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THE LAW OF EUROPEAN SOCIETY

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1. Introduction

I came to know Alison McDonnell through the *Common Market law Review.* We have exchanged thousands of emails; we saw each other regularly for meetings. We have been silently and discreetly sharing many things along the years: ideas, feelings, concerns, things of the everyday, things of life. Our relationships developed little by little, in a slow labour of time. Eventually most of the complexity and simplicity of life entered into it. Recently, I think I may disclose this, Alison concluded an email concerning the draft of one of our Editorial comments with this statement: *"We are lawyers, we are Europeans, and we are people".* A striking line, most unexpected and moving, standing out from a correspondence mainly made of mundane affairs related to the day-to-day management of a journal. I should like to take it as an invitation to briefly reflect on our condition as European lawyers. I am well aware that the "we, European lawyers" on which I rely may be misleading, or oversimplifies a field that is much more diverse and complex than I assume. This is just a way to continue the conversation with Alison in a less personal tone; and also perhaps an invitation to every EU lawyer to engage, at this troubling moment in Europe's time, in self-reflection.

2. "We are lawyers, we are Europeans, and we are people"

For years I have been occupied with the exploration of classic problems of EU law. How to establish a special type of relationship between states, a "common framework for action" based on the rejection of the old diplomatic system, while dealing with strong political actors attached with attributes of State sovereignty, as well as social actors rooted in domestic processes of social struggle? How to ensure the authority of a body of law that is not supported by a State, deprived of the state's means of coercion and markers of legitimacy? How to build a new economic and social order

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that purports to radically transform domestic orders, yet largely depends on the financial resources and the politico-administrative structures of the Member States? How to fashion a legal figure of the "European" unburdened with the identification to a nation's people, able to develop multiple affiliations in diverse societies, cultures and jurisdictions, whilst deriving her status from state citizenship and having as her destiny a full integration into a host domestic society? We, European lawyers, have been thus occupied, in fact, ever since it occurred to us that these insurmountable contradictions and EU law constructions are one and the same. We have come to realize that the most ambitious task for EU lawyers was to address these problems, providing the norms and concepts, the techniques and mechanisms aimed at sustaining a process based on inherent contradictions.

Institutional lawyers as well as legal scholars, interchangeably and perhaps confusingly, have been involved in this.[1] Our job was to provide the set of concepts, methods and techniques on which the whole European construction could be based, constantly striving to complete and perfect them, while actively deconstructing the many discords generated by the process of European integration – hence concepts such as the autonomy of EU law and structural principles of EU law, methods such as the teleological method of interpretation and autonomous interpretation of EU law notions, techniques such as the argument from transnational effects and proportionality analysis. This original endeavour still resonates in the not-so distant, and remarkably abstract, statement of the Court of Justice that EU law has established itself as "a structured network of principles, rules, and mutually interdependent relations linking the EU and its Member States, and its Member States with each other".[2] EU law is designed as a language and normative structure aimed at protecting the supranational structure, distancing it from the chaotic terrain of power relationships, social conflicts, and ideological struggles.

Such a structure is based on two basic operations. One is to establish a hierarchy, making the domestic legal orders subordinate to the supranational legal order. The other is to embed the national legal systems into a global European system. The original concept of "integration through law" is hierarchical and holistic in nature. Pescatore acutely conceptualized the European Community and its law as forming "a system, that is to say a structured, organised, finalised whole". The European institutions embody an "idea of order to which participants – i.e. the Member States as well as the main institutional players of integration – are ready to subordinate their

1. See Leino-Sandberg, "Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?", 1 *European Law Open* (2022), 231.

2. Opinion 2/13, *Accession of the European Union to the ECHR*, EU:C:2014:2454, para 167.

national interests and their national hierarchy of values".[3] Pescatore presented his analysis as a mere descriptive account of "the experience of the European Communities". But, in fact, it was meant to change the perception of the actors on the ground, forcing the "participants" to adopt an internal point of view as parts of a whole. It was meant to frame the course of European integration. Now, due to a set of historical circumstances, and thanks to the support of heterogeneous political and social forces, this actually worked, at least within the narrow milieu of Community lawyers. We were trained to view European integration as more than a collection of discrete political units, more than a functional machinery. It was to be seen as the institutional framework and epistemic viewpoint allowing us to frame, assess and govern the situation of states and their nationals from above the fray of interstate relations.[4]

In this vision, the EU legal order apparently comes close to a federal political structure. This parallel has been frequently noted.[5] It has not been realized, however, that it comes even closer to the traditional conception of society as a "structured whole".[6] The EU legal order should perhaps be seen less as a federal-type constitutional order than as a proxy for a sort of made-up "European society". Arguably, it is less concerned with establishing a new polity, i.e. a central authority and a distinctive collective identity, and more with producing a "society effect". Its main ambition is to force institutional actors and individuals to think of themselves as embedded into a transnational set of political, economic and social relations. Thus EU law has been used as a tool for building a new institutional world, a political society based on many layers of authority and that can persist without the support of a unified cultural or social system; it has been engaged in the building of a socio-economic order, based on the opening up of domestic markets and the transgression of the territorial framework of national communities; and it has developed a genuine programme for the

3. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Sijthoff, 1974).

4. Of course, this view has been challenged throughout the history of European integration, mainly by lawyers trained in the tradition of national legal dogmatics and attached to national sovereignty or identity. For challenges coming from a "European" perspective, see van Middelaar, *The Passage to Europe* (Yale University Press, 2013).

5. See, among many references, Cappelletti, Seccombe & Weiler (eds.), *Integration Through Law* (De Gruyter, 1986); Beaud, *Théorie de la Fédération* (PUF, 2007); Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (OUP, 2009); Halberstam, "Of Power and Responsibility: The Political Morality of Federal Systems", 90 *Virginia Law Review* (2013), 731.

6. On the concept of society as an "articulated whole" enshrined in European sociology, see Christ, "Totalité et symptôme ou comme lire 'la société'", 83 *Archives de Philosophie* (2020), 121.

social life of European individuals, assigning them roles, rights and identities matching the EU institutional projects.[7]

It should be clear that the kind of society upon which EU law has relied is something to be constructed and organized rather than a given. It is not real. Rather it worked as a conceptual metaphor. As such, it has been incredibly helpful in our endeavour to build a brand new world. However, what is striking now is that this has made us somewhat blind to the crises of the everyday in domestic societies. These crises manifest today in a number of ways, from disagreement to protest, from disillusion to collective resentment, from a form of dispossession to a sense of alienation. How to reconnect EU law with the real society, its actual practices, beliefs and needs? How to recover the continuity with the genuine experiences of ordinary people, willing to re-establish local communities and prone to de-institutionalizing Europe whilst, on the other hand, not compromising the transnational and emancipatory sense of the European project? This seems to me the problem with which we are struggling now.

3. "European society must be defended"

Busy as we were with the fashioning of the EU institutional framework and regulatory projects, treasuring the values that have found shelter in post-war European institutions, though not totally blind to the many weaknesses and biases of the EU machinery and its projects, we have made ourselves unaware of the kinds of life people managed to live – or did not manage to live – given the institutions and the laws of Europe. True, in recent works, there has been a tendency to reconsider EU law as part of a broader socio-economic and political field fraught with institutional struggles, power relationships, and political and social battles. EU law is analysed as a mix of claims, practices and theories, not immune from professional, economic or political interests. This is the so-called "critical turn" in EU legal studies.[8] This critique, bringing new insights from social sciences and history, helps us "denaturalize" doctrines, categories or landmark judgments that we EU lawyers tend to take for granted. It prompts us to investigate the narratives, strategies and characters that historically participated in the construction of our legal categories. It also opens our eyes to the real impact of our legal constructions: the sorts of economic, social and cultural injustices the latter may produce or

7. See Azoulai, Barbou des Places & Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing, 2016).

8. See Editorial comments, "The Critical Turn in EU Legal Studies", 52 *CML Rev.* (2015), 881.

perpetuate,[9] as well as the forms of indifference, avoidance or resistance against the project of integration that develop "on the ground".[10] However, this approach does not provide us with the methodological engagement we need to make sense of EU law as "lawyers, Europeans and people".[11] It looks at EU law from the outside. What we need is a critical look from the inside. We need a method that allows us to make visible both the forms of people's life that EU law itself tends to support and promote and the ones that it tends to overlook or suppress.

This is all the more important as the situation of Europe has dramatically changed. In the last few years, the EU has come to think and act differently. For once, this is not the result of the so-called "competence creep". It is something more fundamental: the EU's conception of life has broadened. The rhetoric of the "defence of the European way of life" has emerged and developed in response to the migration crisis, the rule of law crisis and the war in Ukraine; a concern for the quality of life and life itself has taken shape as a result of the pandemic and the ecological catastrophe. As European societies are increasingly interdependent, yet internally dividing and polarizing, and Europe's dependency on external resources is more exposed than ever, people's vulnerabilities are clearly on display. Such vulnerabilities are both social and existential.

The EU has reacted to this in two ways. The first is a shift in its regulatory approach. It seems that the EU is to become a new entity engaged in restructuring, enabling the transition to more resilient European societies. In a time of catastrophe, the EU cannot content itself with ensuring the provision of transnational public goods (the internal market, the free movement area, the common currency, the common policies …) and the protection of common values (those referred to in Article 2 TEU). It is reinventing itself as an "infrastructural" entity, re-orientating its fundamental mission towards the maintenance and development of the essential infrastructures of European societies.[12] This concerns "critical infrastructures" such as the natural ecosystems and their infrastructures, the Member States' healthcare systems or energy networks, the European financial system, the European digital and communication infrastructures. It requires structural policy reforms and high-level financial investments. This is illustrated by the

9. See de Witte, "The Liminal European: Subject to the EU Legal Order", 40 *Yearbook of European Law* (2021), 56.

10. See Vauchez, "The map and the territory: Re-assessing EU law's embeddedness in European societies", 27 *Maastricht Journal of European and Comparative Law* (2020), 133.

11. See, for a sympathetic yet critical assessment of the critical turn, Neuvonen, "A way of critique: What can EU legal scholars learn from critical theory?", 1 *European Law Open* (2022), 60.

12. See Azoulai, "Infrastructural Europe: EU law and human life in times of the Covid-19 pandemic", 66 *Revista de Derecho Comunitario Europeo* (2020), 343.

European Green Deal and climate transition package, supported by a new huge financial plan (*Next Generation EU*) and the creation of a new fund (*Social Climate Fund*). EU lawyers who get a sense of people's social concerns will have to address the issues raised by this shift: these are mostly issues of fairness and redistribution.[13]

The EU's other reaction is to develop a legal concept of European society. This concept has emerged in relation to the implementation of EU sanctions against broadcasters such as *Russia Today France* (RTF) whose action in support of the aggression against Ukraine has been considered as a direct threat to the Union's public order and security. RTF challenged those sanctions before the General Court and applied for interim measures. In its ruling, the President of the General Court stated that the interests of protecting the Union and its Member States against disinformation and destabilization campaigns amount to "public interests aimed at protecting European society".[14] In the judgment on the substance of the case, this is reiterated.[15] We are thus witnessing a "Europeanization" of the concept of society that the ECJ developed in its Union citizenship case law.[16] Union citizenship is ultimately about ensuring the full and deep integration of Union citizens and family members into Member States' societies.[17] A "host society" is not a closed territorial or political community. It is open to new members who are willing to integrate, provided they share a set of core values. The process of social integration enshrined in the Union citizenship regime is value-based. This may entail defending itself against the outside world. In *Petruhhin*, the Court was prepared to oppose the extradition from Latvia to Russia of a Union citizen, an Estonian national.[18] It referred to Article 3(5) TEU, emphasizing that "in its relations with the wider world, the European Union is to uphold and promote its values and interests and contribute to the protection of its citizens". The same reference appears in the *RTF* case.[19] Just like in *Petruhhin*, the wider world, the "outside" threatening the values and security of Europe, is Russia. However, unlike in the citizenship case law, the focus is not on a threat to "one of the

13. See Editorial comments, "A jurisprudence of distribution for the EU", 59 *CML Rev.* (2022), 957.

14. Order of the President of the GC of 30 March 2022 in Case T-125/22 R, *RT France* v. *Council*, EU:T:2022:199, para 61 (my translation from the original French version).

15. Case T-125/22, *RT France* v. *Council*, EU:T:2022:483, para 55.

16. See Editorial comments, "The response to the war in Europe: A more power based EU and the challenge of ensuring that it remains rule and value based", 59 *CML Rev.* (2022), 1.

17. See Case C-165/16, *Lounes*, EU:C:2017:862, para 58.

18. See Case C-182/15, Petruhhin, EU:C:2016:630.

19. Case T-125/22, para 48.

fundamental interests of (a domestic) society"; in this case, the threat is to the Union's interests and European society as a whole.

This means no less than "society must be defended", as in Foucault's words.[20] European society must be defended against a transnational cultural power, *Russia Today*, that puts itself at the service of a third country authoritarian regime which subjugated it. But what exactly is to be defended? For sure, in this context, European society is not just a metaphor. It is about the "foundations of democratic societies". It is defined in terms of ethical principles and values. It is the society of Article 2 TEU "in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" and which is characterized by "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".[21] This conception echoes the recent ECJ judgments on the validity of the rule of law conditionality Regulation.[22] In these judgments, the Court confirms that the Regulation is valid: the effective protection of the Union's financial interests presupposes the respect of the rule of law. As a way to support this, it states that "the values contained in Article 2 TEU (…) define the very identity of the European Union as a common legal order". It then draws what seems to be the natural consequence of that statement: "the European Union must be able to defend those values". There is a need to defend the EU's fundamental values against external threats; but there is also a need to defend these values against internal threats, i.e. illiberal practices of Member States' authorities.

By defining the European society as a community of liberal values, the Court is drawn to suggest that there are practices within the EU that develop outside the "common legal order". This is not problematic in the context of political attacks against democracy and the independence of the judiciary. Abstract liberal values are well suited to the protection of democratic forms of life. However, it may be a problem when it comes to genuine social conflicts. A value-based conception of society inevitably carries with it preconceptions about how to live together, who should be part of the social fabric and who should not. Thus the question is: which place is given to different individuals and social groups in a European society based on EU law? EU lawyers concerned with people's vulnerabilities cannot avoid this question.

20. Foucault, *"Society must be defended". Lectures at the Collège de France 1975–1976* (Picador, 2003).

21. On this understanding of European society, see von Bogdandy, "Our European Society and Its Conference on the Future of Europe", *Verfassungsblog*, 14 May 2021.

22. See Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland* v. *Parliament and Council*, EU:C:2022:98.

4. European society through law

That we are witnessing a "Europeanization of everyday life", i.e. the sharing of material realities, modes of living as well as socio-economic and political ideals, is beyond doubt. Europe has largely become a sociological reality. This is documented by sociological and ethnographic research on Europe.[23] This research provides important insights on European integration as it has developed. Yet, it does not offer us the viewpoint through which we may critically assess this movement in defence of European society. EU law may offer this viewpoint. This is because it is both an institutional language, reflecting the interests of the main political actors, and a grammar for social conflicts, conveying the existential, social and cultural concerns of ordinary people. If we pay attention to both dimensions while deeply and completely immersing ourselves in the EU legal materials, we may gain some understanding of the kind of European society we live in.

Let me quickly mention a few cases from the fields of migration and religion, two fields capturing some of the most salient issues in today's European societies. The concept of society developed in the context of Union citizenship is not unknown in the field of migration. The Court has applied this concept in cases concerning threats to public order caused by third-country nationals.[24] However, in a recent case concerning a Dutch expulsion order made against an Albanian citizen suspected of having committed an infringement of the Netherlands criminal legislation relating to drugs, the Court reasoned that the Schengen Borders Code does not expressly require the personal conduct of the individual concerned to represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" in order for that individual to be capable of being regarded as a threat to public policy.[25] As a result, a mere suspicion may be enough to issue a return decision. This practically means that a third-country national legally residing in Europe for a short stay, for which he was exempted from a visa, is not considered to be part of the national social fabric. The traditional EU law concept of society does not apply to him. In this case, the concept of society is entirely subsumed under that of public policy.

23. See, for an empirical inquiry from sociology, Recchi, Favell & al. (eds.), *Everyday Europe. Social Transnationalism in an Unsettled Continent* (Policy Press, 2019).

24. See Case C-554/13, *Zh. and O.*, EU:C:2015:377, para 60; Case C-373/13, *T.*, EU:C:2015:413, para 79; and Case C-601/15 PPU, *N.*, EU:C:2016:84, para 67.

25. See Case C-380/18, *E.P.*, EU:C:2019:1071.

Is the migrant part of European society? Mr Jawo, a Gambian national, travelled through Africa across the Mediterranean to Italy where he obtained a residence permit on humanitarian grounds.[26] He then moved to Germany where he made an asylum application. In accordance with the Dublin Regulation, the German authorities rejected his application and ordered his transfer to Italy. However, on the day chosen by the authorities for the transfer, Mr Jawo was declared absent from the accommodation centre where he was staying. He declared he had been visiting a friend. However, the German authorities considered this absence as constituting "absconding", a legal reason for extending the time limit for transfer. Later, Mr Jawo refused to be transferred, on the grounds that the conditions under which his asylum application would be processed in Italy did not respect the fundamental rights of individuals. This case raised two issues: one relating to the definition of absconding under the Dublin Regulation, the other relating to the grounds for refusing a transfer. On the first issue, the Court concedes that, in the ordinary sense of the term, abscond implies "an intentional element". However, account must be taken of the fact that the Dublin Regulation establishes "a clear and workable method (…) for rapidly determining the Member State responsible for examining an application for international protection". This institutional objective trumps the intentional element. In the case of absence, the German authorities were entitled to assume that that person had the intention of evading their reach. This does not mean that Mr Jawo is deprived of any protection. The transfer shall be excluded in any situation where there are substantial grounds for believing that he will face a real risk of inhuman or degrading treatment. However, and in view of protecting the operation of the Dublin system, the deficiencies in the Member State concerned "must attain a particularly high level of severity": there should be a risk of "extreme material poverty that does not allow him to meet his most basic needs". A "high degree of insecurity or a significant degradation of the living conditions of the person concerned", the lack of support in family structures or shortcomings in the programmes to integrate refugees do not meet the threshold required to refuse the transfer. It seems clear that Mr Jawo is not seen as an agent, part of the European society. His life is entirely in the hands of Member States' authorities. His bare life is protected. However, he is not expected to engage in life as an active, autonomous social individual.

26. See Case C-173/17, *Abubacarr Jawo*, EU:C:2019:218.

In the field of religion, two significant types of cases have been brought before the ECJ: cases relating to the ritual slaughter of animals according to kosher or halal rites,[27] and cases of discrimination at work.[28] In 2017, the Flemish Government enacted a law which required stunning, rendering kosher and halal slaughtering illegal.[29] The Jewish and Muslim communities in Belgium jointly brought the matter to court. The case eventually reached the ECJ. The Court decided to give precedence to the "requirements" of animal welfare over "religious precepts". This is based on three grounds: animal welfare as a European "value" (consonant with the moral sensitivity of our societies), majoritarian "national perceptions", and the emergence of a "scientific consensus" on stunning. This approach reflects a quest to develop an objective basis for the decision. The same can be observed in relation to discrimination at work. The Court decides on the basis of broad European values (freedom of religion and religious neutrality) with the aim of ensuring social peace within Member States. As a result, in both cases, the religious practices of ordinary people are "neutralized" and marginalized, disconnected from their inner source of normativity. They are tolerated provided they are confined to limited places (wearing of the Islamic veil in workplaces not in contact with clients) or subject to transformative technical devices (ritual slaughter subject to prior stunning). These practices are considered as developing outside the European value order.

5. Conclusion

This is a brief overview of an inquiry that would be worth an extended study. There is much more to be investigated and refined. The concept of European society is implicit in all cases dealing with matters related to processes of identification (sexual identity, collective identity, religious identity, family membership and social integration), processes of socialization (discriminations, migration and digital surveillance) as well as ecological concerns. These cases reflect in some way a discomfort experienced by people about their own place in society, in the world, or on earth. As a matter of fact, in today's Europe, this discomfort translates into legal claims

27. See Case C-426/16, *Liga van Moskeeën*, EU:C:2018:335; and Case C-336/19, *Centraal Israëlitisch Consistorie van België e.a., Unie Moskeeën Antwerpen VZW e.a.*, EU:C:2020:1031.

28. See Case C-157/15, *Samira Achbita*, EU:C:2017:203; Case C-188/15, *Asma Bougnaoui*, EU:C:2017:204; and Joined Cases C-804/18 & 341/19, *WABE*, EU:C:2021:594.

29. See Case C-336/19, *Centraal Israëlitisch Consistorie van België e.a., Unie Moskeeën Antwerpen VZW e.a.*, EU:C:2020:1031.

which are transnational and conflictual in nature. EU law is one of the scenes for such claims. Our short overview seems to show that, confronted by these claims, the Court mainly relies on institutional considerations and broad moral values. Its main concern is to sustain European ecosystems and avoid social conflicts.[30] This is generally commendable. However, as a practical result, some genuine social and existential concerns are neglected. Dealing with such concerns not as anomalies but as symptoms, we may ask ourselves: is the legal framework we have developed so far really reflecting the living and existential conditions of Europeans? Will we come to pose a question such as: what would be a law where Europeans' existential and social concerns may be expressed and integrated without, however, yielding to radical identity claims prone to regression and fragmentation?

30. See, in this regard, the significant Court's statement in Joined Cases C-804/18 & 341/19, *WABE*, para 75.