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Dialogues

DIALOGUING WITH CAROL HARLOW ON “THE LIMPING LEGITIMACY OF EU LAWMAKING: A BARRIER TO INTEGRATION”

ANTOINE VAUCHEZ*

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ABSTRACT. The paper gets back to Carol Harlow’s sobering assessment on Europe’s general failure to legally and politically corset the turbulent and expansionary flow of lawmaking, and questions what is left of EU law’s integrative capacity in the wake of the current polymorphous crisis of EU integration.

KEYWORDS: [EU law-making ; Integration through Law ; European Lawyers ; Democratic Deficit]

I. Introduction

In the wake of a Eurozone crisis that has been featured by new spill-overs of the European Union in domains such as budgetary, economic and social policies, time has come once again to reconsider the haunting issue of EU lawmaking’s legitimacy. Ever since the late 1950s, the question has been a defining one for the Union. The very first legal commentators of the Treaty of Rome had pointed out that its major originality in the field of international law lied in its being a "*law-making* treaty": instead of just establishing mutual commitments between the high contracting parties, it was also setting up a common legislative framework to be used for the purpose of the Common Mar-

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ket. Some prominent scholars of the time even considered -rather counter-intuitively- that, while the Commission was certainly less central than the High authority, overall « the Rome treaties were much more supranational than the ECSC Treaty »¹ for they laid down a legislation system that allowed for unforeseeable yet promising developments in the future. There is no doubt that the historical trajectory of the European Union has provided full confirmation for this intuition. Yet, while all scholars have agreed for a long time now that the expansionary dynamics of the EU has come in large part from its law-making capacity, the definition of the nature of this legislative system has been one of the trickiest scholarly and political debate. "Inter-governmentalists" have long insisted on the idea that EU law-making was a mere delegation under the control of *principals* while "integrationists" viewed this legislation capacity in the context of the formation of political system in its own rights. It is right at this difficult crossroads that stands Carol Harlow's important paper that choses an axiologically neutral position to reconsider the issue. While most discussions on the subject matter end up taking a methodologically « nationalist » or « Europeanist » view, she has taken the difficult yet heuristic decision to stand in-between « both sides of the integration argument ». « Navigating this Rubicon »² may prove more challenging as it requires to question taken-for-granted narratives and perspectives ; yet the view one gets from there is certainly unique and privileged. However, in this journey down the tumultuous river of EU lawmaking processes, the author is able to provide a thick description that combines recent developments with historical legacies, alternating close-ups and bird-eye perspectives.

II. Navigating the Tumultuous Waters of the European Rubicon

While the article provides balanced views on the many attempts to connect Europe with legitimacy, there is one element that seems to be

¹ Former ECJ judge and High authority's Legal Adviser Nicola Catalano in Institut für das Recht der Europäische Gemeinschaften, in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes*, Köln: Schriften zum Europa Recht, 1965.

² K. NICOLAÏDIS, *European Democracy and its crisis*, in *Journal of Common Market Studies*, 2013, p. 351 et seq.

an indisputable *acquis* : the traditional theory of delegation, no matter whether framed in terms of international law or in terms of principal/actor, has long proved incapable to account for the multifaceted expansion of EU lawmaking and to corset, both symbolically and legally, its continuous and turbulent flow. As aptly described by Carol Harlow, the dynamics of delegation and sub-delegation that has featured EU integration along the way has led to a continuous lengthening and complexifying of the chain of delegation. From the already old phenomenon of comitology to the more recent agencification process, more and more institutions have *de facto* taken on regulatory powers of their own at the EU level. This has resulted in a “general failure to respect the subsidiarity principle”, a notion that had precisely been designed, from the Maastricht to the Lisbon treaty, with a view to provide a last rescue to the legal fiction of delegation by Member States. While there is good evidence that the dynamics of expansion of lawmaking were already at play as early as the 1960s, the reader is left with the pressing and yet untouched question as to whether the *current* stage of the EU post-« Eurozone crisis » has not brought the state of affairs to new levels of contradictions. While Carol Harlow suggests here and there elements in that direction, one wonders how the progressive formation of a complex « economic government » has affected the issue, after so much energy had been spent by Lisbon treaty’s drafters to try, once again, to channel the unruly processes of EU lawmaking. The rather unstable division of labour that had *de facto* emerged between issues of « market regulation », of EU competences, and issues of redistributive policies, of national competences, seems to have definitely lost ground under the pressure of emergency. The rise of the European Central Bank in this context, arguably one of the best examples of the dynamics of autonomization of an « agent » from its « principal », strikes as the great absent of Carol Harlow’s account. Drawing from a mandate that had intentionally been designed in very narrow and technical terms (“defence of price stability”), the ECB has progressively expanded the scope of its regulatory action way beyond the mere handling of monetary supply to the supervision of private banks, the contracting of Memorandum of Understanding with bailed-in Member States, and the surveillance of its implementation in the field of economic, fiscal and social policies through the troïka. While there is no doubt that the ECB performs a lawmaking function, the former often takes on highly original forms (communications, press conferences) that escape for-

mal procedures, further challenging legal controls. In the end, the Eurozone crisis seems to have dashed the hopes that had once been put in the capacity of the Lisbon treaty to channel the future developments of the European Union within formal institutional procedures and legal instruments. The fiction of a “delegation” from the sovereign to EU bodies that was supposed to allow for political responsibility now essentially appears in its essentially negative dimension of lure or simulacrum.

III. Taming the Beast. What is Left of EU Law’s Integrative Capacity?

These centrifugal dynamics of EU lawmaking exemplified by Carol Harlow eventually comes down to one daunting puzzle: what is left of EU law’s integrative capacity? Historically indeed, Euro-lawyers have been the prime promoters of unity and coherence in the Union³. EU law came to existence as a new body of knowledge at a time when « Europe » was made of a heterogeneous and oft conflicting set of treaties, Communities, institutions and policies. While scholars often debate the novelty of « direct effect » and « supremacy » case-law from the angle of the relationship between Europe and Member States, they tend to overlook the fact that the framing of a *unique* legal doctrine (Europe’s autonomous legal order) for all treaties and Communities was also a symbolic coup at a time when there were three European Executives and very little coordination between the three Communities. From then on, EU law would become the main provider of unification technique counterbalancing the oft heterogeneous development of European integration and a unifying glue allowing for a common « institutional terrain » to exist. Faced very early on with the necessity to corset « special and unorthodox processes » in EU lawmaking, the ECJ has acted as a key guardian of the « unité opérationnelle des Communautés européennes et de ses institutions associées »⁴. To quote one of the founding father of this doctrine, judge and law professor Pierre Pescatore, « c’est en tant que *représentante de cette idée d’ordre* placée au dessus des Etats que la Cour de Justice apparaît dans la structure institutionnelle »⁵. This collective

³ A. VAUCHEZ, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity*, Cambridge: Cambridge University Press, 2014.

⁴ B. VAN DER ESCH, *L’unité du Marché commun dans la jurisprudence de la Cour*, in *Cahiers de droit européen*, 1970, p. 303 et seq.

⁵ P. PESCATORE, *Le droit de l’intégration*, Leiden: Sijthoff, 1972, p. 362.

habitus of Euro-lawyers was certainly brought to culmination in the undertaking of the constitutional treaty, a project which allowed to finally re-assemble Europe's bits and pieces into the most advanced and rational legal format, that of a Constitution. Yet, it all occurs as if the balancing act that the European Court of Justice has continuously managed between its being « cognitively open » to Europe's new spill overs, yet « normatively closed » through the tenacious defence of overall legal and institutional cohesion, have now come to a point of crisis. From the remains of the « Meroni » doctrine to the « Pringle » case, the ECJ is now having a hard time taming the beast; all the more so that the European Commission, a traditional ally in the promotion of Europe's legal unity, has been hampered by a « managerial turn » exemplified in the paper by the « Better Regulation » policy that, paradoxically, has further undermined the centrality of legal categories to the advantage of a managerial jargon of « road-maps » and « impact assessments ». Again the recent handling of the Eurozone crisis and the related blossoming of sites of economic governance within as well as outside of the framework of EU treaties, seems to have confirmed that EU law's traditional role as Europe's overarching 'integrative' frame is now seriously at risk.

What is striking however is that the legal crisis of the delegation paradigm that Harlow analyses has not undermined its political centrality. The traditional doctrine of delegated executive legislation remains the main cognitive frame that the medias and the politicians use when accounting for the relationship between Member States and the EU. Suffice it to consider the focus of news coverage on the European Council meetings, featuring the choreographed arrivals of official vehicles and other "family" photo-ops with the heads of State, and lauding the "high-level politics" of intergovernmental conferences. Heads of State and government have rarely done anything to deflect this mirror held up by journalists. The image reflected is rather flattering for them: alone at the helm of the government of Europe, decked out as the genuine political sovereigns of the realm, this picture relegates the Commission, the agencies or the ECB to the status of apolitical institutions handling tedious technical assignments. The honour of democracy seems intact, as the hierarchical chain of command is reasserted, distinguishing the principal – the sovereign States – from the agent – the European institutions that hold a *delegated* competence.

IV. The Holy Grail of Legitimacy

Hence the fact that the daunting issue of legitimacy continues to follow EU lawmaking like a shadow. Carol Harlow's account shows that there has been no lack of attempts to meet this challenge. From the election of the European Parliament by universal suffrage (1979) to the creation of European political parties (1993), from the European Citizen's Initiative to the mechanism for the parliamentary investiture of the Commission (2007), the European Union has now donned all the arsenal of democracy. Better still, the whole repertoire of contemporary national democracies is now found in the Lisbon treaties, with a surprising parallelism of words and forms with the national level. There are, pell-mell, the tools of direct democracy (the right to petition and popular initiative); the latest recipes from the participatory movement (institutionalized dialogue with "representative associations and with civil society"); the key buzzwords of new modes of governance (transparency, accountability); and even the "democracy by law" that, via the Charter of Fundamental Rights, allows citizens to assert their rights and freedoms before a supranational court. And yet, while Europe's democratic arsenal is certainly second to none, it seems that the potential of these many policies in terms of legitimacy has been much weaker than it had been initially hoped for. Providing a balanced and empirically-grounded account of these many attempts, Harlow shows the various counter-veiling forces and contradictions that have limited their legitimizing effects on EU lawmaking. Mostly geared towards the Commission, the transparency policies have had a hard time keeping pace with the moving of Europe's power balance, in particular in times when the power balance has shifted to arenas such as the European Council, the trilogue or the Eurogroup, that remain opaque. Both the participatory mechanisms and the Citizens' Initiative that had been conceived as levers to open up « Brussels' bubble » have been up to now for the most part captured by EU "organized society" and watered down by « bureaucratic proceduralism »⁶.

The many European deadlocks and deadends down the road to holy land of legitimacy provide a discomfoting picture. What ulti-

⁶ Cf. A. VAUCHEZ, *Democratizing Europe*, London: Palgrave, 2015.

mately comes out of Harlow's balanced and detailed exploration is that both "integrationists'" and "inter-governmentalists'" paradigms now produce decreasing intellectual returns. While she acknowledges the fact that delegation « no longer suffice as a ground for the legitimation of executive lawmaking », she concludes that we are still lacking « a true sense of representative legitimacy at Union level ». The idea that EU law-making framework was merely « delegated » has been repeatedly contradicted by facts suggesting the autonomization of the European « agents » and the ever-expanding scope of EU law. Symmetrically, it has become equally clear that, as the classical issues of democracy –sovereignty, representation and political responsibility–remained deeply entangled with national polities, the issue of EU lawmaking's legitimacy was bound to come back over and over again. On the whole then, the view from the Rubicon seems rather bleak: no matter which side of « integration argument » one is taking, Europe's lawmaking is facing a perennial state of crisis. At this point of the journey, one would have hoped for a conceptual *aufhebung* of some sort exploring new paths that would allow to bridge Europe's baroque lawmaking process to a political sovereign. Surprisingly enough, the one possible avenue that the Lisbon treaty has opened in that direction, the entry of national parliaments into EU policymaking through the « yellow », « orange » and maybe now « green » cards, is met with a lot of scepticism. Carol Harlow spends her harshest words on this procedure which is viewed as no less than a « dangerous incursion into the autonomy of national constitutions », as if the main result of the paper had not precisely pointed at the fact that this very autonomy had become a mere fiction... In a context featured by the formation of an « independent branch » with European and national ramifications (transnational networks of national central banks, of competition authorities and of constitutional courts) that cut across the national / European borders, the development of a countervailing transnational parliamentary force still remains to be explored both conceptually and normatively.

Last but not least, the author spends her concluding by a useful sceptical note of the very notion of « legitimacy », pointing at the fact that « at the end of the day, legitimacy lies in the eye of the beholder, who may be a politician, judge, administrator or merely a *baffled ordinary citizen who takes an interest in EU affairs* ». Interestingly, this runs counter to the notion of « legitimacy » that emerged in EU quar-

ters: EU reformers and treaty-drafters have seen legitimacy as something vertical that can be engineered in the framework of European treaties, provided that one eventually finds the *right* recipe, effectively adjusted to the specific features of Europe's polity. Most sociological studies however contradict this vertical and rationalized understanding of legitimacy. Rather than something that can be designed and applied top-down, legitimacy comes to existence through social and political transactions between institutions, professions and social groups at both the European and the national level. From this point of view, Europe's legitimacy (or lack thereof) finds its roots in the social and political platform that has turned Europe into a central and taken-for-granted institution. Thereby, the « limping legitimacy » of the EU does not come from ill conceived treaty instruments but, as hinted by Carol Harlow in her concluding remarks, from the type of relationship built with classes, professions and social groups. And yet, the "civil society" that is expected to drive the democratic transformation of the Union remains heavily dominated by sector-specific professionals and policy officers working in Brussels and major European capitals. The steady expansion of EU regulation, in areas such as equal rights and non-discrimination, environment, development aid, etc., has in no way broken down the glass ceiling that make up Europe's invisible social and professional barrier. Instead, when journalists, social activists, trade unionists and politicians come into contact with the European Union, they are seized in the grip of an attractive force, and themselves espouse the profiles and discourse of this "specialized public space." Called to Europe by selection processes that have integrated the specific skills required for the practice of European public affairs, the new recruits are already inclined to reproduce the expert and apolitical forms of EU sociability. Hence the continuous risk that EU's many democratic attempts fall into « Astroturf representation » and « bureaucratic proceduralism ». As the article gets to a close, the reader may feel a little bit dizzy and frustrated of an island of hope that could have brought him to safer quarters, but she/he is by now fully convinced that there is no other way forward for the European journey than through the tumultuous waters of the Rubicon river...