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EDITORIAL

Decentring Europe in EU social law scholarship

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What does it mean to be a scholar of 'social Europe' when European Union (EU) law scholarship, and EU studies in general, are experiencing a hesitant flourishing of postcolonial approaches? Can EU social law scholarship also meet the challenge of its 'decolonial moment'?

In the first issue of European Law Open, we stated our commitment as editors to contextual and critical approaches to European law. A commitment to interdisciplinarity, for sure; but also, I would like to think, to exploring new forms of knowledge production through centring questions which have in the past been at the periphery of EU scholarship, such as acknowledgement of the legacies of Europe's empires and European colonialism. Contemporary EU legal scholarship in universities has been built through the work of exposition and exegesis, through doctrinal or scientific elaboration. For critics and innovators this has long been a source of vexation, to the extent that legal dogmatics is prioritised and the background norms and power asymmetries (eg along lines of race, gender, centre-periphery divides) are undertheorised. Whilst EU law scholarship has developed what Päivi Johanna Neuvonen describes as a 'methodological commitment to critique,'[1] and an engagement with critical approaches which challenge legal orthodoxies,[2] nevertheless, some scholars argue that such critical interventions are rare and still too easily overlooked by the mainstream of the field.[3] The traditions of labour and social law scholarship with which I am most familiar[4] have indeed long been critical and contextual – in terms of a recognition of how private ordering is embedded in the public realm, challenging the coherence of the public/private distinction; marked by a degree of legal scepticism;[5] and open to the adoption of methods from across the social sciences.[6] However, it is debatable to which extent

[1]P Neuvonen, 'A way of critique: What can EU law scholars learn from critical theory?' 1 (2022) European Law Open 60–88.

[2]"If legal critique is argued to encompass bodies of thought that challenge legal orthodoxies or fictions, the study of European law is full of critical legal thinkers": M Everson and C Joerges, 'Facticity as validity: The misplaced revolutionary praxis of European law' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019), 423.

[3]I Isailović, 'Critical approaches in EU law – still a blindspot', Transformative Private Law Blog, Amsterdam Centre for Transformative Private Law, 28 September 2023; <https://transformativeprivatelaw.com/critical-approaches-in-eu-law-still-a-blindspot/> accessed 6 December 2023.

[4]See P Davies, A Lyon-Caen, S Sciarra, and S Spiros (eds) *European Community Labour Law: Principles and Perspectives, Liber Amicorum Lord Wedderburn* (Clarendon Press 1996); S Sciarra, *Solidarity and Conflict: European Social Law in Crisis* (Cambridge University Press 2018); K Klare, Horizons of Transformative Labour Law' in J Conaghan, RM Fischl, and K Klare (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford University Press 2002); R Dukes, 'Critical labour law: Then and now' in *Christodoulidis, Dukes and Goldoni* (n 2), 345.

[5]R Dukes (n 4).

[6]See L Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press 2016), and LJB Hayes, *Stories of Care: A Labour of Law. Gender and Class at Work* (Palgrave 2017). For a recent contribution in relation to EU social law, see A-C Hartzén, A Iossa, and E Karageorgiou, *Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration* (Edward Elgar 2022).

social law scholarship in either its national or EU incarnations is able to build on this commitment to critique and scepticism of legal orthodoxies, to move beyond the labour/capital relation as a central faultline for legal analysis, and to engage meaningfully with the legacies of colonialism as central elements of social law and labour markets.

There are two moves I would suggest for EU social law scholarship, which are related; and both, somewhat counter-intuitively, require decentring the focus on Europe in order to better theorise social Europe. First, a more meaningful engagement with the current decolonial turn in EU studies. Whilst historians and other scholars of empire have long been re-telling the story of the EU integration project as one inextricably linked to Europe's colonial past,[7] it is only relatively recently that EU legal scholars have begun to address imperial legacies,[8] ie that it is not only individual nation states, but the EU itself which are 'carriers' of colonialism and responsible for its legacy.[9]

It is not possible to tell the whole story of the EU's internal market, and the social dimension of that market integration project, without an awareness of the porous borders of the 'social'. Not just in the literal sense, of labour migration into the territory of the EU of 'third country nationals'[10] (in particular from former colonies of EU member states), or the possibility of third country nationals deriving EU work and residence rights via EU citizen family members.[11] But also in the sense that the 'reach' of social Europe extends beyond the spatial boundaries of the EU.

A model for such scholarship is offered by Daniela Caruso and Joanna Geneve, who show with attention to the granular detail of the reasoning of domestic and EU courts, as well as insights into the wider colonial and trade histories, how the interaction between national and supranational migration and asylum law must be considered in the context of the 'triangular framework' of the unresolved histories with the EU's southern neighbours and former colonies.[12] What would it entail to pursue a scholarship on EU social or labour law more broadly which was equally attentive to colonial legacies? Perhaps an awareness of significance of colonial inheritance or 'colonial drain' to the ability to finance systems of social solidarity, or varieties of welfare state and labour market institutions, within individual EU member states – and subsequently in the context of the European social model.[13]

The second way in which EU social law scholarship might decentre Europe is by historicising labour or social law's dominant narrative.[14] EU social law and policy has evolved in large part as a

[7]See G Garavini, *After Empires: European Integration, Decolonization and the Challenge from the Global South 1957–1986* (Oxford University Press 2012); P Hansen and S Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic 2014); K Nicolaïdis, B Sèbe, and Ge Maas (eds) *Echoes of Empire: Memory, Identity and Colonial Legacies* (IB Tauris 2015).

[8]For substantive engagements, see N El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester University Press 2020), especially Chapter 5 'European citizens and third country nationals: Europe's colonial embrace'; S Rehling Larsen, 'European public law after empires' 1 (2022) European Law Open 6–25; H Eklund (ed) *Colonialism and the EU Legal Order* (Cambridge University Press, forthcoming 2024). For an outline of a decolonisation agenda for empirical studies of EU law, see I Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in M R Madsen, F Nicola, and A Vauchez (eds) *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022).

[9]G K Bhambra, 'Whither Europe? Postcolonial versus Neocolonial Cosmopolitanism' 18 (2016) Interventions: International Journal of Postcolonial Studies 187–202.

[10]As Elspeth Guild notes, third-country nationals' initial admission to the EU is usually regulated by domestic law, unless they fall within one of the six types of migration regulated by EU law: E Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in C Costello and M Freedland (eds) *Migrants at Work: Immigration and Vulnerability in Labour Law*, (Oxford University Press 2014) 98.

[11]Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124.

[12]D Caruso and J Geneve, 'Melki in Context: Algeria and European Legal Integration' in F Nicola and B Davies (eds) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

[13]D Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' 50 (2021) Industrial Law Journal 506–531.

[14]J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in G Davidov and B Langille (eds) *The Idea of Labour Law* (Oxford University Press 2011), 120.

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counterweight to the EU internal market.[15] Social law scholarship accordingly tacks closely to the larger political economy from which it originates, focusing on work relations and employment patterns of market participants who conform to the model of the normative worker in industrialised economies. As Judy Fudge observes, 'a specific form of regulation at a particular moment in time has come to be seen as *the* form, rather than *a* form, of labour law'.[16] Thus, non-standard or 'new' forms of work are exceptionalised, and it is a challenge to fit them within the standard paradigm.[17]

The law of social Europe remains anchored in a world of work that is declining. There is a need to 'provincialise' the epistemic, cultural *and economic* premises of knowledge, which is centred around the European model,[18] where that model presupposes forms of work which are themselves unravelling. One means to do this is an approach which centres the experience and history of work in non-hegemonic countries of the global South – in particular, the predominance of informal and precarious work – as exemplary of work and its dilemmas in the new economy.

As Simon Glendinning puts it, understanding Europe requires going beyond Eurocentrism.[19]

In this issue

The core analyses in this issue deal with constitutional law, migration law, 'classic' environmental law and the legal regulation of the socio-ecological transition. We are very pleased to also publish an article on tax competition; partly because of the intrinsic quality of the piece, partly because tax is a criminally neglected topic in EU legal scholarship, and partly because it exemplifies our commitment to early career researchers.

Somek and Paar reconstruct the tensions at the heart of the European constitutional field. Their point of departure is the pluralistic (and therefore anarchical) condition of contemporary constitutional law, in which the authority of constitutions 'avails of more than one anchor'. Indeed, at the very least, of two. Not only the will of the people (as would be the case in the 'old' democratic constitutional law) but also the 'nod of approval' of the relevant 'peer group' (which in the European case is partially embodied by the European Court of Justice or the European Court of Human Rights). This predicament has massive implications for the practice of scholarship, and results in a tension not only between the 'old' scholarly standards and the requirements of digital public law (basically everything that fits to print in 280 characters), but also between normative expectations and its implications. This renders unmissable the political character of constitutions and of constitutional law. No way forward is to be found in a retreat to the pretended immaculate purity of the legal expert. But no salvation is to be expected either from the reduction of legal scholarship to the blogosphere or Twittersphere.

Kampourakis doesn't shy away from a challenge. From the perspective of one seeming oxymoron- 'sustainability capitalism' – he looks for the progressive potential of another – 'planning within markets', all from a theoretical commitment to the idea that markets are legal constructs. From a comparative analysis of Chinese, US, and EU policies to further the transition from internal combustion engines to electric cars, he concludes that law can effectively be used to strategically deploy market processes for the achievement of politically set objectives. If that weren't sufficient, he then addresses the alleged epistemic inferiority of planners relative to the impersonal genius of markets, famously posited by Hayek.

[15]D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' 19 (2013) European Law Journal 303–324.

[16]Fudge (n 14), 121. Emphasis in the original.

[17]N Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' 47 (2018) Industrial Law Journal 192–225.

[18]See G K Bhambra and B de Sousa Santos, 'Introduction: Global Challenges for Sociology' 51 (2017) Sociology 3–10.

[19]S Glendinning, 'Beyond Eurocentrism: A Strategic Memo' European Institute, London School of Economics and Political Science, <https://www.lse.ac.uk/european-institute/BE/BE-EI-Blogs> accessed 6 December 2023.

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To say that public and private autonomy are mutually constitutive solves a lot of problems about liberal conceptions of human rights and personhood. It also leaves immigrants and asylum seekers out in the cold, as their claims to fundamental rights protection cannot be grounded in their position in the political community. Velluti advances a concept of 'equal human dignity' as the interface between legal personhood, equality, and human rights to address and counter the legally sanctioned de-personification and reification of the most vulnerable in our societies.

Jaakkola throws light into one the blind angles of European scholarship, namely the interplay between on the one hand tax law and on the other hand competition as a mode of government and as a societal relation. He starts by reminding us of the peculiar turn of phrase 'tax competition'. Unheard of during the 'treinte glorieuses', it emerged with force in the late eighties pointing to the new limits that the powerful combination of new technologies and the unleashing of capital from controls were introducing into the capacity of states (and in particular Member States of the European Communities) to design and implement "progressive" tax systems. As the author points out, the phenomenon seemed to invite common action through common institutions, and the EU was ideally well equipped to play a major role in that regard. However, the policy measures put forward were deeply ambivalent. The very idea of limiting only "harmful" tax competition seemed to imply there were indeed 'benign' forms of tax competition, extending the disciplining force of competition for capital to the conduct of national tax policy, which would somehow be intrinsic to the normative logic of economic integration (echoed, for example, in the contorted formula used by the European Court of Justice when referring to 'wholly artificial [tax] arrangements' in *Marks and Spencer*,[20] seeming to imply there could be partially artificial tax arrangements, which would pass the test of European validity). While the financial crisis of 2008 and the fiscal crisis which unfolded since 2010 contributed to a change of perceptions, the very possibility of articulating a genuinely political debate on the matter is hampered by the latency of the old normative framework and above all by unanimity voting in tax matters.

Krommendijk and Sanderink note the virtual absence of substantive fundamental rights in the environmental case law of the European Court of Justice, which they attribute, in essence, to the limited relevance of the Charter of Fundamental Rights in EU environmental legislation, to the preference of national courts and litigants to rely on the European Convention of Human Rights in environmental matters, and to the well-known standing limitations in EU law (*Plaumann* prevailing in a much changed EU in a radically different world). That absence, therefore, is hardly surprising and could even be in line with the criticism to human-rights based approaches to environmental protection, tainted as they are by an engrained anthropocentrism. And yet, they see the potential that such an approach could have in EU law. Positive obligations of public authorities could be derived from the Charter that could strengthen environmental protection under EU regulation and allow for a more extensive protection than the one currently envisaged under the ECHR jurisprudence. In addition, if the single environmentally focused Charter provision – the principle of Article 37 demanding 'a high level of environmental protection' – were applied in articulation with Charter rights, EU law could dispose of an additional tool to protect the environment against other rights and freedoms. This is far from a panacea, but it could be one element in the much needed development of legal means to protect the environment.

This issue also contains the second part of the symposium on Stefan Eich's *The Currency of Politics*. Lapavitsas revisits Eich's reconstruction and assessment of Locke's writings on money. The point is not to defend the position of the author of *The Two Treatises on Government*, but rather to clarify the limits to the politicisation of money (its design through democratic procedures to achieve democratic goals) that result from economics of money in a capitalist society. Lockean calls for sound money were made for what the author, agreeing with Eich, regards as wrong reasons, yet should still be considered as a powerful reminder that the design of the fundamental norms governing money finds serious limits in the socio-economic system of which it is one but

[20]Case C-446/03 *Marks & Spencer,* ECLI:EU:C:2005:763, para 57.

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only one of the constitutive parts. Roufos, in his turn, revisits the history of European integration as the history of the different monetary infrastructures of the common market first, and the single market later. Emphasising that such infrastructures have played a fundamental constitutive role, Roufos adds granular detail to Eich's claims. The symposium comes to an end with the rich rejoinder penned by Eich, where he renders explicit a merely implicit theme of his book, namely the degree to which contemporary developments in Europe (the Eurozone fiscal crisis unfolding from 2009) marked and influenced his reconstruction of the political theories of money. Special attention is devoted to the role that John Maynard Keynes plays in the book, and to his vision of a properly politically constituted money.

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