

How much critical distance in the academic study of European law?

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Prof. dr. Bruno de Witte

Faculty of Law

**How much critical distance in the academic
study of European law?**

HOW MUCH CRITICAL DISTANCE IN THE ACADEMIC STUDY OF EUROPEAN LAW?

Dear dean, dear colleagues and friends,

A major advantage of farewell lectures, compared to inaugural lectures, is that the audience does not expect to hear about ambitious research plans or about innovative teaching ideas. Instead, it's fine for the speaker to just talk about the past. The risk, however, is to bore the audience with events and anecdotes from the past which no one else can remember. Let me therefore talk about a subject of *current* interest in European law. There are many such subjects, European law never gets boring, but I have decided not to choose a particular topic of institutional or substantive EU law.

Instead, what I would like to do in this lecture is to present you some reflections on a question that has been nagging me, and others, for a while. What is, in my field of study, European Union law, the proper role of academic scholars? And how, specifically, do they and should they relate to the work of the practitioners of European law who work in the various institutions of the European Union, in the Court of Justice, the European Commission, the European Parliament, the Council of Ministers and the many other bodies and agencies.

This kind of question is situated in a growing sub-field within the academic discipline of European Union law. That sub-field deals with self-reflection about the academic field itself. For instance, there are more and more contributions on the research *methods* to be used in dealing with EU law. There are also, and contributions by legal scholars on the sociology and politics of EU law as an academic discipline. I guess that my talk this afternoon fits in that latter category. It is about the sociology

and politics of EU law as an academic discipline, but seen from one particular angle, namely the way in which EU law academic research is intertwined with the legal work accomplished by the European institutions.

Many of you, like me, are part of a distinct social field in which knowledge of European law is produced. That knowledge is co-produced, on the one hand, by those whose profession is to produce knowledge (that is, scholars who are mostly based at universities) and, on the other hand, by those whose profession is to practice European law – by making, applying or interpreting European law, they also produce new knowledge. These practitioners work in law firms, in business and civil society organisations, and also, above all, in the institutions of the European Union. It's the latter group that interests me this afternoon: how does the co-production of EU law knowledge work between academics and legal practitioners based in the EU institutions?

I will look at the mutual engagement between these two groups of lawyers in two steps. The first step is to describe how the institutions act towards, and within, academia. The second step will be to look at how academics deal with the institutions. In both directions, we see close encounters.

Let me start, though, by noting something obvious that does take me back to the past, to the times when I first heard about European law. That obvious thing is that the academic study of European law did not exist until the European institutions were created. The emergence of the academic field of European law was made possible by the fact that the early European Community Treaties created permanent institutions with real powers who could act independently from the Member States. What then, back in the 1960s, was called the supranational character of the European Community justified the emergence of an academic sub-field distinct from

international law. The early generations of European law scholars were thus closely connected to the fate of the new European institutions. They gave their intellectual support to the institutions whose existence justified their own academic autonomy. That autonomy became visible through the creation of dedicated chairs and specialized journals, a process that started in the early 1960s in countries such as the Netherlands, Belgium and France and then slowly spread to other European countries.

Today, 60 years later, European Union law is firmly established as an academic discipline but some people think that the umbilical cord connecting the early EU law scholars to the European institutions was never cut, and that, today, they are still natural and mostly uncritical supporters of the European integration project and of the way in which that project is conducted by the EU institutions at any moment in time. I will get back to this accusation later on.

Let me, now, return to the first step of my description, namely the main ways in which the EU institutions engage with the academic world, and especially with the little world of EU law scholarship.

First, the EU institutions have always given, and are still giving, financial support to EU legal scholarship in many different ways:

Through the funding of European Documentation Centres in many European universities, starting in the 1960s; these were made conditional upon the existence of teaching and research on European integration in the hosting institutions.

Through the temporary funding of Jean Monnet chairs in European law, a scheme launched in 1989 (and I should disclose that I was an early beneficiary of one of

them in the early 90s here in Maastricht); we later also got the Jean Monnet Centres of Excellence.

Through the funding of collective and individual research, both in the form of consultations requested by EU institutions on particular topics, and in the form of projects funded from the European Union budget, through the Horizon, Marie Curie, Jean Monnet and ERC grants.

Also through the funding of specialized academic institutions such as the College of Europe and the European University Institute, where the study of European law came to occupy a central place

And even through the funding of specialized journals, such as the European Equality Law Review.

It is clear that the European Union, especially the Commission, has actively and deliberately pursued the development of a specifically European dimension in the social sciences (law, political sciences, economics, history). It means that most EU law scholars, at one moment or other, have benefitted from European Union funding for their research or teaching activities, and some of us, like myself, have directly or indirectly benefitted from EU financial support throughout their whole career.

Next to financial support, a second way in which the institutions engage with EU law scholarship is when their members act like scholars themselves. Indeed, many practitioners of EU law are former academics, and some of them teach EU law courses at universities. Some of them publish textbooks on EU law, and articles in law journals. They give visiting lectures and speak at academic conferences. They sometimes sit in the editorial board of journals.

This active presence of practitioners in the academic world of EU law has been described in the literature, most recently in an article by Paivi Leino in the journal *European Law Open*. What we see is an intellectual and social proximity between the world of scholarship and the world of legal practice, which is closer than in most other legal disciplines, certainly closer than in international law. The thin demarcation line is marked by the ritual sentence which the practitioners from EU institutions use in their publications. They declare that the ‘views and opinions expressed in their contribution are personal and do not bind in any way the institution’ to which they belong. This ritual sentence is useful for the academic audience, as it signals the opposite of what it says: it signals that we should be aware that, however interesting and competent those views are, they still stem from practitioners who owe a sense of loyalty to the institution for which they work, and we should read their publication in that light.

A third way in which the EU institutions seek interaction with academics is by organizing a direct dialogue on a topic of common interest. My impression is that this happens more frequently than before. For example, last week the EP and the EUI organised in Florence a policy dialogue ‘In defence of democracy in the EU political system’ with speakers from the EP, from academia and from think tanks. And next week, the European Commission organises a workshop about its recent proposal for a European Media Freedom Act where all the speakers will be academic scholars – in other words, here the institution acts in listening mode.

In all these three modes of interaction, the European institutions have no problem in keeping a critical distance from what academics write or say. In fact, the European institutions do not depend on legal scholarship in the same way as they depend on scientific expert knowledge, for example on the question of climate change or energy prices. The main reason for this is that the European institutions

have their own legal expertise in house. The Commission, Council, EP and ECB have their own legal services, and many of their other officials who are not part of the legal service, do have a legal training. And the Court of Justice is, of course, entirely in the hands of jurists, both among the judges and among the *référéndaires*. This diminishes the need to reach out for academic input in order to find solutions for their daily legal problems.

It does not mean that academic research is considered entirely superfluous. It may occasionally have a policy impact, and sometimes we see concrete evidence of this. But, generally speaking, we don't know to what extent EU law practitioners take note of, or are being influenced by, academic research. Even if they do, the translation of such influence into the content of EU law depends on internal hierarchies and the political choices imposed through them. Notes by the legal services of the EU institutions do not refer, or only very exceptionally, to legal writing. But we do find numerous references to academic work in impact assessment reports that accompany new proposals for EU legislation. The Court of Justice never refers to legal writing in its judgments. Only the Advocates General, at least some of them, refer to academic writing, and many of us have been secretly proud when one of our writings happened to be cited in an Opinion of an Advocate General, especially when cited approvingly.

Let me now look at the other side of the divide, at the way in which academics engage with the work of the European institutions.

The reasons why legal scholars are seeking close encounters with the EU's institutional life are diverse. The main, most obvious, reason, is that EU law scholars based at universities also teach EU law. Teaching in law schools is supposed to reflect the state of the law, and the state of European law depends on what the

European institutions do. So, EU law scholars must necessarily take an interest in the activities of the legal practitioners in the EU institutions in order for their teaching to be relevant. Through their teaching, they diffuse legal knowledge to new generations of jurists and that knowledge will then, indirectly, affect the work of the EU institutions when some of these students will become practitioners in the EU institutions.

This is what one could call the traditional virtuous circle of EU knowledge production. The institutions make, apply and interpret EU law, the academics systematize it and transmit it to their students so as to prepare them, in turn, for making and applying EU law. It explains why a lot of EU legal writing is in explanatory mode. As EU law developments are often confusing and complicated, academics see it as their task to present developments in a structured way. Even though such presentations may include some critical comments, their primary purpose is expository. There is nothing wrong with this. I have done a lot of this kind of writing myself, including not so long ago an article on the Covid recovery plan NGEU, where my principal task was to explain, what the European Union institutions had actually been doing, legally speaking, in those hectic Covid-dominated months of 2020.

However, not all of us need to do this kind of work, and certainly not all the time. The fact that we have to know what the EU institutions do in order to properly teach EU law does not mean that our own research must be in this explanatory mode. Many scholars, instead, approach the work of EU institutions in a critical mode or in legal change mode, in order to advocate improvements in European law.

Such advocacy scholarship, in EU law and other fields, has recently been the object of a debate that was sparked by the publication of articles by Komarek and Khaitan.

I don't want to engage with the debate here, but my general view is that it is perfectly appropriate for legal scholars to advocate legal change. Jurists have always done this. It is reflected in the famous distinction between the *lex lata* and the *lex ferenda*. Traditionally, legal scholars would describe the law as it stood after some new judgment or new piece of legislation, and then, towards the end of their piece, they would either say that they were entirely happy with these developments, or they would present their own, better, view that should be adopted in the future: the *lex ferenda*. What has changed these days is that advocates of legal change are supposed not to just state their own preferred views but also make a sustained argument why those views are sound, possibly by reference to insights from social science or political philosophy. And of course, advocacy should never lead us to ignore or distort the legal reality. Advocating reform of the law presupposes a sharp understanding of what the current state of the law is, because otherwise the advocacy will lead to nothing.

However, many people consider that EU legal research, taken as a whole, is not sufficiently critical of the work of EU institutions. The close ties between EU legal scholars and legal practitioners, which I described before, is not something of the past but continues to exist today and is a source of concern for some observers. For example in the article by Paivi Leino that I mentioned before, she wrote that (I quote) 'EU legal academia should maintain a greater distance from the institutions ... and re-define its self-identity as a reflective and critical force, rather than one mainly focusing on legitimating EU action.'

At this point, I think we have to admit that most EU law scholars do feel supportive of the European integration project, not for career reasons, and not because of pressure exerted on them, but because of their personal trajectory. Many European law academics work in other countries than their own and, if not, have spent years

abroad. They may have grown up in multinational families, or created such a multinational family themselves. For them, for me, our own life is connected to the European integration process, and to the new opportunities and experiences it has created and facilitated. But even if you have spent all your working life in, say, Spain or Sweden, the choice to become a scholar of European law is not an innocent one. It typically comes with a commitment to the project, to a sense that the European Union, as an organisation, is a very useful one, in that it helps all its member states to face common challenges, and that it helps – in some way - to preserve personal freedom and the welfare state.

In my own case, I realize that this basically supportive stance towards European integration has influenced my thinking and my writing. It led me to participate in research projects launched and funded by the European institutions, especially during my years at the EUI in Florence. It also led me to support legal choices made in Brussels or in Luxembourg which others found legally problematic. For example, last year, I published the article in *Common Market Law Review* on the Covid recovery plan that I mentioned before. It was entitled ‘The European Union’s Covid Recovery Plan: The Legal Engineering of an Economic Policy Shift’. As the title implied, I considered that the adoption of the recovery plan had been made possible by creative legal engineering from the side of the EU institutions and their legal services, but I argued that this legal creativity was acceptable and had been done for a good cause. More generally, in my view, the European Union needs to have the capacity to act in order to face numerous challenges that affect all its member states: the Treaty framework occasionally makes this difficult and some legal creativity is then not only acceptable but actually desirable. Others have criticized this position, by emphasizing that our main task, as academics, is to critically control whether the Court and the EU’s political institutions respect the constitutional

framework which the member states established when negotiating the European treaties.

So, I am not apologetic about having sympathy for the European integration project and showing this in my work. But that does not mean that I think we should not keep a critical distance from the work of the EU institutions and from the views expressed by legal practitioners in the academic domain. That distance comes most naturally when academics write about the kinds of things which practitioners don't write about, and are nevertheless important for the construction of knowledge of EU law, such as theoretical reflections on the nature of the European legal order, or on the nature of the EU's economic constitution. But that critical distance should also be there when scholars engage in their main activity, which is to explain and comment on what is going on concretely in the field of EU law.

That critical assessment can be both internal and external. The internal one is by those who work on questions of EU legality by identifying the legal quality of the reasoning in a judgment or of a legal choice made by a European institution. The external one is by those who work on question of EU legitimacy by examining the conditions under which rules of EU law emerge or the impact that EU law rules have on social reality.

The internal critique is ubiquitous. All EU legal scholars practise it. In fact, I really wonder why it is still said that most EU legal scholars uncritically support the Court of Justice. If one looks at case comments in any of the EU legal journals, the majority of them are quite critical of the Court's reasoning. To simply reiterate what the Court decided, and to silently approve its reasoning, has become the exception and is, indeed, frowned upon in academic circles. Critical comments have become the rule, and have become a sign of scholarly distinction. Personally, I like to be able to

praise the Court when I think it gets it right, and criticize it when I think it gets it wrong in its legal reasoning. For example, I basically supported the Court when commenting, together with Thomas Beukers, on the Pringle judgment, and, together with Lilian Tsourdi, on the refugee relocation judgment. And I strongly criticized, together with Sejla Imamovic, what I considered to be the weak and self-serving reasoning of the Court in Opinion 2/13, when it rejected the EU's accession to the ECHR.

What I just said about the Court is also true for the work of the other EU institutions: when new EU legislation is proposed or adopted, scholarly analysis is more often than not accompanied by critique of the legal logic or consistency of what was done.

External critique of the functioning of the EU institutions is less common, but it's a growing part of European legal scholarship. It looks at the conditions under which EU law rules or judgments emerge or at the impact that they have on social reality, both inside and outside Europe, at their distributive consequences. This work looks at European law in its broader political, economic or cultural context, and often engages with interdisciplinary approaches. In many academic settings, this kind of work is nowadays encouraged. In some countries, it is still frowned upon, because considered not to be the proper way of doing legal research. But this is not, I should add, because of any pressure from the side of the European institutions. Indeed, my feeling is that EU legal scholars are, these days, in almost all European countries, freer than ever in choosing the object and method of their research, of doing doctrinal work or law-in-context, in being supportive of what the EU institutions do, or not. European law today is a pluralist academic field, and that is a precious thing.

CONCLUSION

Dear dean, dear colleagues and friends,

Having almost finished my lecture, I am now coming to the 'valedictory' of it. That's the 'farewell' part, for those of you who have never heard the word valedictory, one of those quaint words which the Dutch university tradition is fond of.

The institution of the farewell lecture, one of those typical Dutch thing which made me marvel when I first arrived here, is based on the idea that this is the last opportunity for the speaker to say something in public, to imprint on the audience his or her intellectual heritage, before disappearing in the woods. Nowadays, it does not really work like that anymore. Emeritus professors are provided with a desk, an email address and printing facilities if they like it, and most of them do. And so do I. And therefore, I do not need to be tearful for the fact that I will never see you all again, because the chances are that I *will* see you again either at this university or at some academic event elsewhere.

Still, it is appropriate to serve the tradition and, by looking back at my trajectory, recall some of the phases in that trajectory and people who accompanied me along it.

This university was still called Rijksuniversiteit Limburg (without a corresponding name in English) when I first arrived in 1989. It has since been transformed into the bilingual Maastricht University. That transformation started in the early 1990s, around the time the Maastricht Treaty was being negotiated across the river, and it went on relentlessly. When I started here, only four or five of us were dealing with European law, and now there may be about 50 academics here at the Faculty of Law

who do so. There are many specialized courses in European law, and the composition of staff and students is now very European. The steps leading to this transformation were recounted recently by Hildegard Schneider in her own farewell speech, and I do not need to rehearse them again.

This Faculty has been particularly generous to me, because I have been unfaithful to it. In 2000, after ten happy years spent in Maastricht, I left to work in Florence at the European University Institute. When my term came to an end there, in 2010, I looked around for my next job, and the Faculty of Law of Maastricht, through its dean Aalt Willem Heringa, kindly invited me back to an institution which, in the intervening ten years, had changed so much. I found myself then in 2010, and still today, surrounded by a true 'dream team' of European Union scholars, the best collection anywhere in the world. The composition of that 'dream team' has changed over the years. Some of them went on to develop their careers at other universities, or indeed at some EU institution, but are still very much friends of Maastricht. Others have arrived since then. They are active participants in the European law debate and it's a source of pride to open the latest issue of a European law journal and to see that once again it contains a contribution by a Maastricht based scholar.

I also would like to recall the many, often very talented, undergraduate students that I have met here, and the many doctoral students whom I accompanied for a few years of their careers both here and in Florence. I confirm that one of the nice parts of being a university professor is to meet – usually at this time of the year – a fresh group of students and doctoral researchers and experience the intellectual buzz that comes with it. I should also like to thank the leadership of the Law faculty and its administrative staff that have always been very supportive and have created the very nice and open intellectual climate that marks this faculty.

I should specially like to mention Monica Claes and Ellen Vos, my two closest colleagues who have been here all this time and who were responsible for organising the workshop that took place here this morning, a secret workshop (at least secret for me), but a very nice one.

I also thank all of you for showing up here this afternoon, including my dear family members.

The lecture is over now.

Ik heb gezegd.