CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE

Constitutional Dialogues in Comparative Perspective

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We dedicate this book
to Madame Advocate General Simone Rozès
to John R. and Patricia A. Reitz
to Kathy and Mark

Contents

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Foreword

This book is among the most remarkable of its kind to be published to date. It is a reflection of the best in a new scholarly approach to legal Europe, and it has some unique features which position it on a pedestal all its own.

What is 'its kind'? It is about Europe; it is about courts in Europe, or rather the 'judicial branch' since it resolutely views courts as an integral part of government and governance; and it is about the way in which non-doctrinal approaches to law may illuminate legal norms and legal institutions.

Though this is not the case today, twenty years ago or so the mere fact of putting out a book of the kind I have just described would have been remarkable.

Europe as an object of inquiry for political scientists enjoyed an early classical period in which the likes of Haas, Deutsch, Schmitter, Lindberg and Scheingold laid a most sophisticated foundation of integration theory. But, as the Continent seemingly refused to follow the plans of its visionaries and as facts seemed to get in the way of theory, spill-over became spill-out and integration studies went into a medieval period of hibernation, to be salvaged by a renaissance only in the late 1980s in the heydays leading to the Single Market. I say 'seemingly' since that very period of political (and theoretical) hibernation saw the most dramatic developments in legal integration; indeed it was the 'Heroic Period' of constitutionalization and judicial empowerment. Part of the failure of the political science community was its temporary blindness to the unusual character and unusual importance of courts, legal institutions and legal culture to the emerging European polity. European law was unthinkingly associated with discredited international law, its constitutional features not visible to the political scientists.

The legal community did of course pay huge attention to the dramatic legal developments. But lawyers, too, had their blind spots. Twenty years ago it would have been relatively novel, and hence remarkable, to find a book such as this one dealing with European law and legal institutions in the same broad manner and with the same methodological perspectives as the contributors to this book do; it would have been equally remarkable to find a group of (mostly)

political scientists with the interest, factual knowledge and expertise to contribute to such a book; and it would, perhaps, have been remarkable that a distinguished Research Center in an American University would dedicate its resources to the comparative study of the judicial process in Europe from a non-doctrinal perspective, although, let us admit it, even more remarkable if it were a university in Europe!

For those too young (or, like me, too old and hence forgetful) to remember the landscape of European legal scholarship two or three decades ago, the following words could serve as a good refresher. They are the words of Martin Shapiro commenting in the late 1970s on what was, on its own terms, a very fine piece of scholarship on the European Court of Justice of the European Community. It was, he said:

> Constitutional law without politics . . . [presenting] the European Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text and the [European Court of Justice] as the disembodied voice of right reason and constitutional theology (Shapiro 1980, 537–8).

Much has changed since then. To be sure, fine doctrinal scholarship has, thankfully, not disappeared. It is not simply legitimate but inevitable and indispensable. *La Doctrine,* let us not conveniently forget, is the vernacular of the broadest judicial and legal conversation. The Talmud, strictly speaking, is mostly a Rabbinical commentary on the sacred Text of the Pentateuch. And yet, inevitably and indispensably, exegetic and homiletic Rabbinical commentary becomes part of the living text itself. This is no different in more modern legal traditions.

Where European legal scholarship has changed in the last generation, by way of self-generation as well as direct importation and osmosis from other branches of law, from other disciplines and from other jurisdictions, is in the drawing of the boundaries of legal discourse and its purposes. This change has not only taken a generation to establish itself but has also been generational.

It is a new generation of academic scholars, in Europe and the USA, which has not simply expanded the reach of the inquiry beyond doctrine. These scholars have gone even beyond the 'Law and . . .' approach, be it Law and Economics, Law and Society et cetera. This new generation does not distinguish between, on the one hand, 'pure'

law pieces and, on the other hand, other pieces enriched by the insights of, say, the political scientist or economist or legal sociologist. Instead, European Law has become according to this approach a discourse in which those insights are integral. The new 'pure law' is one in which doctrine, as a matter of course, is situated in its broader economic, political and social context. That is the norm. Alongside this expanded discourse there is no longer 'Law and . . .'; there is, instead 'Law without . . .'.

In another change, the 'sacred' nature of law has come to be treated far more gingerly. Exegesis and homiletics may be acknowledged as part of the living text but, learning from a realist lesson made explicit both in Scandinavia and the USA, the notion of judicial 'neutrality' is dealt with in a far more nuanced way. Ideology and differing hermeneutic sensibilities are acknowledged as inevitable. After all, when an omniscient God gave his Nomos to Moses at Sinai and intended it to live for eternity, are we really to assume that he did not understand that it would be shaped and reshaped in the hands of its frail and sinful human custodians? And could any terrestrial constitution maker believe otherwise?

Being a latecomer to this insight, new European legal scholarship seems thankfully to be escaping some of the tedious rage which results from it and which affects other legal fields. It is always worth remembering that just as a court is an institution, the output of which is partly shaped by the sensibilities of its frail and sinful human members, so is the output of scholarship about courts. Indeed, scholars, being more self-aware, might be even more adept than courts in concealing their own sensibilities. Still, in the burgeoning European critical scholarship, whilst *politesse* is always preferable to invective, deference to courts and colleagues has happily diminished and is continuing to diminish, and normative criticism has become far more common.

The most telling development in my eyes to a changing legal landscape is the as yet slow realization in European law circles that the broader legal discourse does not only enhance our understanding of the role and impact of legal institutions and judicial processes in society which are the classical interest of the social sciences, but that it enriches the quality of the legal profession, be it in litigation, other aspects of practice, the legislative process and more. The skilled and experienced legal practitioner is always a legal realist, often without even realizing it. Without batting an eye, he or she will tell a young colleague in the course of preparing a brief or oral argument: 'Good

point, but no chance before *this* judge' and then explain why; the explanation will have little to do with 'the law' and everything to do with the judge. Likewise, without giving it much thought or finding it exceptional, a Member of Parliament will request the parliamentary draftsman: 'Please make this judge-proof' and the latter will not need an explanation why, although he or she might realize how difficult a challenge that request may be! The new broad discourse of law is, in some respects, no more that an attempt to study in a more methodical and rigorous way these intuitions. This, too, should provide a lesson in humility to those who don't do but do teach: the explication of intuition is a messy business. Even today, a goodly chunk of the most successful entrepreneurs never went to business school.

This generational transformation in the discourse of European law, to which this book makes so important a contribution, is far from complete and not without a controversial (not to say fractious) fallout. Part of the controversy is the usual hurly-burly of academia. But there are three additional, attitudinal dimensions, which explain the resistance to the new winds and give the controversy, at times, an exceedingly sharp edge.

One I have already mentioned: a generation of scholars is made, in some respects, to feel obsolete. People who write their work with fountain pens do not, at times, take kindly to computers. The reactions range from oblivion, to amusement, adaptation, but also annoyance and hostility. The hostility typically takes two variants: 'What's new? We knew this all along' and/or 'This is not law' or 'This is bad law.' This last charge is often justified. There are plenty of articles written with all the jargon of political and social science which, however, cannot conceal a weak grasp of European law and add little to existing learning. Examples abound in the seemingly endless number of student-edited American international and comparative law reviews. Talking in a new language about European legal integration is no substitute for having something new or interesting to say.

This is also the cue to a second factor aggravating some of the reactions to the transformed discourse. One should not fear to speak its name: it is the Americanization of the broader discourse of European law. It is not surprising that this creates some negative reactions in Europe. There is often a brashness and measure of hegemonic *chutzpah* to the American tone resulting from a *'been there – done that'* attitude. It is a confidence that comes from a much longer experience with federalism, with constitutionalism, with judicial review, with a social and political science which has taken courts seriously and a legal

profession and academy which lost its innocence earlier and feels far more comfortable with an expanded legal discourse. There is, thus, often a distinct 'ugly American' tone in writing coming from this side of the Atlantic. The truth is that in many respects Americans have not 'been there' and have not 'done that'. The European experience in integration, in constitutionalism and in judicial review is in large measure distinctly un-American, deriving from and developing with a different telos and ethos. There are few things more annoying than the encounter with sloppy comparative Euro-American analysis, clumsily grafting on to European institutions and processes insights deriving from a very different American political culture.

For their part, there is at times something equally ugly in European attitudes and resentments: an anti-Americanism which derives from a similarly annoying sense of cultural and intellectual superiority which occasionally is only a thin guise to a sense of inferiority in the face of American legal and political scholarship.

Finally, in explaining the difficult transition to a new European legal discourse one additional factor should be mentioned. In the dialogue(s) about constitutional dialogue, we should not forget the uneasy dialogue – if that is what it may be called – between political science and lawyers. Often it is less of a dialogue and more a series of cross-purpose monologues. Political scientists and lawyers have learnt enough of each other's language to carry on a conversation, of sorts. And there may even be, like the English spoken in European institutions, a new kind of language or dialect for carrying on this conversation. The word *discourse* has an honorable place in that new dialect.

But am I exaggerating in suggesting that there is, too, an unmistakable streak of mutual contempt in the on-going dialogue between political scientist and academic lawyers? In dealing with lawyers the political scientist often goes into anthropology mode. When political scientists talk among themselves the lawyer often becomes a primitive subject (or object) which has to be observed, at times humored, and even listened to carefully. But the lawyers' explanation of what they are about is but another datum to be integrated in the altogether deeper political analysis. At times one cannot blame the politologists for taking this approach on seeing the oblivion of so many lawyers to the broader significance of their practices and discipline. For their part, the lawyers (some at least) will listen, or appear to be listening, with equal care to their political science colleagues. But among themselves they too shrug their shoulders. Here are some of the lawyers' plaints about political scientists: 'They just do not know law – the

ostensible object of their inquiry.' 'They always focus on a handful of famous cases and often get them wrong.' 'Their understanding of law is always derivative – something they picked up from this or that legal scholar; ironically, they do not understand the indeterminacy of legal scholarship.' There is, let us admit it, some truth in these plaints, though I doubt whether these grains of truth are the real explanation for the resistance that the transformed discourse of legal Europe encounters.

It is in this scholarly landscape, no longer pristine, that this new book appears. One of its virtues is the skillful manner in which it avoids many of the pitfalls of narrative and dialogue I have just mentioned. In tone, content and erudition it is exemplary. That alone is worth a great deal.

What makes it so remarkable, however, is both scope and execution.

First, its definition of *Europe* is bold and operates at many levels: the book deals with individual states, it deals with transnational Europe in its two principal guises of European Community and Council of Europe and (wholly appropriately given the theme of constitutionalism and judicial review) the book also deals with the new Central and Eastern European jurisdictions. Just as America is not the USA, Europe is not the European Union, a lesson fully driven home in this volume.

Its definition of the legal landscape is also bold. Law does not mean courts and 'courts' do not simply mean 'Supreme Courts'. Despite its focus on the judicial process, the book draws a very wide canvass of the legal landscape and its actors including in the legal conversation all manner of courts and all shape of players.

There is a second sense in which the volume transcends not only the old but also much of the new genre of European law scholarship. It is not confined to structure and process – government and governance – the darlings of so much of the European integration literature. Some of its studies focus on substantive rights such as freedom of expression and show the complex and normatively ambivalent faces of constitutionalism and integration. Where it does focus on governance, it manages to illuminate areas which have to date remained in the shade such as the process, indeed phenomenon, of judicial appointments to the European Court.

A third virtue is its methodological richness, which is shortchanged by the bland catchphrase, political science. In truth it is the broad range of social sciences which inform the various contributions as well as that delicate interface between legal theory and political science.

Perhaps the greatest contribution of the entire volume, aptly the subject of its remarkable concluding chapter, a contribution which transcends even its 'European' orientation, is in provoking us to a deeper understanding of the phenomenology of courts, judicial review and constitutionalism in contexts which are different from the well-established and well-known Western liberal nation-state.

In this sense the literature has been greatly enriched by this volume and for that, all contributors should be congratulated.

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List of Abbreviations

CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CDU	Christian Democratic Union
CSU	Christian Social Union
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
FDP	Free Democratic Party
FPRLR	Fundamental Principles of the Laws of the Republic
GFCC	German Federal Constitutional Court
ICC	Italian Constitutional Court
SCT	Spanish Constitutional Tribunal
SGIs	Strict Guidelines of Interpretation
SPD	German Social Democratic Party