rulings and the amount of intra-European economic exchanges as singled out by Alec Stone. But rather the cross-national and cross-sector *variations* that is where the two graphs actually diverged (K. Alter, Vargas 2000). Cichowski is however among the first to take this varying as the very enigma of her empirical inquiry focusing at the many “mediations” that lie in-between the two macro-variables. This enables her to enter into the *concrete* and *situated* historical processes through which litigation served (or not) as an engine of Europeanization. The research design and the very rich and diverse empirical material are therefore shaped so as to seize “the factors that affect the preliminary reference rates both within and across member states” (p.37)¹: the strength of national legal expertise in given policy domains, the degree of conformity of national laws to EU legislation, the specific national legislation on legal standing or access to justice, etc... are not peripheral but central to the shaping and the pace of a judicialization process². Interestingly, the author tries to assess empirically the weight of each of these factors thanks to a very large and diverse *corpus* of data. However, one can not but remain disappointed with the treatment of “legal resources”. To be sure, Cichowski is among the first to break with one of neo-fonctionnalists’ major dead-angle : the role of Euro-law practitioners as specialists bearing specific professional interests and worldviews (A. Vauchez 2008b). Legal expertise (lawyers’ specialized networks, amount of legal training in the field...) are indeed considered as an essential factor in terms of interest groups’ proclivity to take on the judicial route. However, the inquiry remains limited in this matter as the indicator build for measuring national legal resources remain unrefined (p. 38). On the whole, although incidentally referred to as essential to the emergence (or non-emergence) of EU terrains of regulation, lawyers’ agency and agenda are given very little attention.

¹ The representativity of the two policy domains chosen (women’s rights and environmental policy) could be questioned. As they are both recent and still relatively weak domains of EU polity compared to others - more ancient such as the CAP or the anti-trust, or more sensitive such as the CSFP- they are more likely to make the case for the intricate and cumulative relationship between transnational mobilization, supranational litigation and EU regulation. As a matter of fact, similar patterns of relationships have actually been observed in *national* settings in these two domains where the bureaucracies created in the 1970s bypassed their weak financial means, limited human resources and marginal positions in the government, by trying to build up a constituency –a “civil society”- and by coopting groups that would help strengthen their weak legitimacy.

² For instance, the fact that there be initially no legal basis in the EEC treaties for judicial action in environmental issues or the fact that “direct effect” of EU norms in that domain has been critical in preventing interest groups to have recourse to the ECJ.

Despite this neglect, the overall picture drawn by the results exemplify that “Europe” is not just *one* land of opportunity *equally* open and accessible to citizens regardless of the nationality, specific interests or stakes. Rather, EU structure of political opportunities (SPO) is highly dependent on national and sector-specific legal and political trajectories. In the second part of the book, the author illustrates the fact that, far from being static, this SPO evolves as activists succeed or fail in opening new avenues that will help them push their agenda *and* as EC institutions (the Commission and the ECJ) seize or ignore the claims filed by the latter before them. Both chapters 4 (women’s rights) and 5 (environment) illustrate the dynamic relations and mutual transformations of players’ strategies and institutions’ opportunities. Thereby, it provides with a qualitative study of the transformations over time of the pattern of relationships between supranational litigation, transnational mobilizations and EU rulemaking across policy domains. Such an analysis of evolution would be more convincing were the whole process not viewed as an ever-repeated spontaneous, and peaceful adjustment of *all* stakeholders (Commission, European Court of Justice, member States, interest groups, activists...) to the changing SPO. To put it differently, the narrative would be more convincing if it was not told from the winners’ point of view, that is from the point of view of those activists, EU civil servants, ECJ judges, national bureaucracies, etc who have succeeded in imposing a specific conception of regulation in these two domains. Looked with the benefit of the hindsight and with the lenses of these actors, the process seems to be this natural process of *adaptation* of groups and institutions to new opportunities and new venues. That “things could have gone differently or things could have failed” is not seriously considered by the author. “Following the actors” would help point at the fact that this legalization process is less a matter of adaptation than a matter of conflicts and power relations in which alternative conceptions of what women’s rights or environment is about and competing sub-groups were defeated and marginalized³. This is not just about providing a “thick description” of reality but rather because the very dynamics of legalization might actually lie in these conflicts. Judicialization in this perspective is not just about the European-judge-intervening-more-in-the-regulation-of-a-specific-policy-domain. It is the contingent outcome of an on-going fight within and in-between between EU-implicated institutions and groups (ECJ, interest groups, national governments, Commission, etc...) for the definition of the “social problem” at stake, its contours, its legitimate stakeholders, its required know-how, etc... There are women’s rights activists who did not favour this judicial route preferring a more classic political repertoire of activism; there are EU top civil servants who certainly preferred over tools of regulation such as the OMC one or more classic bureaucratic ways of action; there are interest groups who preferred to keep the behind-the-close-door type of pressure; there are ECJ judges who were reluctant to grant rights in domains that lack clear recognition in the treaty, etc... “Judicialization” therefore marks the prevailing a constellation of actors (legally-trained activists, pan-European ECJ judges, rights-orientated EC top civil rights, etc...) endowed with specific (legal) credentials taken in a variety of sector-specific struggles but progressively converging under the flagship of judicial regulation.

³ To take an example, the fact that women’s rights autonomize from social rights as far as EU regulation is concerned is not a natural process.

II/ Democratic empowerment with no power relations ?

On the whole therefore, the *direction* of the process (a growing judicialization of EU regulation) ultimately remains identical to the one sketched in the neo-functional account (“once the path was paved, the subsequent development (...) were almost inevitable”, p. 194), and the incremental dynamics unfolds relentlessly, combining Europeanization and litigation. In both policy domains, the balance of powers ends up by converging, the European Court of Justice becoming an essential ally for activists progressively forcing member States to give up some of their power to the European level of regulation. The author’s ambition however goes further as she intends to prove the democratic potential of this process. The argument proceeds as follows: mobilized by stakeholders marginalized in the regulation process, litigation has triggered a dynamics of institutionalization of a “green public sphere” and of a “public sphere for women”. As it opens new avenues for interest groups to participate in EU regulation, this judicial alley “enables individuals and groups who are often disadvantaged in their own legal systems to gain rights at the national and European level”. A “positive trajectory” is therefore forged marked by the “ever closer union” between litigation and democratization that elicits further participation and public access to the policy process. Just as it complements the neo-functional paradigm as it tries to give it a democratic *débouché*, we argue that this research highlights some of its dead-angles. First and foremost, The case for “democratic empowerment” would require a theory capable of seizing “power relations”. I argue here neo-functionalism or neo-institutionalism are not fit for that challenge. As a matter of fact, the “Europeanization” and “legalization” of policy domains are not just about inter-institutional fights over the level and the scope of regulation; they also entail social and professional changes over the credentials deemed necessary to act in a persuasive and effective manner in these emerging EU public spheres. Second, when looking at European courts, American lenses leads to over-emphasize the ECJ’s democratic contribution. I argue that with this very optimistic view of international courts’, the book –in line with the neo-functional literature on the European court of justice- is deeply entrenched in a specifically American context featured, on the one hand, by a specific conception of the democratic potentialities of courts and, on the other hand, by the specific currents of American political/academic debate in which international law and multilateralism are vividly discussed.

-1- The case for the democratic potential of litigation is probably more complex than what the author seems to consider⁴. To be sure, the fact that the narrative presented in the book is strikingly in line with Euro-lawyers’ self-representation should raises some suspicion over its capacity of seizing the whole picture. “Emancipatory functionalism” where the Court is viewed “as a way of taking law out of the hands of bureaucrats and politicians and giving it ‘back’ to the people” (H. Schepel, 2004, p. 3) is indeed today one of Euro-lawyers’ most widespread representation of their own contribution to EU polity. Law, it is implied, belongs to “civil society” and the European Court of Justice is instrumental to its return in its hands. Maybe is it not coincidental that at this stage, the

⁴ The argument is not incidental as shown by the fact that the author has engaged, in other papers, in generalizing some of her results to international courts (Cichowski, 2006).

author's argumentation gets suddenly less sophisticated than in the rest of the book. The premise that the ECJ opens new avenues for participation and allows for overall public inclusion is repeated as a motto –but is never fully discussed. Yet the argument is far from unproblematic. Not only for the obvious reason that the litigation path short-circuits the classic democratic chain of legitimacy of EC institutions (both the Parliament of elected representatives and the European Council of 'elected' heads of government). But also because the book does not challenge the equally classic argument according to which "governance" does not improve but actually endangers democratic participation as it makes accountability more difficult. The complex set of policy networks and the emerging multi-level governance described by Cichowski could well be seen as making the decision making process even more opaque and arcane, therefore weakening political accountability within EU polity while reinforcing the position of the various specialists of this complex jungle be they consultants or lawyers. However, in an attempt to stick to avoid purely ideological debates (Hilbink, 2008), I will stick to a discussion of the approach and empirical results presented in the book. I do not wish here to draw from the broad sociological point according to which litigation structurally favors the 'haves' at the expense of the 'haves not' (Galanter) –although it would certainly have been important to refer to this iron clad rule as suing before the ECJ is certainly a lengthy and costly undertaking. Rather, I wish to echo a perspective of political sociology and point out at the fact that, as these European public spheres autonomize, new bodies of specialists emerge that tend to monopolize the positions in the debate no matter which position is to be defended. From this point of view, the idea according to which the institutionalization of a European public sphere in the two chosen policy domains has marked an "opening" and provided EU citizens with a greater role in the policymaking process can not but puzzle. Particularly to the political scientist as he has been taught that processes of stabilization/institutionalization are never just about inclusion and participation, but *also* about exclusion and self-censorship. Rather than "narrowing the gap" between citizens and policy makers, institutionalization processes are well known to *re-cast* the gap between laymen and specialists endowing it with new and re-enchanted motives (competence, seniority in the field...). In other words, the book's focus on the change in groups and institutions (transnational interest groups and supranational institutions) taking over regulation in specific policy domains might actually overshadow a more profound change in the social and professional conditions of entry (credentials) in the policy game. There are motives to believe that the *opening* of the decision-making process to new actors as put forth by Cichowski has gone along with a concurrent *closure* of the profile (breeding grounds, professional background, career paths) of policy-makers. Or, to put it differently, the lowering of the institutional barriers could well go hand in hand with the increasing of social and professional threshold to participate to the bargaining. The book therefore underscores the fact that the players in these public spheres are not only rivals but "associated rivals" who share a common understanding of what it takes to be a legitimate player in the game and a common interest in keeping laymen outside the bargaining game. Institutionalization, in its sociological sense, also means "stabilization" of both the "social problem" –its stakes, its contours- and of the "legitimate players" –their credentials, their access paths, etc...

In its obsession with the "which-institution-prevails?" question, the neo-functional model provides with many details on the strategies of reified actors ("the

ECJ”, “member States”, “litigants”, “activists”...), but it is not equipped nor does actually it intend to “see” other sorts of power relations. Still, when considered in this perspective, some of the data gathered in the book could actually document such a process of uniformization of the social and professional properties of the stakeholders (regardless of their continued belonging to various institutions or groups) as well as the increasing divide between the in-group and the out-group. Trajectories seem to show that the inter-connectedness and over-lapping of the otherwise contending groups and sites: “60% of DG XI (environment) people are external appointments, off the usual EU career line, and they are overwhelmingly Green activists” (p. 224). Biographical informations indicate that one of the key legal activists on equal payment, Eliane Vogel-Polsky, after having successfully promoted various critical test-cases in the domain of women’s rights before the ECJ (Defrenne I, II, III), became an expert to the EEC and the European Council. Additional documents point out that, in the early 1980s, the DG Employment built around itself a strong network of legal experts. Last but not least, conference proceedings in both environmental and women rights’ domains illustrate the fact that academics, lawyers, EC top civil servants, national agencies’ leaders are frequently brought in *fora* (typically, conferences, journals, edited volumes...).

Considering professional trajectories, individual biographies and arenas of sociability that make up these policy domains is not just a manner of refining the empirical data. Just to give an example: even before she started the legal suits that made her famous in the 1970s, Eliane (not Elaine !) Vogel-Polsky was not just the “isolated” legal activist depicted in the book; but a young law professor at the Université libre de Bruxelles, trained under the patronage of Prof. Léon-Eli Troclet, former Belgium minister of labor and former president of the WTO Board; and a member of the pro-integration milieu of Brussels’ Euro-lawyers, including Michel Waelbroeck, arguably one of the major repeat players of the ECJ, or Jean-Victor Louis, a well-established authority of the field of European law, etc...⁵ Such informations potentially change the whole narrative on the emergence of European public spheres. These data display another view of the *relations* between the various groups and institutions. Many protagonists of these policy domains are not static ; they move across the boundaries (national-European, private-public, law-politics...), they -simultaneously or successively- play the various roles available (activists, academics, experts, policy makers...). On such bases, one could therefore hypothesize an alternative pattern to the one displayed in Cichowski’s book : the institutionalization of a specific European public sphere is made possible by a relatively narrow set of “associated rivals”, specialists who circulate between the various poles of the EC polity while at the same time sharing both social and professional profiles and common views on what is feasible and legitimate to do and claim in the domain. What is at stake would therefore rather be a classic process of institutionalization : among other things, stabilization is produced through the progressive exclusion of political activists to the profit of go-betweeners capable of mediating between the defense of the cause (through an experience in environment’s or women’s rights activism) *and* the requirements of institutional credibility (professional expertise, connections within EC institutions, reasonableness in the claim, etc...). In which case Euro-legalization is not to

⁵ « Agir pour les droits des femmes : Entretien avec Éliane Vogel-Polsky : », *Raisons politiques*, n°10, 2003.

be seen as the opening or the democratizing of a European public sphere, as it is optimistically stated by the author, but rather as a process that ensures the prevailing of specific credentials (transnational/European social capital, legal know-how) over others (national connections, political activism).

-2- Such a representation of the relationship between democracy and courts might actually be a case of “structural misunderstanding” (P. Bourdieu) between American and European academics as the legal and political contexts from which they stem differ dramatically. Traveling across the Atlantic might seem a very short trip to many, but as far as courts and political sovereignty are concerned it remains a long journey.

What appears under the same guise and with the same names, is more often than not be related to a whole different array of connected and opposed concepts. This is certainly not to say that American scholars do not have the tools to understand European specifics ; nor that Europeans have a naturally better standpoint to grasp these very processes. To the contrary, as argued in the introduction, U.S. scholarship had far more “freedom” and was better equipped to seize the contribution of the European Court of Justice to political, economic and social integration. Each academic traditions provides with forms of lucidity and forms of blindness. In other words, researchers travel with their national context of thought (Bourdieu). As for the study of Law, this means essentially two equivalences: Law=case-law and case-law=civil society. In this regard, it comes as no surprise that U.S. scholars have focused almost exclusively: i) on the judicial dimension of legal integration (see the profusion of quantitative analysis on judicial proceedings), ii) on the fact that law is a by-product of “civil society” as its various EU-implicated actors use it for their own sake. The absence of any empirical account of the Legal service of the Commission or of the European Council (admittedly the *Légistes* of the European Union in the sense Kantorowicz gave to that word) as well as on the role of Euro-law professors and doctrine is striking.

This is a reminder that our transnational academic debate requires a reflexive move on the historical foundations of the various categories of thought it mobilizes. The very notions and questions it is moulded into are highly dependant not only on “legal culture” generally speaking, but more generally on the national architectures of power and on the patterns of relationships between law, legal professions and politics in which they were framed. Such an invitation to reflexivity is a call for comparative study of the historical foundations of both American and European categories of thought in order to control more for this bias in international academic debates (M. Garcia Villegas, 2006).

Part of the gap relates to U.S. intellectual/politic currents, part of it lies in the deep-seated and still vivid differences in the law-and-politics pattern of relationship. The first one is more punctual as it relates to on-going heated political/academic debate between neo-cons and liberals over multilateralism and international organizations. In the context of a presidency –that of Bush Jr.- notoriously influenced by neo-cons, international courts have also sparked a heated academic debate with conservative legal scholars (R. Bork, 2003) denouncing courts’ undemocratic role when promoting a liberal agenda of rights against the conservative will expressed in majoritarian institutions. Reviewing the increasingly prolific literature on courts’ difficult relationship to majoritarian institutions, Lisa Hilbink actually indicated the debate had got particularly

sensitive over the last years. There is no reason to exclude that this might actually weigh significantly on the way U.S. scholars debate and research on international or regional courts as any “academic result” could well become “political resource”. Be that as it may, this vivid controversy is certainly one of the aspects of the special relationship between American society and the courts. There is no denying the fact that, as far as judges’ political functions, there are common trends (rise of constitutionalism, of judicial review, decline of parliamentary sovereignty...) (Cichowski, Stone, 2003). But it would simply be wrong to draw from that a global process of convergence around one unique (American) model. The specific division of labor between the various legal roles (lawyer, professor, judge, legal adviser, etc...) and the hierarchy between the various sorts of legal capital (practice-orientated vs. *professorenrecht*) remains profoundly different as the legal scholar is still “the great man of the civil law tradition” (Villegas, 2006, p. 368) (N. Duxbury, 2001). The type of relationship between law on the one hand and the State and the market/civil society on the other hand is among the most obvious differences. EC law is also a *savoir d’Etat*, one science of EU government. The many resistances and blockages to the process of Americanization (R. Kagan) are quite telling in this regard. No country does the judiciary have strong democratic underpinnings as in the United States –for judicial arenas from the federal Supreme Court to local juries have long been considered as one the *fora* of democratic deliberation. There is a distinctive “American case” as far as law and politics (M. Shapiro, 1994; L. Hilbink, 2008) is concerned that has no equivalent abroad, nor can it be said to have extended to the Western world (R. Kagan).

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