From the stage to the high seas.
Concluding thoughts on the present and future of EU legal studies

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Abstract

Difference between social science analyses of law and legal analyses – Theatre metaphor to understand the difference – Internal and external points of view – Necessity for legal analysis to use materials lying outside the classical pyramid of formal sources – Overview of the spectrum of legal research – Legally relevant texts and practices – Interdisciplinary approaches to law and lawyers' disciplinary edge.

Introduction

As the papers collected in this issue have amply demonstrated, there is no easy way to circumscribe the breadth of EU legal studies. This is probably because this methodological question begs another, more fundamental one: what are legal studies for? Or more to the point: what does it mean to analyse an issue from a legal point of view? What makes it different from, say, a sociological or political science analysis of the same problem?

In relation to these questions, this paper seeks to make two claims. First, there is a difference in nature between social science analyses – understood in the context of EU studies as referring mainly to sociological and political science studies – and legal analyses – a term defined below and used to capture both legal practitioner's work and mainstream legal literature. This claim will be developed in section 1 based on the title of this special section. It will be argued that, by using notions coming from the world of drama such as "actors" and "roles", this title sheds light on the essential features of legal

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analysis and helps contrast them with the approach traditionally underlying social science inquiries.

The second point is that that this difference in nature does not prevent legal researchers, *without losing their disciplinary edge*, from analysing materials (such as texts or practices) lying outside the classical pyramid of formal sources. Drawing on the papers assembled in this volume (and on a few more projects discussed during the conference that gave rise to this special section), section two will attempt to demonstrate that any type of legal research entails *some degree* of openness. Even narrowly construed, legal analysis resorts to interpretive materials beyond the formal sources of law. Moving beyond this minimal degree of openness, a richer and more substantive approach to law can also include in its scope of investigation practices perceived as challenging for the foundations of the legal system. More adventurous lawyers can go even further and, following fruitful traditions such as pluralism or system theories, analyse as genuine *norms* practices that unfold at the margins of State-sprung positive law. Finally, legal scholars can decide to approach law not as a system of norms but as a type of discourse or as a socially meaningful practice. Walking through the looking glass, they then adopt an external point of view on law with a view to bringing a distinctive contribution to social science analyses. The word 'distinctive' is important here. It is one of the central assumptions of this paper that when legal scholars join social scientists in their attempt to explain social phenomena or practices, they should resist the temptation of mimicking them. Legal researchers can only bring an added value to social science literature if they do not break away from the assumptions that form the bedrock of their own epistemic community[1] – the most important of them being that legal discourse works according to its own codes and constraints and that, for this reason, it must be taken seriously and

[1] Understood as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area". These professionals "have (1) a shared set of normative and principles beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs (…); (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and (4) a common policy enterprise – that is a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence" (P. M. Haas, 'Introduction. Epistemic Communities and International Policy Coordination' 46 International Organization (1992) p. 1-35, at p. 3)

should not be regarded as the simple mirror of external (economic, political, social) factors.

1. The theatre metaphor to understand the difference between lawyers and social scientists

As many legal theorists have noted[2], law shares a lot of features with drama. Law is primarily about creating characters. To name just a few examples drawn from the EU play, the Council, the Commission, the Court, the Ombudsman, the Member State, the Applicant, the Worker, the Citizen are abstract figures with defined characteristics which can be impersonated by various people, whether simultaneously or across time. Furthermore, law assigns specific roles to these characters, such as proposing, adopting, amending, implementing, invoking, advising, enforcing, reviewing legal acts.

Law also provides the actors with a script that, depending on the act concerned, is more or less detailed. Returning to the EU play, the script can be basically limited to the Treaty rules when it comes to adopting a legislative act. It will however be much more precise regarding implementing acts. And it will leave – officially at least – no freedom with respect to judicial rulings.

Besides, like in a theatre, law is mostly played on a stage. This is most obvious for trials, from the clerk announcing the opening of the court session to the costumes worn by judges and counsels alike. But it also applies to parliamentary work and increasingly, thanks to the publicity and transparency principles, to the Council and Commission dealings. Even trilogues can no longer fully escape the limelight[3].

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[2] *See* e.g. P. Moor, *Le travail du droit. Essais sur l'Etat de droit* (Presses Universitaires de Laval 2021) p. 9-22 ; N. Rogers, 'The Play of Law: Comparing Performances in Law and Theatre', 8 *Queensland U. Tech. L. & Just. J.* (2008) p. 429; O. Cayla, 'La souveraineté de l'artiste 'du second temps'' 12 *Droits, revue française de théorie juridique* (1990) p. 129-148.

[3] GC 22 March 2018, Case T- 540-15, *De Capitani* v *European Parliament*, paras 83-84: '[T]he effectiveness and integrity of the legislative process cannot undermine the principles of publicity and transparency which underlie that process. Accordingly, the Court finds that no general presumption of non-disclosure can be upheld in relation to the fourth column of trilogue tables concerning an ongoing legislative procedure.'

Finally, from a dynamic point of view, the life of the law can be characterized as an endless sequence of acts involving different characters. By way of example, an oversimplified version of the EU regulatory script would typically start with a scene featuring the Commission and stakeholders. The next acts would in turn include the Commission, the European Parliament and the Council; the Commission and comitology members; the lawyer and her client; and finally, litigants before (EU or national) courts. But far from a breath-taking finale, the play would then continue to unfold, haphazardly, from one scene to another, hinging on the goals, strategies and (mis)fortunes of the various characters.

This analogy is useful because it goes a long way toward revealing the major difference between a legal analysis and a social science approach. Freely relying on Ricoeur's work,[4] one can argue that social scientists mainly seek to *explain* social phenomena. What they care about is what is *really* happening "out there". Therefore, when social scientists turn to the fabric of EU law, they want to know how it *really* works. With that objective in mind, they will of course consider what is happening on stage but they will look at the play for what it is – *a play*.

Good social scientists will not minimize the very real and concrete effects that this play has on the conduct of the audience[5], neither will they downplay the impact that the script has on the behaviour of the actors on stage[6]. But that will not be the end of the story for them. They will peep at what is happening backstage in an attempt to unveil the role of "shadow lawmakers" such as lobbyists or the Eurogroup[7]. They will look at the

[4] See P. Ricoeur, 'Expliquer et comprendre. Sur quelques connexions remarquables entre la théorie du texte, la théorie de l'action et la théorie de l'histoire', 75 *Revue philosophique de Louvain* (1977) p. 126-147; P. Ricoeur, 'Logique herméneutique ?' in P. Ricoeur, *Ecrits et conférences* 2 – *L'herméneutique* (Seuil 2010) p. 123-195; and the excellent summary by J. Grondin, *L'herméneutique* (PUF 2006) at p. 81-86.

[5] As Robin Gadbled aptly noted, one may wonder who sits in the audience if even citizens and workers are on stage. It is a good point that shows that this metaphor, just like any other, has its limitations. However, I think that it is fair to consider that most EU nationals only occasionally (and on very limited aspects) jump on stage as an EU Citizen, Worker or Service Recipient. We spend most of our lives off stage, watching (more or less carefully) other people's performance in the EU play.

[6] See e.g. A. Vauchez, 'Le travail politique du droit ou comment réfléchir au "rôle politique" de la Cour ?', in L. Clément-Wilz, *Le rôle politique de la Cour de justice de l'Union européenne* (Bruylant 2019) p. 39-54.

[7] *See* e.g. U. Puetter, *The Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance* (Manchester University 2006)

professional training of the actors[8], at their routines and habits both on and off stage[9] (trilogues, etc.), but also at their power relations[10] and legal strategies[11] in order to understand their performance. They will measure the audience's feelings after the play, whether through qualitative interviews[12] or large-scale polls such as Eurobarometers[13]. In a nutshell, what is happening on stage is only part of their investigation. And what the script says should be happening on stage is even a smaller part of it. Because what the script says does not fully account for what the actors do on stage. And because what the actors do on stage does not fully explain the whole show. Social scientist are like reporters writing an article on the new show in town.

Enters the lawyer, whose vantage point is completely different. For the purpose of this article, "lawyer" is used as a category that includes anyone trained to carry out legal analyses. Legal analysis, in turn, is defined as the reasoning aimed at identifying a legal norm. Legal analysis can be conducted in the context of a case. As is well known, practicing lawyers and judges routinely apply their skills to finding the "right answer" (i.e., the applicable norm) to a specific factual situation. But legal analysis can also operate at a more general, less controversial, level. When a professor decides to carry out a legal analysis – an activity that does not exhaust the possibilities of legal research, as explained below – of the legislative procedure, it means that he or she will seek to identify the norms governing such a procedure by looking at a number of legally relevant elements such as Article 294 TFEU, the ECJ's case-law, etc.

[8] *See* e.g. A. Vauchez, *L'union par le droit. L'invention d'un programme institutionnel pour l'Europe* (Sciences Po 2013).
[9] *See* e.g. T. Delreux, T. Laloux, 'Concluding early agreements in the EU: A double principal-agent analysis of trilogue negotiations', 56 *J.C.M.S.* (2017) p. 300-317.
[10] *See* e.g B. Oztas, A. Kreppel, 'Power or Luck? The Limitations of the European Commission's Agenda Setting Power and Autonomous Policy Influence', 60 *J.C.M.S.* (2022) p. 408-426.
[11] *See* e.g. A. Tacea, 'From legal to political reasoning: national parliaments' use of reasoned opinions in the Area of Freedom, Security and Justice', 59 *J.C.M.S.* (2021) p. 1573-1589.
[12] *See* e.g. E. Van den Hoogen, W. de Koster, J. Van der Waal, 'What does the EU actually mean to citizens? An in-depth study of Dutch citizens' understandings and evaluations of the European Union', *J.C.M.S.* (2022) p. 1-17.
[13] *See* e.g. C. Mcevoy, 'The role of political efficacy on public opinion in the European Union', 54 *J.C.M.S.* (2016) p. 1159-1174.

Unlike other contributors to this special section[14], I do not think that there is a substantive difference between these two types of reasoning although practitioners usually formulate their conclusions in prescriptive terms while academics often use a descriptive tone. The institutional context and "illocutory dimension"[15] of academics' and practitioner's utterances may well be different; but the objective that they pursue – identifying legal norms – and the type of knowledge that they mobilize to that effect – assembling elements regarded as relevant for identifying such norms – are the same.

Understood in that sense, legal analysis should not be conflated with social science. Its purpose is not to *explain* reality but to *interpret* relevant texts and practices with a view to determining norms supposed to govern such reality. Reverting to the theatre metaphor as applied to the law-making process, lawyers do not pay much attention to the actors. *Characters* are what matters to them. They do not care about what the actors do off stage or what is happening behind the scenes. The play is their only reality and the integrity[16] of the *opus* being played is their sole benchmark.

Their primary mission is to determine whether, based on the script and any other relevant element (the intent of the author of the play, the context in which they play, etc.), the actors have given the best possible performance. They act like art critics whose reviews are not based on what the actors had for breakfast or on what the audience felt about the performance, but only on how well the comedians impersonated their characters and gave life to the story. Attorneys will launch proceedings, judges will annul acts and scholars will criticize judgments based on the conviction that some of the actors did not follow the script. Of course, lawyers know that many external factors can *explain* a good or bad performance. But explanation is not what they are primarily after. They first and foremost seek to identify the right performance[17] – or the set of equally convincing

[14] See the papers by Anna Beckers and by Bruno de Witte.
[15] Broadly defined here as what the speaker means to achieve while speaking (describe, request, promise, create, etc.). On this notion, *see* the seminal work by J. Austin, *How To Do Things with Words* (Oxford University Press 1962)
[16] On that notion, see R. Dworkin, *Law's Empire* (Belknap Press 1986), especially chapter 6.
[17] On the right answer thesis, see primarily R. Dworkin, *Law's Empire*.

performances[18] – and evaluate[19] the actors' play according to that yardstick. In doing so, they may respect the discretionary power of the actors when the script gives them such freedom. But they will also make sure that even when they use some measure of discretion, the artists do not betray the *intentio operis*.

Moving back to the original question, this analogy seems to give it a simple and clear-cut answer. Lawyers should be primarily concerned about identifying and clarifying the *norms*, not the *practices* of those subject to the norms. It is therefore entirely normal if a legal account of, say, the ordinary legislative procedure, does not reflect the reality of how this procedure operates in practice. It does not mean that lawyers are naïve or blind-sided. They perfectly know that law does not operate in a vacuum and that its application is subject to an infinity of external factors. But they *decide* to ignore it. And they do so not just because they are not methodologically equipped to analyse such factors, but also – hopefully – out of a genuine commitment for the rule of law. When law fades into the background of institutional practices, it is one of the Union's core values that is in jeopardy. Twentieth-century positivists such as Hart or Kelsen knew that only too well.

2. Looking beyond the script and behind the scenes as a legal scholar

The above description of legal analysis will probably be regarded – and rightly so – as giving an excessively formal and narrow description of what legal scholars do. After all, unlike practicing lawyers, legal researchers are not doomed to develop their analyses entirely within the legal pyramid. EU law literature is replete with studies venturing outside the traditional boundaries of the legal system. This is obviously true for textbooks which, for educational purposes, strive to present a realistic account and a contextualised *explanation* of EU rules and institutional practices[20]. But this tendency

[18] R. Ponsard, 'Les moyens d'une analyse scientifiquement et juridiquement critique : l'exemple de l'étude des décisions du conseil constitutionnel', 31 *Annuaire international de justice constitutionnelle* (2016) p. 65-90

[19] Scholars can also give their interpretation of the script (say, of the EU legislative procedure) in the abstract, i.e. not in reaction to a specific performance by actors. Such descriptive accounts are in no way incompatible with the practice of art criticism (J. Elkins, 'Art Criticism' in J. Turner (ed.), *Grove Dictionary of Art* (Oxford University Press 1996)).

[20] See e.g. E. Herlin-Karnell, G. Conway, A. Ganesh, *European Union Law in Context* (Bloomsbury 2021).

can also be found in a wide variety of scientific papers. While some authors peep behind the scenes to give a better description of how law actually operates[21], others analyse a legal phenomenon in the light of stakes[22], approaches[23] or concepts[24] estranged from the usual legal toolkit. Most crucially for our purpose, these works are presented as the fruit of legal (not sociological or political science) research.

In order to understand how legal scholars can look behind the scenes while not forfeiting their disciplinary identity, I will now somehow loosen the straitjacket fashioned in section 1, taking my cue from the papers collected in this issue. I will relax the belt notch by notch, moving from the most obvious and consensual opening to the most daring one, but always keeping in mind that legal scholars (or science, for that matter) have nothing to gain from mimicking social science investigations.

Legally relevant texts

The view presented in section 1 draws on what the famous legal philosopher H.L.A. Hart calls the rule of recognition[25]. Thinking like a lawyer implies accepting to reason within a system of norms which have in common some kind of "pedigree" determined by specific rules of the system, namely rules of recognition. In that sense, the legal system is closed on itself: only law can create law. More specifically, in modern legal orders, law can only be created through a limited number of so-called "formal sources". These sources (such as primary law, general principles, secondary and tertiary law for the EU legal order) are the norms' official medium. However, as every lawyer knows, the closed nature of the legal system does not mean that norms are available from a simple reading of the law's formal sources.

[21] See B. de Witte's contribution to this volume.
[22] See e.g. M. van den Brink, 'Justice, legitimacy and the authority of legislation within the European Union', 82 *M.L.R*. (2019) p. 293-318.
[23] See e.g. P. Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation', 6 *E.L.J*. (2000) p. 98-116
[24] See e.g. F. Ippolito, 'Vulnerability as a normative argument for accommodating "justice" within the AFSJ', 25 *E.L.J*. (2019) p. 544-560; L. Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization', 45 *C.M.L.Rev*. (2008) p. 1335–1356
[25] H.L.A. Hart, *The concept of law* (Clarendon 1961).

It is now widely agreed among legal theorists that norms should not be equated with the texts supposed to embody them. To take just one example, Article 34 TFEU is not a norm. It is a text from which the Court has derived specific norms relating to the free movement of goods. As is well known, the legal regime associated with that specific provision has evolved over time while its wording remained untouched. Even more to the point, one single text can sometimes give rise to different legal norms from one legal order to the other. Many provisions of the Napoleon Civil Code gave rise to diverging case-law from the Belgian and French supreme courts. And current tensions between the ECJ and the European Court of Human Rights around the interpretation of certain rights supposed to have the same meaning in both legal orders further exemplify this point[26].

Such variations demonstrate that formal sources do not alone control the legal reasoning. Finding the "right" answer very often entails reliance on other elements. Elements that are deemed to be "legally relevant". What are these relevant elements? This is for the interpreter to determine on a case-by-case basis, following what he or she considers to be a relevant input in the construction of a convincing legal answer.

As said above, such elements obviously contain the "formal sources" of law in modern legal orders. But identifying a norm usually requires looking at other materials. For instance, the Court of Justice is searching for interpretive guidance in all sorts of peripheral documents such as *travaux préparatoires*, Commission guidelines, Parliament resolutions, Charter explanations, minutes of comitology meetings, declarations annexed to the Treaty, Advocate General opinions, and case-law from international courts such as the European Court of Human Rights or the International

[26] See e.g. A. Bailleux, 'Article 52-2. Portée et interprétation des droits et principes', in C. Rizcallah, F. Picod, S. Van Drooghenbroeck (eds), *Commentaire article par article de la Charte des droits fondamentaux*, 3rd edn. (Bruylant 2022 (forthcoming)) at para. 24.

Court of Justice. Advocate Generals are more talkative and do not shy away from referring to scholarly literature, dictionaries and even literary work[27].

Does it mean that the authors of these texts should be described as part of the EU lawmaking process? Not in a strict sense of course, because their intervention is not provided in the script. But their writings are legally pertinent because they can help illuminate the meaning of the script. This is precisely the beauty of law as a discipline, to be both normatively closed – in the sense that only law can create law – and cognitively open – in the sense that finding the right answer requires looking beyond the often terse and unhelpful wording of the formal source[28].

It is difficult to map out this universe of texts that can be convincingly relied upon in support of a legal reasoning. I would however suggest that at least two categories of texts are almost always relevant.

The first category covers the *institutional texts*. It spans the whole range of texts produced by the actors as part of the official script but which are not recognized as formal sources of law. In the EU legal order, examples of such texts include European Council conclusions, Parliament opinions, Commission legislative proposals, Advocate General opinions, European Ombudsman decisions and Member States declarations annexed to the EU Treaty. Of course, such texts may have some normative breadth of their own: their adoption can be legally mandatory (think about European parliament's opinions) or may give rise to further obligations (think about the Commission's legislative proposals). However, and here lies the difference with formal sources of law, these texts do not *contain* norms[29]. On the other hand – and this is the point I want to make here –, these texts can help identify norms primarily embedded in formal sources of law. In that sense, they are potentially relevant to any legal analysis.

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[27] For a survey of AG Opinion's references to Shakespeare writings, see G. Gadbin-George, 'To quote or not to quote: "Literature in law" in European court decisions and legal English teaching' 64 *ASp* (2013), available at http://journals.openedition.org/asp/3842, visited 25 March 2022.

[28] This notion famously comes from G. Teubner (*Autopoietic law. A new approach to law and society* (de Gruyter 1988)) although he means something slightly different when he refers to the cognitive openness of law.

[29] I am indebted to Elise Muir for drawing my attention to the need to introduce this distinction.

The second category comprises a set of texts that can best be described as *learned legal writings*. Judicial precedents obviously belong to that category. The relevance of the case-law in today's legal world can hardly be overstated, especially in the EU legal order. But the persuasive force of precedents can extend to rulings handed down by courts operating wholly outside the legal order of reference. By way of example, EU Courts have – albeit rarely[30] – relied on rulings handed down by international courts such as the International Court of Justice[31] and on doctrines developed by foreign courts such as the United States Supreme Court[32] in support of their EU law-based reasoning.

Academic papers also belong to the category of learned legal writings. Their legal relevance is self-evident. As is well known, Article 38 of the International Court of Justice Statute holds that "the teachings of the most highly qualified publicists of the various nations" can be used as "as subsidiary means for the determination of rules of law". Admittedly, no similar provision can be found in the EU Treaties and the ECJ rulings do not contain any explicit reference to legal literature. However, the influence of academic work on the development of EU law cannot be downplayed. Joana Mendes' contribution to this volume goes a long way toward illustrating the "underhand" influence of academic writings in the understanding and shaping of a whole field of EU law[33].

This openness of interpretation already loosens the lawyer's straitjacket quite a bit. Looking up at the normative sky, lawyers should not be blinded by the shiny glow of formal sources. Reliance on these sources may well – in our Western contemporary legal culture – be necessary to the identification of a legal norm. But it is rarely sufficient.

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[30] Leaving aside the notable exception of the European Court of Human Rights, the ECJ has proved rather reluctant to draw on international and foreign case law. See e.g. its dismissal of the UN Human Rights Committee findings in *Grant* (ECJ 17 February 1998, Case C-249/96, *Grant*, paras 45-47).
[31] ECJ 21 December 2016, Case C-104/16 P, *Council* v. *Front Polisario*, paras 91 and 105.
[32] GC 8 September 2016, Case T-472/13, *H. Lundbeck v Commission*, para. 353.
[33] In the same vein, but from a political science perspective, see J. Bailleux, 'Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan-Stresa 1957)', 60 *Revue française de sciences politiques* (2010) p. 259-318.

Legally relevant practices

Letting the belt out a notch, one should also remember that law is not exactly like a play. There is more at stake in legal interpretation than in, say, literary analysis. Law is meant to govern conduct, which explains why lawyers are not supposed to only look up at the texts, but to also look down at the real-world practices. Not to *describe* them like social sciences do, but to *evaluate* them from a legal point of view. Accordingly, it is not just "legally relevant" *texts* that the lawyers must pay attention to, but also "legally relevant" *practices*[34], namely practices that have a special relationship to law. Here again it is difficult to draw an exhaustive list of the practices that deserve such a label but, based on several contributions to this volume, it seems possible to break them down into three categories.

The first and most obvious one includes *regulated practices*, i.e. practices *governed to some extent* by law. Even limited to EU law, this is of course a very broad category, ranging from mergers between companies[35] to the allocation of education or training grants for EU citizens[36]. The knowledge and analysis of these practices *insofar as they are legally regulated* is a must for any lawyer seeking to grasp the meaning and scope of the rules governing them. Applied to the question of lawmaking in the European Union, this first category covers, for instance, *specific aspects* of lobbying (as Emilia Korkea-Aho convincingly argues), trilogues (as Bruno de Witte points out) or companies' standards and codes (as Anna Beckers suggests). All these practices that contribute to the development of EU legislation are to some degree regulated by the EU script; the actors partly endorse a "character" in the EU play. *To that extent*, such practices are relevant for a legal description of the EU law-making process. They develop (partially) *within* a defined legal framework.

[34] Obviously, such practices (think about trilogues or lobbying) typically entail the production of texts. But my point is that it is the practice itself, and not its end result (say, the text agreed upon at the end of the trilogue phase), that is primarily relevant to legal analysis. That is what makes this category distinct from the "legally relevant texts" category. I am grateful to Robin Gadbled for drawing my attention to this potential confusion.

[35] See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004) OJ L 24/1.

[36] ECJ 24 October 2013, Case C-275/12, *Elrick*; ECJ 24 October 2013, Case C-220/12, *Thiele Meneses*.

Admittedly, such a regulation-based approach is still very narrow. It does not capture a variety of practices (or parts of practices) which, albeit not governed by law, affect the underpinnings of the legal system. Freely drawing on Emilia Korkea-Aho's reference to the "constitutional framework", one could call such phenomena "*challenging* practices". This category refers to practices that are legally relevant because they challenge the "constitutional" foundations of the legal system – challenge being understood in the double sense of potentially undermining these foundations and representing a challenge for legal thinking.

Undoubtedly, many (more) aspects of lobbying, trilogues,or private regulation (but also agencification, comitology, etc.) feature among such practices, whether because they (threaten to) upset the balance of power between the institutions or because they jeopardise certain values or objectives inherent in the European Union project. But wholly unregulated practices can do that too. Think about the 1966 Luxembourg compromise; the Eurogroup's impact on ECOFIN meetings; the European Council strong-arming the Commission over the suspension of rule of law clause in the multiannual financial framework[37]; or about Mario Draghi's "whatever it takes" statement amidst the sovereign debt crisis[38].

Including such practices in a legal analysis significantly enriches the lawyer's discourse but it also makes it more vulnerable. As the "legal grip" grows in amplitude, it loses its firmness given that practices can only be labelled as "challenging" based on a certain understanding of the constitutional underpinnings of the legal system concerned. And such understanding always depends on a prior interpretation of broad principles. In other words, the "relevance" of the practice is determined by the initial perception of a "tension" between that practice and the EU's constitutional bedrock. It therefore involves a prior value judgment (as the word "challenging" suggests) even if, upon

[37] Conclusions of the European Council meeting of 10 and 11 December 2020, EUCO 22/20.
[38] C. Alcaraz e.a., 'Whatever it takes: what's the impact of a major nonconventional monetary policy intervention?', ECB Working Paper Series no. 2249, March 2019, https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2249~543dd2fbd3.en.pdf, visited 25 March 2022.

closer analysis, the practice may ultimately not be regarded as unlawful or unconstitutional. Of course, this does not mean that an EU law textbook can only mention "para-legal" practices provided that their legality is questioned. The simple description of such practices can certainly be relevant for educational and informational purposes, including for law students. But it does not mean that it is always relevant to legal analysis – which in turn should not be the alpha and omega of legal education.

One could argue further that some of these practices can also be deemed legally pertinent in another sense, namely because they *constitute norms themselves*. Their inclusion in legal analysis would therefore be inevitable since they *form part of the legal framework*. This alternative brings us to the third category of relevant practices, to which I will now turn.

This last category refers to practices that are legally relevant not because of their relation to pre-existing norms or principles (like the other two categories) but because of their own normative potential. I therefore suggest calling them *normative practices*. Clearly this is hardly new to lawyers. Even die-hard positivists have long considered that a repeated practice combined with the appropriate *opinio juris* could magically turn into a norm. Yet, surprisingly, the identification of EU customary rules has remained understudied, with a few notable exceptions. Keller and Blanchet consider, for instance, that the involvement of the Special Committee Agriculture instead of the COREPER in the preparation of Agrifish Council meetings is a European custom[39]. Arguably, several other "challenging" practices, provided that they are not regarded as *contra legem*, could be regarded as the expression of customary rules This is probably a promising avenue for EU legal research[40].

[39] J. Keller & T. Blancher, 'Peut-on parler de coutume en droit de l'Union européenne ?', in I. Hachez *e.a.* (eds), *Les sources du droit revisitées – volume 1* (Anthemis – Université Saint-Louis 2012) p. 245-246.
[40] In the same vein, see S. Besson, 'General principles and customary law in the EU legal order' in S. Vogenauer & S. Weatherill, *General principles of law. European and comparative perspectives* (Hart Publishing 2017), chapter 7.

But customary rules are just the tip of the iceberg. The bravest legal explorers could, following Anna Beckers' suggestion, embrace a wider understanding of law typical of – but not specific to – the pluralist movement. That approach entails considering as "legal" norms that spring from the practice of actors and that cannot be connected to any State-like formal source. This century-old approach has proved extremely effective in drawing attention to rampant, vernacular, "vulgar" laws that might escape the eye of the State-law trained lawyer.[41]

However, this approach is also fraught with difficulty because it may result in adopting an overbroad definition of law. For instance, legal theorist Lucien François considers that any imperative wish backed up by some sort of pressure (in the form of the threat of a sanction) amounts to a legal norm[42]. Based on that definition, a company should be regarded as issuing a legal norm when it warns the government that it will move its business activities abroad unless the domestic corporate tax rates are lowered. In the same vein, the "global law" movement – which aims to think of law without any reference to the notion of "legal order" – regards university rankings and credit ratings assigned by private agencies as legally relevant *norms* (not just as – regulated or challenging – *practices*)[43].

The problem with such approaches is twofold. First, as realistic or pragmatic as they claim to be, such definitions of law are miles away from the layman's common understanding of what a legal norm is in the 21st century – instinctively associated with formalism and procedures. In that sense, the gain achieved in terms of analytical scope is somewhat offset by a loss in intelligibility and – more importantly perhaps – in terms of "granularity". By indiscriminately treating as legal norms threats made by "bands of

[41] For seminal papers providing a good introduction to modern legal pluralism, see e.g. J. Griffiths, 'What is legal pluralism?', 24 *Journal of legal pluralism* (1986) p. 1-55; S.F. Moore, 'Law and social change: the semi-autonomous social field as an appropriate object of study', 7 *Law and Society Review* (1973) p. 719-746; S.E. Merry, 'Legal pluralism' 22 *Law and Society Review* (1988) p. 869-901.
[42] L. François, *Le problème de la définition du droit* (Liège 1978) and *Le cap des tempêtes. Essai de microscopie du droit* (Bruylant – LGDJ 2012).
[43] See e.g. B. Frydman, 'Comment penser le droit global ?', Série des Working Papers du Centre Perelman no. 2021/01, https://www.philodroit.be/IMG/pdf/comment_penser_le_droit_global_2011.pdf?lang=fr, visited 6 July 2022.

robbers"[44], benchmarks created by private bodies and constitutional provisions, the legal researcher arguably loses its analytical edge. Second, and related to that, this loss also has political – if not ethical – implications. The rule of law is based on a relentless respect for forms and procedures. Treating corporate threats or private benchmarks as legal norms, even for purely scientific purposes, obliterates such a fundamental dimension of modern law and might – involuntarily – contribute to undermining the increasingly fragile 'rational-legal authority'[45] that underpins our modern societies.

One way to steer clear of that problem without remaining stuck in a State-centered conception of law could be to rely on H.L.A. Hart's definition of a legal order, which consists of a combination of primary norms (such as "you shall not kill") and secondary norms, namely norms which regulate the recognition, adoption, amendment, and enforcement of primary norms[46]. Whether they originate in the State or in private actors, secondary rules give norms their legal "pedigree"; they insert them into a web of other norms that distribute and regulate the law-making and law-saying functions. Teubner's "societal constitutionalism" follows this exact pathway[47]. Based on that approach, and coming back to the EU landscape, the standards adopted by the Basel Committee for the prudential regulation of banks should, for instance, be regarded as legal norms that deserve the lawyer's attention regardless of their incorporation into formal sources of EU law (directives, regulations, etc.). Delocalisation threats made by a company against a State, on the other hand, should not.

Walking through the looking glass: interdisciplinarity and the external point of view

[44] Following St Augustine's famous expression (*The city of God*, part I, IV, 4: "Without justice what are kingdoms but great bands of robbers? And what is a band of robbers but such a kingdom in miniature?")
[45] For an application of this Weberian category to contemporaneous legal developments, see M. Coutu, *Max Weber's interpretive sociology of law* (Routledge 2018).
[46] H.L.A. Hart, *The concept of law* (Clarendon 1961) p. 79-110.
[47] See G. Teubner, *Constitutional fragments. Societal Constitutionalism and Globalization* (OUP 2012) p. 48-49: "private codes (…) attain their validity from an independent combination of primary and secondary norms".

Finally, it is also possible – and even desirable – for legal researchers to occasionally take off the straitjacket altogether. After all, legal scholars are not just lawyers. They are also scientists, and scientists do not like working with blinkers. Besides, law is not just a closed system of norms. As a specific type of discourse, it produces its own version of reality and impacts social relations in a variety of ways that cannot be reduced to the "compliance/violation" couple.

While not seeking to replace or mimic social scientists, legal scholars should not turn a blind eye to this "social" dimension of law. They have a distinctive and "thick" understanding of law that is key to any attempt at elucidating its relation to "reality". They can usefully warn social scientists against the temptation to reduce law to "power in disguise" and remind them to take seriously law's claim to rationality and coherence.

Legal scholars should therefore be encouraged to sometimes leave the wonderland of law and, walking through the looking glass, adopt an *external* point of view on legal phenomena. But it is crucial that when they do, they make this shift in *gestalt* explicit and that they are aware of the consequences of such a change in posture. Stepping outside of the legal system inevitably "exposes" lawyers. Once in the outside world, they can no longer use the legal system's perimeter and the fundamentals of legal dogmatics as a substitute for a strong methodological framework. If they do not want to drown (or swim in circles) in the high seas of social science, legal scholars must borrow methods and epistemologies from such disciplines.

Drawing on sociological concepts and approaches such as cause-lawyering, the critical race theories and actor network theory, Iyiola Solanke's oral contribution to the conference that gave rise to this volume illustrates such an interdisciplinary approach[48]. By studying the omission of racial discrimination at the origin of the European Communities and by addressing the composition of the EU courts from a racial angle, the study summarized in that contribution seeks to develop a socio-legal approach to

[48] This communication drew on I. Solanke, 'Diversity and independence in the European Court of Justice', 15 Colum. J. Eur. L. (2008-2009) p. 89.

law-making. Another type of interdisciplinary angle can be found in Loïc Azoulai's research project on "forms of life". In an anthropological vein, this project analyses EU law as reflecting – or even instituting – specific visions of the individual (worker, citizen, etc.) and of human lives[49]. A third illustration of such an external approach in the field of EU legal studies can be found in the ongoing research on Europe's judicial narratives. This project brings together lawyers, political scientists and philosophers in the search for the representations of Europe that are conveyed by the European Court of Juctice mainly (but not exclusively) through its case-law[50].

These three research projects share the ambition to overcome the vision of law as a set of norms while continuing to take legal discourse seriously. Walking this fine line is certainly difficult and risky. But it is arguably not impossible[51] and extremely refreshing.

Conclusion

The contributions collected in this volume make a compelling case for expanding the scope and methods of EU legal studies beyond a strictly normativist approach. At the same time, this set of papers shows that such an expansion can take place at varying degrees. The papers by Bruno de Witte, Joana Mendes and Emilia Korkea-Aho feature moderate openings that sit easily with a positivist take on law. Including trilogues, lobbying or the EU administrative law doctrine in a legal analysis of the 'EU law fabric' is not only perfectly justifiable. It is also necessary from an internal point of view insofar as such elements represent potential challenges to the foundations of EU law.

[49] L. Azoulai, *European Union Law and Forms of Life: Madness or Malaise?* (Hart 2022)
[50] A. Bailleux, E. Bernard (eds), *Les récits judiciaires de l'Europe. Concepts et typologie* (Bruylant 2019) ; A. Bailleux, E. Bernard, S. Jacquot, C. Landenne (eds), *Les récits judiciaires de l'Europe. Dynamique et conflits* (Bruylant 2021). A third (and last) volume, dedicated to the dissemination and reception of such narratives is forthcoming in 2023.
[51] On the very possibility to embrace an external point of view on law while taking legal discourse seriously, see the doubts expressed by A.-J. Arnaud ('La valeur heuristique de la distinction interne/externe comme grande dichotomie pour la connaissance du droit : éléments d'une démystification', *Droit et Société* (1986), p. 141) and the reply by F. Ost and M. van de Kerchove ('De la scène au balcon. D'où vient la science du droit?' in Fr. Chazel and J. Commaille (eds), *Normes juridiques et régulation sociale* (LGDJ 1991) p. 67-80) .

Anna Beckers' paper in support of legal pluralism and transnational law presumably entails a wider opening. It departs from positivism by breaking away from EU law's formal sources. However, it remains within the legal wonderland: even when adopted within a private setting, "lawstuff" (namely norms adopted in accordance with other, pre-existing norms) is analysed through legal eyes and methods.

Finally, these concluding remarks have referred to projects developed by Iyiola Solanke and Loïc Azoulai in previous papers and presented at the conference that gave rise to this special section. These contributions illustrate scientific endeavours of a different nature. They endorse an external point of view whereby legal scholars apply their skills and knowledge to an understanding of law that goes beyond the legal system, in cooperation with other sciences.

Overall, this special section offers a remarkable – yet not fully representative[52] – sample of the EU legal studies' current state and prospects. They show that this field of law is home to a thriving and diverse literature. One can only hope that the current trends in academia will not imperil this fragile ecosystem. On the one hand, the competitive grant-based model and the ensuing publish-or-perish dynamic, by fostering path-dependency and niche specialization, might hamper the emergence of innovative and cross-cutting approaches to EU law. Although most research projects nowadays pay lip-service to interdisciplinarity – which often boils down to a box-ticking exercise – genuinely collective analyses of EU law involving researchers from different academic backgrounds take time and are still limited in number. On the other hand, the increasing divorce between the academic curriculum and legal practice might cause as much damage at the other end of the spectrum. It is not the least of the EU legal doctrine's challenges to continue to provide analyses which, both in terms of subject-matter and method, tally with the experience and needs of practitioners. *In varietate concordia*.

[52] The enduring success of the law & economics movement and the increasing use of quantitative analysis, for instance, are not discussed or represented in any of the papers.