'Integration through Law' Revisited

The Making of the European Polity

Edited by

Daniel Augenstein

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Preface

The idea for this edited collection originated in the course of a PhD working group in legal and political theory at the European University Institute Florence – the birthplace of the 'Integration through Law School', which contributors to this volume undertake to revisit. It took concrete shape during a DTRF-funded workshop at the University of Edinburgh some years later. Zenon Bańkowski, Jo Shaw and Niamh Nic Shuibhne from Edinburgh each contributed a comment on one part of the book. Joseph Weiler kindly agreed to revisit his own work through the eyes of others to round up the book with an epilogue. *In memoriam* the beautiful years I spent at the European University Institute Florence and the University of Edinburgh, not least thanks to the wonderful colleagues and friends I found in both places.

Daniel Augenstein, Tilburg, December 2011

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Daniel Augenstein and Mark Dawson

Revisiting 'Integration through Law'

It is now over twenty years since Mauro Cappelletti, Monica Seccombe and Joseph Weiler (1986) published their seminal work on legal integration in the European Union. Many of its conclusions were captured by Joseph Weiler's often repeated observation that law is both the *object* and the *agent* or *instrument* of integration: while law is a product of the polity, the polity is also to some extent the creature of the law (Cappelletti, Seccombe and Weiler 1986: 4; Dehousse and Weiler 1990: 243). This mutual conditioning of legal structure and political process was a central insight of the original Integration through Law project, evidencing the concurrent integration *of* and *through* law in the European Union.

Although, retrospectively, the Integration through Law School (ITL) did little less than shaping the contours of EU law as an academic discipline, the descriptive accounts of, and normative concerns with, legal integration in the European Union have remarkably changed over the last twenty years. Whereas ITL defended 'convergence' as both an appropriate description of legal integration (bolstered by the doctrines of supremacy and direct effect) and a normative ideal for the emerging European polity (creating a 'European identity'), many scholars today are concerned with the perceived differentiation and pluralization of the European legal order and its *acquis communautaire.* While the Integration through Law School reflected, for example, on the decisive early breakthroughs of the European Courts in establishing the principles of direct effect and supremacy, contestation of these principles by national constitutional courts seems to demand a reconsideration of EU law's constitutional ambitions. Similarly, whereas ITL saw legal institutions as part of EU integration's vanguard, the rise and development of 'new modes of governance' in the EU, as well as the continued rejection of judicial supervision in crucial fields of integration, such as the common foreign and security policy, question the centrality of law, and courts, to the integration process. These national, political and legal challenges could be seen not only as demanding a re-evaluation of law's role in the integration process, but even as questioning the argumentative core of the early Integration through Law project.

What though are the assumptions upon which these challenges are based? On closer inspection, a re-examination of the centrality of law to European integration demanded by recent developments may, far from undermining it, prove the continuing significance of ITL. The very view, for example, that national contestation of supremacy challenges the EU's constitutional ambitions and the integration of its Member States 'through law' rests on particular assumptions arguably reminiscent of the Westphalian tradition of the nation-state: that European constitutionalism ought to be seen in monist terms, with a 'challenge' from national constitutional orders necessarily threatening the authority and supremacy of 'the centre'; or, that the degree to which 'positive' or 'posited' European law accomplishes the progressive harmonization of Member State legal orders should be the benchmark for evaluating the success and failures of European integration; or, that European polity building will be perpetually hampered by the fact that the European legal order cannot lay claim to a 'demos' or a relatively homogeneous socio-cultural pedigree that underpins the production of, and obedience to, legal norms in the nation state.

Yet what if these assumptions are subverted? The national 'supremacy challenge' could indicate less a failure of integrating European societies 'through law' than an altered landscape of integration, in which the emergence of a pluralist constitutional order is seen as a central pre-condition for successful integration to occur. Equally, the placing of law beyond traditional national/international dichotomies may necessitate rethinking its conceptual foundations and its role in integrating modern pluralistic societies 'beyond the State'. To take another example, recent developments only partially envisaged in the original ITL project, such as the rise and development of 'new modes of governance' in the EU, may not be seen as displacing the centrality of 'law' to European integration but as indicating the evolution of a new legal paradigm in which mutual learning between States, and the flexible national implementation of rules, combine to create a more diversified – yet still 'integrated' – legal order. The very elements which appear to 'challenge' law's centrality to the integration process may thus also be viewed as reinforcing it.

In this vein, rather than positing 'law' and 'European integration' as a priori categories, this edited collection pursues a twin strategy: it studies how our understandings of law influence our perception of European integration *and* how European integration changes our understandings of law. Just as our view of what law means and entails in a post-national context conditions our view of what a viable European order can and should look like, so our understanding of the course and limits of EU integration has established new understandings of law's social and political roles. In this respect, the relationship between law and politics – explored by a number of contributions in the book – may be a foremost example. While a notion of law as relatively depoliticized may have rendered it an attractive tool for supranational integration in the early days of the European Community, the last 25 years of integration have equally revealed the normatively ambivalent side-effects of law's 'politics of de-politicization' i.e. its tendency to

remove contentious issues – such as the relative balance between market and non-market values – from the political table. To return to Joseph Weiler's celebrated formula, not only does our understanding of law frame the 'objects' which we see integration as pursuing; our reflection on the course of EU integration also forces us to re-evaluate law's 'agency' i.e. its own ability to evolve and respond to new social conditions.

In this sense, processes of pluralization, differentiation and trans-nationalization in the European Union concurrently challenge the relevance of the original ITL project, and present new opportunities to examine its relevance in an altered political and legal context. The contributors to this volume investigate such new understandings by revisiting a series of guiding assumptions of the early Integration through Law School: about the law as an 'agent' of European integration, about the nature of the political and social landscape which the law is to integrate (the 'object' of integration) and, finally, about the way these two dimensions reflect upon each other.

While the essays display different normative concerns, and carry varied theoretical starting points, a basic contention common to all is that the early Integration through Law School is of enduring significance for European legal studies, with its original empirical observations and normative assumptions serving to identify continuities and discontinuities in the European integration process over the past two decades and beyond. Thus, while examples of change and discontinuity abound, many of these changes and discontinuities underline rather than sideline the ongoing relevance of the original project.

The Constitutional Frame of European Legal Integration

The first part of this collection inquires into the relationship between EU constitutionalism and European legal integration. As Niamh Nic Shuibhne remarks in her intervention, the contributors conceptualize the constitutional frame of 'Integration through Law' through the prism of three guiding themes: uncovering the source of EU constitutionalism; identifying the features of its empirical reality; and providing a principle-based evaluation of these features.

Maria Cahill sets the scene by unravelling consonances and dissonances between constitutionalism and integration in providing the normative foundations of the European project. Revisiting the ECJ's early 'constitutional' dicta in *Van Gend en Loos* and *Costa*, Cahill notes that it is not clear whether the Court considered constitutionalism necessary to support and mandate European integration, or integration necessary to support and mandate European constitutionalism, or whether it thought of the two as mutually supportive. A different picture emerges once one turns to the reactions to this jurisprudence by Member States' constitutional courts, which Cahill discusses under the heading of 'judicial dissonances'. While these courts readily accepted the terms and conditions of European legal integration, they did not endorse its constitutional premises and implications. At

the conceptual level, Cahill traces these 'dissonances' to an internal connection of EU constitutionalism with the normative ideals of democracy, self-determination, representation, constituent power and fundamental rights – a connection that European legal integration appears to be lacking. She notes with some concern the potential consequences of such disentanglement of European integration from European constitutionalism, namely that the (relative) absence of legal integration may become its very rationale and sole mandate.

Matej Avbelj's concern is less with the substantive outcomes of European legal integration than with the 'structural principles' that render it viable in the absence of a statist constitutional hierarchy. At the outset, Avbelj distinguishes a 'policy conception' of 'Integration through Law' that – in the face of political power struggles – instrumentalized positive law to implement Europe's supranational *telos*, from Cappelletti, Seccombe and Weiler's (1986) academic project that reflected on the relationship between law and European integration in the light of the 'federal idea'. Drawing primarily on the 'structural principle' of primacy/supremacy, Avbelj associates these two approaches with two different models of the integration's constitutional frame: a hierarchical constitutional model that portrays supremacy as an absolute and unconditional facet of European legal integration; and a conditionally hierarchical model that espouses a broader and somewhat ambivalent conception of supremacy/primacy as an umbrella concept that extends beyond a mere conflict rule. In contradistinction to both models, Avbelj defends a heterarchical constitutional model of structural principles for the purpose of which the relationship between the European and the Member State legal orders is governed by a relational and trans-systemic notion of primacy. The ensuing pluralistic mindset of European constitutionalism arguably shifts the *telos* of the integration process from promoting convergence to accommodating diversity – a diagnosis that is shared by a number of other contributors to this volume. What is more, while Cahill warns us against decoupling integration from normative ideals of constitutionalism inherited from the Statist tradition, Avbelj's contribution may be read as questioning, from a European perspective, the continuing relevance of certain structural principles of State constitutionalism that underpin these normative ideals.

Alun Gibbs concludes the first part of this collection with a reflection on the conditions under which Europe's constitutional frame may render European legal integration legitimate. While this resonates with Cahill's concern about the normativity of 'integration through law', Gibbs does not juxtapose 'constitutionalism' and 'integration' but intertwines them through an overarching notion of civil responsibility in practising constitutionalism. This results in a more embedded sense of constitutional framing that cognizes legal integration not simply as a means to an end but as an integral part of acting and reflecting upon our own agency. Gibbs illustrates this with reference to the Integration through Law School's distinction between law as an 'object' and an 'agent' of integration – another recurring theme of this collection. Distinguishing a 'facilitative' and a 'symbolic' dimension of recognizing the agency of law through constitutionalism,

Gibbs suggests that what matters as a yardstick of legitimacy is not the integration *of* or *through* law but our engagement *with* law. As he puts it, paraphrasing Dworkin, 'taking the agency of law seriously entails recognizing its relational character; that instead of acting on the political and social it is acting with it'. Ultimately, it appears that it is *our acting with law* in a non-instrumentalist fashion that reveals the conditions of legitimacy which structure the relationship between constitutionalism and integration by answering, in an ever preliminary and incomplete way, the question of 'what kind of people we are'.

Conceptions and Roles of Law in European Integration

The second part of the collection shifts the focus from constitutional framing to analysing the interrelation between different conceptions of law employed to explain the nature of the integration process, and different roles attributed to law in fostering its goals. Once again, the inquiry is informed by a twin perspective: we may evaluate the success and failures of European legal integration through the conceptual prism of the State legal order; yet we may also trace challenges to the enduring relevance of this conceptual framework brought about by European legal integration.

Cormac Mac Amhlaigh's chapter on 'Concepts of Law in Integration through Law' can be read as a continuation of Avbelj's reflection on the legal viability of European integration from a legal philosophical angle. While Avbelj's concern with constitutional framing leads him to advocate a heterarchical model geared towards the accommodation of conflicts between EU and Member State legal orders, Mac Amhlaigh finds some virtue in positivistic conceptions of law in European integration precisely because they may bracket deep-seated moral and socio-cultural differences between the Member States that could impede a successful 'integration through law'. He draws a trajectory of European legal integration from an early positivist to a late pluralist stage that he ties to a tension in the original ITL project's 'third school of legal thinking' as *via media* between legal positivism and natural law. On the one hand, ITL's conception of law as an object and agent/instrument of integration was premised on legal positivism in that it was geared towards creating 'a strong centripetal effect towards unity and centralization at the EU level'; yet on the other hand, ITL's grounding in the 'federal principle' displayed 'an elemental ambiguity with regard to the question of ultimate authority'. It is the latter that, in Mac Amhlaigh's view, prepared the ground for inserting principles of political morality into European legal integration which led to the evolution of constitutional pluralism as a means to accommodate emerging constitutional conflicts.

Mac Amhlaigh's chapter nicely illustrates how debates on the EU's unity-in-diversity conundrum connect to different conceptions and roles of law in the European integration process. Reading Scott Veitch's contribution along these lines may suggest that Europe's 'unity' is bought at the high price of depoliticization

triggered by processes of juridification that entrench an artificial separation of the economic and the political spheres. Like Mac Amhlaigh, Veitch sees the roots of European integration in positive law that provides its 'elementary integrative normative legitimation' vis-à-vis a community of strangers 'writ very large'. Indeed, ITL's coinage of law as an agent and object of integration is portrayed as the harbinger of an 'immense expansion and densification of the legal field in Europe' that was yet to come. Veitch cautions us against the depoliticizing effects of such integration through positive law that has settled, in advance, the terms and conditions of political contestation. In a European Union where law and economics have come to dominate morality and politics, he concludes, we may well reverse the question posed by the Introduction's title: 'not so much what law for what polity, but what polity for this law'.

As Zenon Bańkowski remarks in his intervention, another way to link the three contributions collected in this part is by placing their conceptual reflections on the role of law in European integration in the context of concerns with the 'process and stasis' of European integration, be it by way of juxtaposing 'static' legal positivism with 'dynamic' constitutional pluralism (Mac Amhlaigh), 'frozen' juridification with 'becoming' political contestation (Veitch) or, as in the case of Daniel Augenstein, a convergence-based understanding of European identity with a process-based notion of identifying the European Union. Augenstein revisits the 'convergence thesis' of the early Integration through Law School by way of contrasting two views on the proper nature and unit of European legal integration: one that centres on the European Union as comprising the EU Member States; and one that centres on the EU Member States as composing the European Union. While, on the former view, positing law as an agent and object of integration will trigger a gradual process of social convergence constitutive of an emerging *European* identity, on the latter view the socio-cultural embeddedness of law precludes any meaningful integration of different *national* legal orders. In contradistinction to both approaches, Augenstein contends that the gradual erosion of the ties between the State and the nation through European legal integration calls for a transnational account of the linkages between law and societies for the purpose of European legal integration. He defends a relational conception of legal integration that guards itself against two normative pathologies of the integration project: a form of legal positivism and instrumentalism that, *pace* Veitch, leads to a European juridification of the social; and a form of convergence preaching that leads to a national socialization of the legal.

Beyond 'Integration through Law'?

The contributors to the third part of this volume move beyond classical conceptions and roles of 'integration through law' to embrace more participatory, reflexive or fragmented forms of legal rule in European integration. This serves, as Jo Shaw remarks, to 'epitomize both the consolidation of the turn to reflection and critique