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Editorial

Integration Through Fear

Quos Deus vult perdere prius dementat! The manner in which Europe is addressing its grave crisis seems to be validating this piece of wisdom attributed to Euripides, Seneca and others.

One manifestation is an argument which has become prevalent. In his very first speech as Premier elect to the Italian Senate, Mario Monti warned that 'the end of the Euro would unravel the single market, its rules, its institutions, and would take us back to where we were in the 1950s'. The same nonsensical scare tactics – if the Euro fails, so does Europe as a whole – have been used by all major European leaders, from Barroso and van Rompuy to the Merkozy twins.

The argument is, of course, simply false. The Single Market, the most singular and enduring economic achievement of Europe, operates today across the Euro divide. Ten of the 27 Member States do not belong to the Euro and in some of these countries their currency is not even pegged to the Euro. Sure, fixed exchange rates facilitate the functioning of the market. And a break up of the Euro will be incredibly messy and wreak havoc within that market. But unless one turns this into a self-fulfilling wish, and that is rapidly becoming the case, the actual existence of the Single Market never was, and still is not, dependent on some or all of its Members having a single currency.

Why is this nonsense peddled? Linking the fate of the Euro to the very existence of the Union offers a powerful tool with which to bludgeon one's opponents and public opinion as a whole. Thus, each of its proponents uses it to advance positions and policies which at times are even at odds with each other.

Beyond its falsity, it is a reckless tactic, a Faustian compact, deeply injurious, and one which will return to haunt us regardless of the fate of the Euro.

One of the greatest achievements of the past decades in all but one of the Member States (the UK) has been to shift European integration *from something that Europe does to something that Europe is*; from a discrete political project to a framework within which one debates and contests discrete political projects. One argues about the shape of Europe and its future, but not about its very existence. And the notion of leaving (or, more grotesquely, the threat of being kicked out) would be akin to state dismemberment. All this has changed. With their own words, the very custodians of the European construct have called into question those perception gains that had taken years to cultivate. They have put an axe to an asset that is not measurable in Euros and Cents and regressed the Union into the British 'what's in it for me' conceptual

understanding of Europe: conjunctural and ever contingent. The toothpaste is now out of the tube; it cannot be squeezed back in.

In the process they have also dealt blow after blow to the much vaunted alleged social solidarity of Europe and its more general underlying idealistic stratum by rooting the argument for a European-wide assumption of risk in domestic self-interest ('this is how we will protect our own banks', etc.) and bullying and cajoling their citizenry into 'more Europe' based not on conviction and idealism but on fear and 'there is no option' type of pressure.

At an even deeper level the 'no Euro–no Europe' reverses yet another long-term process which succeeded in repositioning the European construct, reshaping it from a political construct primarily linked to the material and economic into a broader self-understanding of Europe rooted in the human and the cultural. That broader vision, to which one could have and should have appealed precisely at the moment of economic crisis, has, too, suffered a series of self-inflicted own-goals, the last one of which was tipped in by, perhaps not surprisingly, the former Commissioner for Competition Policy.

Make no mistake, the break up of the Euro, should it happen, will be miserable and bring misery to many, a point conceded by those who regard this fate as inevitable as well as those who regard it as advisable. But if it happens, the existing Union needs to be at its strongest and most prepared. Instead, huge, if not always visible, damage has been inflicted by the loose talk serving short-term agendas.

Essential *EJIL* Statistics for 2011

Last year we published quite extensive statistics for *EJIL* over the last 20 years. Here is an update of our vital stats for 2011. The stats relate both to submissions during 2011 and articles published. The published articles will, by the nature of things, include many submitted the preceding year. Synchronizing would be very time consuming. I do not think that leaving the numbers as is distorts the overall picture. I want to remind our readers that we practise no form of affirmative action, in respect of either solicited or unsolicited manuscripts.

Gender

Of the total number of manuscripts submitted, 79% came from men and 21% from women. Of these, manuscripts accepted for publication were 71% by men and 29% by women. In 2011 67% of published articles were by men, and 33% by women.

Regional origin

48% of articles submitted originated in EU countries, 8% originated from Council of Europe countries outside the EU, 8% came from the US and 36% from the rest of the world. Of this cohort of submissions, the percentage eventually to be published will be as follows: EU 65%; CoE other than EU 2%; USA 11%; Rest of the World 23%. Of articles published in 2011 65% were EU origin, 3% CoE other than EU, 18% USA, 14% rest of the world.

Linguistic origin

42% of submissions came from English-speaking countries and 58% from non-English-speaking countries. In 2011 54% of articles published came from non-English-speaking countries and 46% from English-speaking countries.

From the Editor's Postbox: The Language Issue – Redux

From time to time I receive missives from frustrated authors complaining about the linguistic policy of *EJIL* – we are an English-language journal, though, as seen above, a majority of our published articles come from non-English-speaking countries. Here is the pertinent sentence from a recent letter:

It is a shame that the EJIL forces all the authors to write in English – there is indeed in my eyes nothing European in such a stance. That is also the reason why I usually categorically refuse to write for your journal;

Here are some excerpts from my reply to the author:

Dear Colleague,

OUP forwarded to me your angry email of December 15th. I am sorry you find our policies so frustrating that you decided to express yourself as you did.

There is no easy solution to the problem you raise given the linguistic diversity in Europe. *EJIL* started as an English-French Journal. There were two problems with that solution. First, many colleagues in Germany, Italy, Spain etc. found a one language solution more acceptable than a two language solution – the other language being French. They did not think it any more 'European' and just a hangover from a post war political era which exploited a moment of Anglo-French domination. Whether right or wrong, the resentment was quite real. To exacerbate the problem, though we made huge efforts to promote *EJIL* in France (and Belgium) we had very, very few submissions from French authors, vastly fewer than those coming from German and Italian colleagues, which made it all the more difficult to explain the two language solution of English and French.

For a while we toyed with the extraordinarily expensive idea of translations. We even tried it for a while. It was a colossal flop – authors were endlessly unhappy with the translations and with the length of time the process took. Articles appeared in 'translator's' English, which read like official documents of the UN, not the living voice of an author. We also realized that we could not afford the translation services of a quality that would satisfy our readers and authors.

We have always had a majority of non-English speakers on our Board of Editors and at the time we finally decided to settle on English, the Editor in Chief was a French native speaker (Renaud Dehousse, currently a Professor at Science Po.)

We reasoned as follows. As a first language English has no intrinsic merit over any other, not least the other major European Languages such as French, German, Spanish or Italian. As a second language it is vastly more common, by a factor of 1:10 by some estimates, than any other language. In a way, by publishing in English, we are offering our non-native English authors the chance of having their work reach a vast audience which they otherwise might not have had if writing in their own language. *EJIL* is one of the most successful legal journals of Oxford University Press, if not its most successful. Its list of subscribers, individual and institutional, paper and electronic, stand alone or bundled, is measured in the thousands – far more, as far as I know, than any other international law journal in Europe. There were close to

400,000(!) downloads of its articles last year alone from all over the world. We are unaware of any other international legal journal with anything close to these numbers.

It thus does not surprise me that consistently we publish in *EJIL* more articles written by non-English-speaking writers (of which around 70% hail from Europe) than by English-speaking writers. Although, as you note, it is more difficult for them, they understand the resonance that publishing in *EJIL* gives their work and thus find the trouble worthwhile. I would add that *EJIL* has emerged as a veritable European voice, and counter-weight (in English) to the *American Journal of International Law*. Our Editorial policy, style of publication and selection of authors and subjects is very different to *AJIL*. *EJIL* also provided the springboard for the establishment of ESIL – the European Society of International Law – another important development in the field.

I was saddened that you ‘categorically’ refuse to publish in *EJIL* because of our language policy. It is a great loss to a vast number of readers who, unfortunately and scandalously – but such is the world – do not read French. I am an admirer of your work, notably the impressive . . . and would like to see more of it in *EJIL*. I hope you might consider reconsidering your categorical decision in the light of the above. It will be our gain.

In this Issue

We open this issue with a challenging article by Armin von Bogdandy and Ingo Venzke on the quest for democratic legitimacy of international adjudication in an age of both globalization and fragmentation. If this article sets the theoretical scene, the following two contributions give flesh and bones to such a concern and its challenges by looking, albeit in different ways, at the intertwinement between the international and the national realms. On the one hand, Marlies Glasius addresses the legitimacy gap that might exist between an international court and the realities of a national situation by studying the particular case of international criminal justice. Should international criminal courts be democratically accountable to populations affected by crimes in order to be legitimate? On the other hand, Espósito and Carrillo-Santarelli analyse the legitimacy function that national judges can exert in relation to international law. How can judicial actors situated at the national level operate as protectors of global legal goods? Lastly, David Koller explores another facet of the situatedness of international law: its cartography as an historicized narrative which gives to international law a more or less explicit normative direction.

As part of our occasional series, *Critical Review of International Jurisprudence*, we publish three pieces that shed light on some important recent developments. In the first piece, Marko Milanovic, a new Member of our Scientific Advisory Board, critically examines the reasoning behind the 2011 judgments of the European Court of Human Rights in *Al Skeini v. United Kingdom* and *Al-Jedda v. United Kingdom*, as well as their broad policy implications regarding ECHR member state action abroad and their implementation of various Security Council measures. In the second piece, Matthew Parish studies a recent opinion of the European Court of Justice, striking down a proposed European and Community Patents Court; he stresses and questions the importance of the ECJ’s self-perception as the final arbiter of EU law in its ruling. In the third piece,

Agnieszka Szpak reviews the jurisprudence of the *ad hoc* International Criminal Tribunals in regard to the definition of a national, ethnical, racial or religious group as protected groups against genocide.

With *Roaming Charges*, we invite you to experiment visually the human condition through the contemplation of 'Moments of Dignity: Bicycle Repair Man, Peking'. Reminder: Photos from our readers are welcome.

The *EJIL:Debate!* in this issue is between Jose Alejandro Carballo Leyda and Eyal Benvenisti, revolving around the scope of the occupant's prescriptive powers in the occupied territory as defined by Article 64 of the IV Geneva Convention.

Our occasional series, *The European Tradition in International Law*, focuses on an international scholar, Nicolas Politis, whose work and life emphasize that lawyers, as men, are products of their time; in this case, the interwar period. Following an introduction by Linos-Alexander Sicilianos and Thomas Skouteris, co-editors of the symposium, Marilena Papadaki sketches a general intellectual portrait of Nicolas Politis. Robert Kolb situates Politis in the interwar sociological jurisprudence and Umut Özsü emphasizes his anti-formalistic stance towards international law and his commitment to extra-legal considerations. Nicholas Tsagourias takes issue with the contribution of Politis to the outlawry of war and the definition of aggression and Maria Gavouneli recounts his polemic against the 'anachronism' of the law of neutrality.

The issue concludes with *The Last Page* poem, *The Second Wave* by Patricia E. Palacios Zuloaga.

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