The European Journal of International Law Vol. 29 no. 1

Editorial

Editorial: A Court that Dare Not Speak its Name: Human Rights at the Court of Justice; Vital Statistics; Time for Change: With Thanks to Guy Fiti Sinclair; In this Issue

The adequacy of the ECJ jurisprudence in the area of human rights has been the subject of extensive critical comment in recent times, not least since its much commented upon decision in Opinion 2/13. I have invited one of the most authoritative, knowledgeable and sober voices in the EU law interpretative community, Daniel Sarmiento (https://despiteourdifferencesblog.wordpress.com/) to contribute a Guest Editorial on this topic. We are honoured to publish it in this issue.

A Court that Dare Not Speak its Name: Human Rights at the Court of Justice

'We are not a human rights court.' This phrase has been repeated over and again by judges and advocates general of the Court of Justice of the EU for many years. To the question of why does the Court not rely more on Strasbourg case law on human rights in the field of, say, competition, the reply was a classic: 'we are not a human rights court'. If the Court was accused of ignoring international human rights instruments in cases with a strong tie with international law, the response sounded familiar: 'we are not a human rights court'. If human rights were put aside or restricted in the name of free movement rules, the explanation was always ready to go: 'we are not a human rights court'.

Indeed, the Court of Justice was not designed in its early days to be a human rights court, but its current role as the lead player of the European judicial landscape has put it in an unprecedented situation. There is no area of policy that escapes the scrutiny of the Court of Justice: the digital world has found in the Court an uncompromising upholder of private life that will not tolerate intrusions in the sphere of individuals' privacy; the effectiveness of asylum policy depends on the Court's readiness to interpret asylum rules as procedural or substantial guarantees in light of human rights; consumers throughout the continent rely on the Court's judgments to rule on how banks, digital titans or retailers treat their clients; criminal procedures have come under the umbrella of EU harmonization instruments, putting the Court in a privileged position to set standards and guarantees of criminal procedure in all Member States.

 doi:10.1093/ejil/chy022

These are only a few examples of how the Court has been transformed from a modest international jurisdiction into a supranational hegemon, whose decisions have a direct and significant impact on the rights and lives of millions of Europeans.

The transformation has been particularly intense in the field of human rights. Ever since the entry into force of the Charter of Fundamental Rights of the EU, the Court of Justice has faced thousands of preliminary references from national jurisdictions searching for interpretative help on human rights. For the very first time, the Court has begun to be systematically confronted with human rights questions in a way that cannot be solved through its traditional syllogistic and apodictic reasoning. The case of freedom of religion is paradigmatic: in scarcely two years, the Court has been confronted with the interpretation of the Charter's rules on freedom of religion and equality in cases concerning the use of the headscarf in the workplace, the use of private slaughterhouses for the Islamic Feast of the Sacrifice, the collection of private data by Jehovah's Witnesses when preaching on the doorstep, or the recruitment criteria of management based on the grounds of the candidate's religious beliefs. No matter how predominant the internal market and its rules might be, the argument that 'we are not a human rights court' has dramatically run out of steam since the entry into force of the Charter.

But is the Court solely to be blamed for its lack of enthusiasm in embracing its human rights responsibilities?

Probably not.

The European legal community is broad and intellectually powerful, exerting at the same time a significant influence over the Court of Justice, its judges, its advocates general, its legal secretaries and all the actors that play a role in the decision-making process in Luxembourg. The 'legal community', understood as academics, commentators, practitioners and civil servants from the EU Institutions and the Member States, has hardly engaged with the Court in its new capacity as a human rights jurisdiction. For the past years since the entry into force of the Charter, academia has been more concerned, to give a few but revealing examples, in criticizing the Court's decision to reject the agreement on the accession of the EU to the European Convention on Human Rights, or in arguing how unworkable its interpretation of Article 51 of the Charter, and the criteria to determine its scope of application in Member States, is for national courts. In the meantime, national courts, particularly constitutional courts, have kept themselves busy playing a European cat-and-mouse game, with the aim of dealing with a Freudian obsession about power, prominence and fatherly authority. The price we have paid is an academic community increasingly out of touch with the crucial task of contributing to a European common legal project, and a judiciary too obsessed with power and setting the terms of the dreary question of the final word.

Thus, the Court of Justice cannot be solely blamed for having little appetite to become a human rights court: the legal community has given her scarce materials to reflect on, not many scholarly utensils to construe a human rights discourse with intellectual added value. For the time being, EU legal scholarship has provided the Court with some valuable works, but also many complaints about competence creep and lack of sensitivity. Hardly the material on which an incipient human rights court can feed on.

This outcome is closely linked to a change in the approach towards EU law that took place in the late 1990s. As European legal scholarship took a critical turn, a negative narrative about European justice and integration emerged in academic circles in various Member States. Constitutional pluralism, and particularly its strand of radical pluralism, was the most sophisticated manifestation of this critical trend, in which the Court of Justice was seen as an unreliable hegemon, too powerful to be left alone with no supervision from national constitutional courts. The economic crisis and the rise of a Eurosceptic wave throughout Europe, in which arguments about austerity, democratic deficits, German *diktat* and technocracy, among others, turned a critical stance towards European integration and law into a *sceptical* undercurrent that impregnated much of the literature on EU law and integration. When the time came to turn the Court of Justice into a human rights court, many of those who criticized the Court in the 1980s for not doing enough, were now accusing the Court for being activist, insensitive and intrusive with national identities.

For all its faults and defects, the Court of Justice is a remarkable institution that has produced one of the most relevant legacies of European legal culture. However, no matter how remarkable this jurisdiction might be, it cannot construe on its own a case law as complex and ambitious as the current circumstances now demand. If the Court is to assume its role as a human rights court, it needs, inter alia, constitutional courts to provide useful contributions on the scope and interpretation of human rights, and not gratuitous reminders of how powerful and self-important constitutional courts can be. In this regard, the recent judgment in *M.A.S.* is a very positive development, whereby the Italian Constitutional Court has engaged with the Court of Justice in a genuine dialogue not so much about power, but about striking, in a common and noble effort, the right standard of protection in interpreting a fundamental right.[1]

The same applies to academia. The critical turn of many commentators has hardly helped the Court to find a helpful hand in scholarly writings as of late. For a jurisdiction trying to assert the effective enforcement of a new but intrusive legal order in closed and self-centred national legal systems, the discourse of radical pluralism is an unmanageable tool that puts the Court before an impossible dilemma to which it cannot reply. Radical pluralists have still not come to grips with the fact that their claims are not only unassumable, but hardly understandable for a jurisdiction whose mission is to ensure the coherent and uniform interpretation of EU law.

However, it is possible to construe a positive working relationship in which all parties retain their independence while nevertheless contributing positively to facilitating the Court's full transit into its new skin. In the same way that the Italian Constitutional Court has lowered the tone of its discourse on the *controlimiti* on EU law and has embraced a shared effort in the interpretation of human rights, hand in hand with the Court of Justice, legal scholarship should assume that there is a lot of work ahead of us that is better construed *with* the Court, rather than confronting it. The critical turn is a useful guide in pointing towards where we should not head, but it cannot be the main guiding light in the academic legal discourse. As the saying goes, *plan beats no plan*.

[1] Case C-42/17, *M.A.S and M.B.* (EU:C:2017:936).

No matter how flawed Opinion 2/13 might be, or how disappointing the Court's reluctance towards international law was in *Kadi*, or how frustrating the Court's interpretation of the Charter's horizontal provisions can be, legal scholarship has a duty to engage constructively with the Court, not against it. This is not an invitation to blindly accept whatever comes from the Court, quite the contrary. It's simply an invitation to support the Court in its struggle to speak its name loud and clear, so that it can soon be in a position to unashamedly say 'we *were* not a human rights court, but we are one now'.

Daniel Sarmiento

Vital Statistics

Each year we publish statistics on the state of our submissions: where submissions originated, which were accepted, and which were published in *EJIL* during the previous 12 months. We do this to observe and understand any changes that may be taking place in submission and publication patterns in our Journal and to keep our authors and readers informed of such.

The final selection of articles published in *EJIL* is determined by two principal considerations: quality is, naturally, one of these. All published articles go through our double-blind peer review process. We do not put the finger on the scale when it comes to national or geographic origin of the article, gender and other such factors. We look for excellence: articles we hope will be read, recalled, referred to and cited in years to come.

The second consideration is curatorial. *EJIL* is not a mere refereeing service. We publish between 40-60 articles per year. We receive anywhere between 5-10 articles per week. We receive many more excellent articles that are worthy of publication than we are able to publish, given considerations of space. Choices have to be made. Our curatorial decisions aim to produce issues of interest to a wide variety of readers, covering different areas of international law, different approaches to scholarship, and the like. EJIL Talk! is an integral part of *EJIL* and its coverage is part of the mix we consider. Thus, in the initial screening by the editorial office we may reject articles simply because we have published recently on the topic, or there might be something in the pipeline and other similar considerations. We also engage in some 'agenda setting' by initiating debates and from time to time commissioning symposia generated by our own Boards or accepting symposia proposed by others. Finding the right balance is always a delicate curatorial decision and the figures are fluid. In recent years we have privileged unsolicited articles, given the growing number and quality of submissions. In 2017 we published fewer commissioned symposia in our four issues than in previous years: unsolicited manuscripts accounted for 76 per cent of our published pages, whereas in previous years it had been around 65 per cent.

Whilst the percentage of manuscripts submitted by women authors this past year rose from 32 to 38 per cent, the percentage of accepted submissions by women dropped from 33 to 24 per cent and the figure for published articles fell slightly from 35 to 32 per cent. We believe this is a haphazard dip.

We somewhat arbitrarily divide the world into four regions for our statistical purposes: the European Union, the Council of Europe countries outside the EU (CoE), the US and Canada, and the rest of the world (RoW). We measure by country of submission rather than by nationality of author, simply because it is not possible to accurately obtain the latter information. However, we think the figures convey a fairly reliable picture of our authors and *EJIL*'s presence in the world. EJIL received submissions from 55 countries during 2017.

Of the total number of manuscripts submitted in 2017, 37 per cent came from the EU, 7 per cent from CoE countries, 12 per cent from the US and Canada and 44 per cent from RoW countries. As in previous years, however, a larger percentage of articles from EU countries were accepted and published: 53 and 47 per cent, respectively. So too, the US and Canada saw a larger percentage of manuscripts accepted and published, 29 and 27 per cent respectively. Fewer manuscripts from the RoW were accepted and published: 12 and 21 per cent, respectively. We will be monitoring this, too. CoE countries made up a small but stable part of accepted and published manuscripts: 6 and 5 per cent respectively.

We encourage submissions from authors outside the English-speaking world, and provide an excellent copy-editing service for all articles accepted for publication. This past year saw a small rise in the percentage of submissions from non-English-speaking countries, from 62 to 65 per cent. We saw an increase in published manuscripts from non-English-speaking countries, 47 per cent, reflecting the large increase in accepted articles in this category in the previous year. The figure for accepted articles from non-English-speaking countries was 41 per cent in 2017 so there will be a dip in published articles from non-English-speaking countries in 2018. These numbers oscillate around 50 per cent.

I have written before about my scepticism regarding Impact Factor, H-Index and the like. There are no sour grapes here: for example *EJIL*'s H-Index among international law journals as computed by Google Scholar places it number 3 after the *American Journal of International Law* and the *Human Rights Quarterly*, and on the William & Mary ranking for impact factor among international law peer-reviewed journals it is typically ranked similarly. My scepticism is based on the bias in the journal database from which these indices are calculated (strong North American bias), and more importantly because of the negative impact that the chase after a higher 'impact factor' produces on editorial policy. 'Famous' scholars will increase your impact factor to the detriment of the young and upcoming. 'Sexy' topics will have the same effect, to the detriment of the esoteric and unusual. And yet if you examine our Tables of Contents[2] over the last quarter century you will see plenty of evidence for our commitment to young scholars and a broad range of topics. Likewise, you can improve your impact factor by simply reducing the number of articles published. Our issues grow in thickness.

The metric we pay most attention to, and which we think is relevant to our authors too, is the number of PDF downloads of *EJIL* articles. Our open access policy (all *EJIL* articles are free and accessible after one year from the date of publication) means they have become, for example, a major resource for classroom teaching. The numbers

[2] Available as Special Exhibit 1 at https://academic.oup.com/ejil/pages/A_retrospective.

keep growing. For 2017, there were 636,000 annual downloads of *EJIL* articles, up 28 per cent from the previous year. We hope that despite the unavoidable necessity to be selective in what we can publish, international legal scholars will continue to submit their work for consideration by *EJIL*.

Time for Change: With Thanks to Guy Fiti Sinclair

Guy Fiti Sinclair joined *EJIL* as the Associate Editor in September 2012. He agreed to take on the position for one year. Now, after more than five years of excellent service, Guy is stepping down as Associate Editor but, thankfully for us, he will stay on as a member of our Scientific Advisory Board. For his excellent judgment and insight, his dedication and efficiency, his care to detail and towards the authors, his wit and good humour, our most sincere thanks go to Guy and we wish him every success in his academic career.

I also take this opportunity to welcome Johann Justus Vasel on board as our new Associate Editor.

In This Issue

The overture for the 29th volume of *EJIL* is conducted by *Eyal Benvenisti*, whose Foreword article opens this issue. Benvenisti aims to determine the role of global governance today in view of the challenges presented by new information and communication technologies. In his view, the task has shifted, or rather expanded, from simply ensuring the accountability of global bodies to upholding democracy and protecting dignity. As with previous Foreword articles we have published, Benvenisti's article takes stock of an important field of study in international law, and is sure to set the agenda for that field in the coming years.

The following articles in this issue share a retrospective dimension. *Wolfgang Alschner* and *Damien Charlotin* undertake the arduous task of analysing almost seven decades of jurisprudence of the International Court of Justice regarding its increasing self-referentiality. Intriguingly, they find that the growing complexity of the Court's self-citation network is both a vice and a virtue. This empirically grounded and institution-centric endeavour is followed by an article by *Hendrik Simon,* which takes an almost deconstructivist approach in reexamining one of the most prominent and provocative doctrines in the history of international law. By shedding light on forgotten disputes in 19th-century international legal discourse on justifying war he demystifies the doctrine of *liberum ius ad bellum*. *Ignacio de la Rasilla del Moral* complements this section with a retro-introspection. Given the upcoming 150th anniversary of academic publishing in international law periodicals, he examines the history of international law journals from the mid-18th century until today, concluding with thoughts on contemporary features such as digitalization, linguistic monopolies and specialization.

The next set of articles focuses on International Economic Law. *Sungjoon Cho* and *Jürgen Kurtz* identify the distinctive historical paths and multiple intersections of

international investment and trade law from a common origin to divergence and reconnection. In their view, this pattern of convergence and divergence is not limited to historical development but can also be traced to common challenges deriving from balancing market goals and public interest. *Christopher Vajda* explores mechanisms of dispute resolution in a variety of international economic agreements of the EU, and distils from this comparative exercise the importance of a direct effect whilst pointing to some deficiencies concerning the agreement with Canada.

Roaming Charges takes us to Manila where public transport can be unique experience.

In this issue, and over the next three issues of *EJIL*, we will mark the four-year centenary of the Great War with a four-part symposium on International Law and the First World War. Each part of the symposium will explore different aspects of international law's relationship to the global conflict. We begin in this issue with 'International Law before 1914 and the Outbreak of War'. Following *Gabriela Frei's* Introduction on international law and the 'great seminal catastrophe of the 20th century', *Jochen von Bernstorff* explores the largely unregulated employment of violence and international law before 1914 by differentiating between order-related and ontological justifications.

This issue closes with two Critical Review articles. In his Critical Review of International Jurisprudence article, *Alan Desmond* explores the increasingly curtailed human rights protection granted by the Strasbourg Court to migrants facing deportation under Article 8 ECHR and proposes a less state-centric and more human rights-consistent approach. The Critical Review of International Governance article follows, in which *Joel Dennerley* examines state liability in the event of collisions of space objects. Since these aspects are governed by the only fault-based liability regime, the analysis of this vague but important term is front and centre.

On the *Last Page* we feature a poem entitled 'Monolith' by Stephen Haven.

JHHW