

## A Legal Approach to EU Studies

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### WHAT IS A LEGAL APPROACH TO EU STUDIES?

To lawyers European law is the mother of all academic disciplines that are relevant for studying Europe. After all, the European treaties are the *alpha* and the *omega*: they started the whole process of European integration and they ultimately define its limits in terms of competences. This view is not always shared by other disciplines. In fact, while politics, economics and even sociology are considered to represent important dimensions of the European integration process, some see law as merely a tool to make the other dimensions work. In these views one hears the echo of a particular perspective on law in relation to the relations between states: why indeed should one bother to study international law in the area of foreign affairs? After all, as repeated by Henkin (1979: 2)

as for the diplomat and the maker of foreign policy, they do not appear to consider international law important. International law is convenient for formalizing routine diplomatic practices so as to give free rein to the art of diplomacy; it is often an acceptable minor obstacle in the pursuit of policy; it is not a significant restraint on a nation's freedom to pursue important national interests as it sees them.

In fact, as Boyle (1985) and other authors hold, the involvement of lawyers in international politics can even be regarded as counter-productive because of the *'mélange* of inherently debilitating characteristics fundamental to legal education and training, to the processes of legal reasoning, to the practice of law, and to the legal profession' (Boyle 1980: 194).

These views may be the result of a *prima facie* absence of law in the relations between states. Unlike domestic society, the world, in the eyes of many observers, seems to lack structured rules, institutions and procedures

to regulate the relations between states. From this vantage point, international relations – when based on legal norms at all – are based on the 'law of the jungle'. Legal analysis, in this view, is not to be isolated from the political set-up that dominates it, since this would lead to artificial theorizations not having much in common with reality (Scott 1994).

The aim of the present section is to contribute to an understanding of legal approaches to the European integration process and, thus, to the contribution of legal science to EU studies. It is asserted that – on an analytical level – one should be able to isolate putative legal arguments from political ones in order to get to grips with the whole range of norms, habits, deals, and commitments that exist between the EU Member States as well as between them and the European Union. In short, what lawyers do is determine whether the facts they are confronted with are also 'legal facts' in the sense that they form part of a *legal order* (*ordre juridique* or *Rechtsordnung*) and, if so, how one should interpret the phenomena encountered in the light of the special rules and mechanisms set by that order. It is these special rules, mechanisms, and consequences that – whenever they exist – have always justified (and even rendered essential) the separate analysis of the legal framework governing the European integration process.

At the same time, it is clear that the links between the legal approach and the political, social or economic approaches to European integration are essential. After all, the whole idea of French Foreign Minister Schuman in 1950 was political and the means – as well as most of the substantive norms in the EC Treaty – are mainly economic and social (Diebold 1959; Koopmans 1991). Nevertheless, interdisciplinary research has proven to be difficult and European law has its own practitioners, journals, conferences, and discourse.

### How to Recognize Law In EU Studies?

Indeed, what European lawyers study are legal norms and competences. But, how do they distinguish their 'legal' order from the 'political', 'economic', or 'moral' order that exists simultaneously? A legal order is mostly conceived of as an abstraction, a way of looking at a number of inter-related norms in a coherent fashion. Moreover, there are no generally accepted criteria defining a legal order, or even defining 'law'. What we are dealing with is different ways to interpret and classify norms. In the words of Bengoetxea (1993: 37): 'the law is composed of *Rechtsätze* or norms in the form of legal precepts, i.e. legal or normative statements – what legal dogmatics or legal science does, with the help of a certain legal theory, is to order, clarify, and structure those sentences into norm-propositions forming a coherent whole or legal order'.

While the past 15 years in particular has revealed an interest of some legal researchers to look beyond the traditional doctrinal approaches of European law (see *infra* section 3), European legal scholarship seems to be influenced mostly by *legal positivism*. The basic idea behind legal positivism is that there is no imperative relationship between 'what is' and 'what ought to be'. In accepting this assumption, legal positivists focused in particular on the internal structure of the legal system. While in Austin's (1998; Raz 1970) view, for instance, a law was perceived as a general command of a sovereign addressed to his subjects – which excluded the more complex relations between different laws – other and subsequent approaches, in particular those presented by Kelsen (1949) and Hart (1961), stressed the systemic links between different norms. Unlike approaches in which a direct link between legal norms and moral considerations is thought to be essential (Fuller 1973; Dworkin 1977; Finnis 1980), *legal positivism* has always offered lawyers a more practical criterion for the determination of the *existence* of a *legal* norm: systemic validity (MacCormick 1998: 341). 'By "validity" we mean the specific existence of

norms. To say that a norm is valid, is to say that we assume its existence or – what amounts to the same thing – we assume that it has "binding force" for those whose behaviour it regulates' (Kelsen 1949: 30; 1991: 171, 213). Hence, according to Kelsen, a norm is valid if it is based on another valid norm, resulting in a 'chain of validity' – ultimately leading to a 'basic norm'. Since this *basic* norm cannot be based on another norm, its existence is presupposed. 'All norms whose validity may be traced back to one and the same basic norm form a system of norms, or an *order*' (Kelsen 1961: 111).

With Austin and Bentham, Kelsen saw all norms as *prescriptive* and thus as *imperative* (Raz 1970: 156). Hart contested this view in stating that there are also prescriptive norms which are not necessarily imperative norms, but which, nevertheless, guide human behaviour. These norms may be called *power-conferring norms* and have proved to fulfil a key function in European law. In Hart's (1961: 81) terms,

Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do so or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers [...].

Nevertheless, Hart is in agreement with Kelsen that the legal order is a complex system of inter-connected norms. In his view, however, the determination of a valid norm requires a second rule, identifying the first one as valid. Hart (1961: 95) called this identification rule the *rule of recognition*: 'a rule for conclusive identification of the primary rules of obligation'. Like Kelsen's *basic norm*, the existence of the *ultimate* rule of recognition is not dependent on other laws in the legal system: 'whereas a subordinate rule of a system may be valid and in that sense "exist" even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts.

officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact' (Hart 1961: 110).

This explains the focus of European lawyers on norms and competences that can somehow be traced back to the treaties and it, subsequently, explains the pivotal position of the treaties in the legal approach to EU studies. As we will see, the legal dimension is not merely about case law of the European Court of Justice. Indeed, regardless of the value of the approach of, for instance, Kelsen in offering tools for the identification of (valid) legal EU norms, its main weakness is obvious. The existence of a legal system ultimately depends on its acceptance in practice (Ruiter 1993: 19). In Kelsen's (1967: 11) view 'a general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity' (see also Kelsen 1991). Hence, the answer to the question why a particular EU norm is valid in the legal system is: 'because the system is valid'. Why then is the system valid? 'Because it is accepted in practice'. Kelsen (but Hart also) has thus based his concept of a legal system on assumptions or presuppositions which derive their validity from the fact that they are accepted in practice. Ruiter (1993: 52–4) seems to be following the same line when he insists on the need for the surrounding community to acknowledge a legal performance. He uses the concept of legal norms as *presentations* purporting to be made true by general acceptance. Validity in that sense would seem to depend on a general acceptance in the form of a social practice based on a common belief in the actual existence of the legal norm. This, in fact, seems to be an accurate description of how European lawyers select their objects of study.

Despite the fact that many European lawyers have indeed become 'Court watchers', the earlier observations reveal that the scope of European law extends far beyond the interpretations provided by the European Court of

Justice. While most common law systems indeed base their concept of legal order on the notion that 'it is by examining the courts' opinions that one finds the laws on which they act' (Raz, quoted by Bengoetxea 1993: 39), this cannot mean that the addressees of the norms are only the courts, for if the rules (norms) did not exist for the public at large how were they to regulate their activities in legally relevant affairs. Norms exist before they are applied by the courts. The validity of the source does not depend on its being recognized by the courts: *the norm is recognized and applied precisely because it is valid*. What the courts determine is the meaning or content of the norm. However, most European norms and rules will never be part of a case before the Court. Their analysis depends on academics that are trained to present an interpretation that is meaningful in relation to all other norms that together make up the EU legal order.

#### What is European Law?

While there has been much debate among legal theorists whether the international system could also be regarded as a legal order (Hart 1961; Mosler 1976; Combacau 1986) – thus implicitly questioning the role of law beyond the state – with regard to the European system this question was answered by the European Court of Justice already in the early years of the integration process. In the leading case *Costa-ENEL*, that 'by contrast with ordinary international treaties, the EEC Treaty has created its own legal system' (Case 6/64 1964). This case – together with the increasing complexity of the discipline – has also caused European law to develop into a field separate from both national and international law (Pescatore 1974; Koopmans 1986, 1991; Schwarze 2001). In that sense, one may argue that the birth of 'European law' was inherent to the far-reaching agreements laid down in the Community treaties in the 1950s. Indeed, '[t]he construction of a genuine legal order is, naturally, also the construction of a genuine academic discipline' (Schepel and Wesseling 1997: 183).

The previous section revealed the mainstream answer to the question whether or not

a norm forms part of any particular international legal order. Obviously the norm must allow for it to be traced back to an (explicit or implicit) treaty provision. If the general findings are subsequently translated to the EU legal order, any identification of legal norms – and thus the focus of European law – should be based on the following trio (Ruiter 1993: 93):

1. treaty norms are legal norms;
2. norms authorized by legal norms are legal norms; and
3. only norms specified in 1 and 2 are legal norms.

This allows us to define European law – or more precisely: the Law of the European Union – as the institutional and substantive norms laid down in the EU and EC treaties (*primary law*), in the decisions based on either those treaties (*secondary law*) or on other decisions (*tertiary law*), including the *case law* of the European Court of Justice. Irrespective of the complexity of most European issues, the legal approach thus has a very specific focus: treaties, decisions, and case law. As in any other domain, the main function of the legal approach is analysis and interpretation. European lawyers are interested in the question how a particular field is regulated and how the different norms and rules are to be interpreted. While 'law' is sometimes considered to be a 'normative' science, it is above all the analysis and interpretation of norms that is at stake rather than their creation on the basis of for instance moral values or political, economic, or social needs. Mainstream legal science is based on the 'positive' starting points described above and the job of legal scientists is to study the legal order and to interpret and place into context the new developments in that order. In that sense the legal approach is 'value free'; it deals with democracy, legitimacy, human rights, or the internal market, but it did not invent these concepts. The 'normative' dimension is defined by political science, economics or sociology; law basically studies the results of the debates on these concepts as they are laid down in legal rules. This is not to say that European law does not take into account any principles or

even values. These principles or values, however, may become part of the legal system – either because they are included in the treaty (see for instance the references to human rights in the treaties and many EU decisions), or because we allow a Court of Justice to acknowledge or introduce them as legal principles.

Obviously, however, European law was created by politicians and lawyers coming from different legal traditions – and in particular those of the original six Member States – are still visible in the European legal order (Koopmans 1991). Thus, initially there was a dominant influence of French administrative law, which is still visible in the provisions on actions for annulment of Community decisions or in the form of the judgement and the role of the individual advisory opinion by one member of the Court. In the early years the European Court even followed the case law of the French *Conseil d'Etat* quite closely. The flexibility known to for instance Dutch and German lawyers was also visible, while the German influence has particularly been essential in the development of some of the current legal principles of Community law, such as the principles of proportionality (*Verhältnismässigkeit*) or loyalty (*Bundestreue*). These days, one may add the principle of subsidiarity to that list. As the UK only acceded to the Community in 1973, it took a while for the *common law* tradition to be able to play a role in the further development of the European legal order. Due to its main characteristics – 'courts climb from the facts to the rules to be applied, rather than deducing rules from principles or from more general rules' (Koopmans 1991: 503) – the common law influence could in particular be discovered in procedural matters, such as more attention for oral hearings and dialogue between 'bar and bench'.

Despite its disciplinary boundaries and the influence of different legal traditions, European law has developed into an academic field with specialists on detailed areas, which have almost become sub-disciplines, such as European environmental law, competition law, trade law, justice and home affairs law, foreign and security policy, or the free movement of goods (Craig and DeBurca 1999).

While the basic characteristics are known to every European lawyer, it has become impossible to stay a generalist and cover the full scope of 'European law'. Both the extensive case law and the often technical aspects of EU regulation have caused for specialists to emerge in almost all fields. It is interesting to witness a development that is similar to the specialization in law that took place ages ago at the national level.

## KEY THEMES IN EUROPEAN LEGAL STUDIES

### What do European Lawyers Spend Their Time On?

The number of available text books on EU law is amazingly high. In the UK in particular, almost all university lecturers seem to have published their own text book. In the international debate, the colleagues from the UK obviously dominate. This is partly due to the fact that they are able to write in their own language, but also to the fact that European law has been firmly established in all Law Schools and plays a prominent role in both the academic debate and in politics (Hunt and Shaw 2000). While the quality of the work in for instance Germany or Italy is by no means lower than that of the British, these countries are only slowly entering the international debate and have long stuck to publications in their own language.

It is striking that the many text books do not differ too much and that there seems to be a consensus on the relevant themes. The leading ones (Arnulf et al. 2000; Craig and De Búrca 2003) have changed their titles from 'European Community Law' to 'European Union Law', while others have maintained 'EC Law' as a label (Steiner and Woods 2003). While a use of the term 'EU' fits the popular terminology better, most text books do not devote much space to the Union as such, but have continued to almost entirely restrict themselves to the Community pillar. Indeed, for 'hard core' Community lawyers, the non-Community pillars of the EU

(Common Foreign and Security Policy and Police (CFSP) and Cooperation in Justice and Home Affairs (JHA)) are not regarded as forming part of European law. The fact that they fall outside the Community, are more intergovernmental in nature, and come close to other forms of cooperation under international law, made it difficult to fit them into the traditional doctrinal themes studied by Community lawyers. By now, the unity of the European legal order and the inter-relationship between the three pillars seems to be more accepted (Wessel 2003). Important reasons are the apparent connection between the political and economic external relations of the Union, the difficulty to make a clear distinction between the JHA issues in the third pillar and the so-called area of freedom and justice covered by the EC treaty, as well as the signing of the Treaty on establishment of a Constitution for Europe (2004), in which the pillar structure as well as the distinction between the European Community and the European Union is abandoned.

General courses on European Union law are similar all over the world. Most of the courses follow the doctrinal themes covered by the text books (see below). The increasing complexity of EU law, however, made it necessary to offer special specialization courses. Thus in most Law Schools courses are offered in for instance European Environmental Law, European Competition Law, or External Relations Law. In addition a difference is sometimes made between European Institutional Law (on the institutional structure, the types of decisions, the decision-making procedures, and legal protection) and European Substantive Law (on competition and the free movement of goods, persons, services, and capital). While it is difficult to separate institutional questions from substantive ones, the bottom line is that some European lawyers are mainly interested in how the rules are made, while others focus on the content of the rules. Again, others choose to specialize in a thematic field and know everything there is to know about the Economic and Monetary Union (EMU), Telecommunications Law, Intellectual Property, or European Defence Policy.

## Institutional Themes

A major theme in European law is the role of the institutions in the decision-making process. After a historical introduction (in which the basic treaties are introduced), most text books start with a chapter on the institutional structure. It is in the analyses of the role of the institutions that connections with other disciplines are easily made. The way in which the Council operates or the powers of the European Parliament are recurring themes in EU law and allow a joining of the more general debate on democracy and legitimacy. Contrary to other disciplines, however, law is less interested in how decisions are made in practice, but rather poses the question of whether the relevant actors were competent, taking into account the legal treaty basis of the decision. If there would be one term to distinguish the legal approach from any other approach, it would be 'competence'. Many legal questions are somehow related to this notion: did the institutions have a competence to adopt the decision, was the right legal basis used, can an 'implied' competence be construed, does an external competence (*vis-à-vis* non-Member States) exist, and is the Community exclusively competent or do Member States still have something to say?

Closely related is the legal nature of the instruments. While other disciplines may show a tendency to take the overall possibilities of the Union to influence the behaviour of states into account, lawyers show a clear preference for the formal instruments: the Directive, the Regulation, and the Decision. The instruments of the second and third pillars play a less prominent role and soft law (ranging from Commission policies to the open method of coordination) is an area that is only studied by a select group of scholars (Senden 2004). Most legal questions concern the legal effects of the instruments in the legal order of the Member States. In that respect the Directive is, without doubt, the most important one (Prechal 2005) and questions include the possibilities to invoke a Directive after the implementation period has passed or the possibilities for damage claims.

While some answers to legal questions can be found on the basis of legal reasoning, it is

much easier once the European Court of Justice has settled an issue. The case law of the Court therefore forms an inextricable part of the habitat of the European lawyer. (Un)fortunately, however, the case law of the Court is often multi-interpretable, allowing many European lawyers to give their own interpretations and to start a debate on the possible consequences of the Court's verdict. The importance of these analyses can, however, not be overestimated. As European law has become almost incomprehensible to laymen, lawyers are indispensable in analysing and interpreting the many complex rules and regulations. An important dimension of European law is related to legal protection. Citizens and companies are not only confronted with the rules made in Brussels, but equally have a right to invoke them to their own benefit. The key concepts of 'direct effect' (the question of whether a Community norm may be invoked before a national judge) and 'supremacy' (the priority that should be given to a Community norm once it conflicts with a national norm) are therefore central in many analyses on legal protection (De Witte 1999).

With the ongoing institutionalization of world trade law and the coming of age of the EU's foreign, security, and defence policy, the external relations law of the Union has developed into a specialization focusing on the relations between the European Community (and the Union) with third states and other international organizations, such as the United Nations or the World Trade Organization (Eeckhout 2005). The central question in this domain concerns the delimitation of competences, both vertically (between the EU/EC and its Member States) and horizontally (between the Community and the other two Union-pillars) (Wessel 2000b).

## Substantive Themes

Two themes dominate the debate on substantive issues: the internal market and competition. As the internal market (or, in treaty terms, the common market) is traditionally seen as forming the heart of the European Community, it

may very well be the area that has received the most attention in European law. The rules on the internal market boil down to the establishment of a European area without internal economic borders and with a common policy along the external border. The lion's share of the debate is devoted to the free movement of goods and in particular the forbidden quantitative restrictions on intra-Community trade (Weiler 1999b). The notion that 'all trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restriction' (Case 8/74, *Dassonville*) resulted in a complex legal puzzle, in which national rules on product characteristics (such as the German purity rules for beer) could be regarded as hampering trade between the Member States. This has turned the free movements of goods area into an area for which technical legal expertise has become essential.

The same – although maybe to a lesser extent – holds true for the free movement of persons. While this area originally was close to the free movement of goods, as persons were only relevant when they turned out to be 'workers', it has developed into a special branch (O'Leary 1999). This is mainly due to the fact that the European Union has become more active in the regulation of the rights of other persons (such as students or third country nationals) and the substantive development of the notion of 'European citizenship' by the European Court of Justice (Staples 1999; Schönberger 2005).

A final – and still booming – substantive theme concerns competition law. From an institutional perspective this area is also interesting as the rules on competition allow the European Community to directly impose obligations on companies and are increasingly set up in a 'multilevel' fashion, with tasks for both Community and national authorities. In fact, the competition regime aims to bind individual companies to the internal market rules for Member States. The rule – and the subsequent academic debate – on competition are possibly even more technical than those on

the free movement of goods. Their means are the control of anti-competitive behaviour by cartels and the prevention of abuse by undertakings of a dominant position. Closely related are the rules on financial state aid. While many of the competition rules are food for practicing lawyers, the academic debate has a tough job in keeping up with the interpretations of the Court and an analysis of new sets of rules (Bellamy and Child 2001).

#### DIFFERENT APPROACHES IN EUROPEAN LEGAL STUDIES

##### Taking Other Academic Disciplines Seriously

As argued above, European legal scholarship has long succeeded to remain primarily doctrine-led, with a dominance of positivist theories (Hunt and Shaw 2000). In the orthodox legal approach to European studies, integration was conceived of as a 'legal process driven by legal interpretation rather than political decision' (Schepel and Wesseling 1997: 166). Judging by the publications on EU law – and in particular the available textbooks – this is still the way most European lawyers approach their object of study. Nevertheless, the past 15 years or so revealed a broadening of the academic discipline in the sense that the legal analysis was more frequently placed in the context of other academic disciplines, in particular political science, public administration, and sociology. This had, no doubt, something to do with the more general trend to stress the importance of interdisciplinary research projects, but it also had a distinctive dynamic.

After the somewhat 'slower' decades in the European integration process (the 1970s and 1980s), the end of the 1980s and the beginning of the 1990s showed an unprecedented speed following first the Single European Act (entry into force in 1987) with a clear focus on the completion of the internal market and, second, the signing of the Treaty on European Union (entry into force 1993), which was generally perceived as an important 'constitutional' step

in the integration process. These developments seemed to herald a phase in which some members of the European legal community developed a vulnerability to (or on a more positive note, an openness towards) the analyses made by political scientists, political philosophers, and sociologists with regard to issues such as the legitimacy of the EU, a possible democratic deficit, the absence of transparency, the European polity, or constitutional questions relating to for instance citizenship or flexibility. By now it has become quite easy to find publications on EU law which are less doctrinal, place the law in context, or use the methods of critical legal studies or post-modernism (Hunt and Shaw 2000). While one may argue that what these approaches primarily do is borrow insights from other disciplines to put the more orthodox views into perspective, their emergence can be seen as a sign that the European legal discipline has finally matured and increasingly shows similarities to both national and international law, which have always drawn upon a variety of methods. Nevertheless, it seems fair to stress that these alternative approaches remain exceptional. They have, however, been indispensable in building bridges towards other academic disciplines and in including lawyers in the overall discourse on European integration – something that occurred relatively late (Snyder 1990; Schepel 1998; an early example is Cappelletti et al. 1986).

A particular debate that was joined only recently by some European lawyers concerns 'governance'. Considering the popularity of the term in studies on public administration, political science, and sociology, there seemed no way to escape coining the concept in legal studies as well. The very fact that the notion is used in some legal circles underlines the fact that legal scholarship is indeed more open to the influence of other disciplines these days. The most relevant dimension of governance is the 'multilevel' variant. While lawyers tend to stress the separate existence of legal orders (as the legal order defines the competences of those who govern – see *supra* section 1), there is some awareness that the concept of multilevel governance comes close to the way the relationship

between the Community legal order and the national legal orders is traditionally perceived: separate, but inseparable (Craig 1999; Bernard 2002; Pernice 2002; Hirsch Ballin and Senden 2005; Wessel 2006). At the same time, the notion of 'governance' is occasionally used in the meaning of 'good governance'. In particular after the publication of the Commission's White Paper on European Governance (2001), some studies started to look for a translation of good governance into legal principles (Curtin and Wessel 2005). Finally, the concept returns (although not always explicitly) in studies which focus on the executive function of the EU institutions, both with regard to the actors (regulatory agencies, comitology) and the instruments they use (soft law) (Joerges and Vos 1999; Vos 2000; Senden 2004).

#### Constitutional Approaches

Together with the increase of measures necessary to attain the objective of a Europe without internal borders by 1992 (initiated by the 1986 Single European Act), the signing of the 1992 Treaty on European Union may very well have boosted the broadening of the legal approach to European integration. As Weiler (1999a: 238) reminded us: 'It started with a bang: the signing of the Treaty on European Union at Maastricht in February 1992. It ended in a whimper: its entry into force in November 1993: a low, anti-climatic moment in the history of contemporary European integration, not its crowning achievement; a would-be triumph turned sour'. After so many years of an overall acceptance of the European project, something had changed. 'Maastricht, justly hailed as a remarkable diplomatic achievement, was met in many European streets with a sentiment ranging from hostility to indifference. [...] The Member States of the European Community are being swept by an electorate which is increasingly frustrated, alienated, and angry with politics as usual. And "Europe", once *avant garde*, has, it seems, become just that: politics as usual'.

While in their writing on the new Union treaty many European lawyers still concentrated on the more doctrinal issues – with a strong

emphasis on the institutional structure of the new EU and the implications of its legal status (Curtin 1993; Wessel 2000a; Curtin and Dekker 2002), the general atmosphere in which the Union was perceived as a further step towards a European Federation (although the 'F-word' itself was carefully omitted in the treaty text), without a simultaneous transfer or creation of the traditional values, checks and balances, had an influence on European legal scholarship as well (Bankowski and Scott 2000; Schwarze 2001). The 'constitutional' approach, which in earlier days had largely been limited to studies which were still 'close to the Court', took account of the debate among political scientists and political philosophers on legitimacy, democracy, citizenship, and human rights (MacCormick 1993; Grimm 1995; Shaw 1996; Scott 1998; Craig 1999). Many of the publications attempt to take political ideas aboard by making translations into legal concepts. Thus, democracy and legitimacy, for instance, found concrete applications in how to make the Union more transparent or how to reorganize the system of representative democracy (Curtin 1996, 1997; Verhoeven 2002). Other 'constitutional' issues are the challenges and threats of the new possibilities for flexible cooperation and multi-speed Europe (Schrauwen 2002), the emergence of the European citizen (Shaw 1998; Schönberger 2005) and the need for the EU to formally be bound by the same human rights standards as its Member States (Alston 1999).

Thus, the debate which arose in the margin of the negotiations on the 2004 Treaty establishing a Constitution for Europe was far from new. By that time European legal scholarship was quite used to placing its arguments in the broader interdisciplinary constitutional debate, although a focus on the legally relevant questions was clearly maintained (Hartley 2002; De Witte 2003; Dehousse and Coussens 2003; Pernice and Poiries 2004; Eijsbouts and Reestman 2005). Indeed, the debate as it could be followed at conferences on European law and in European legal journals was – and still is – mainly on purely legal issues: the changes in the provisions in relation to the current treaty texts, the contradictions in the treaty texts, and the consequences for legal practice.

But, above all, it is about what lawyers do best: trying to make sense of legal texts by using their own means of interpretation and by explaining (and arguing about) how provisions are to be read and applied.

While the 'constitutional' approach is clearly visible in the academic debate, it had a marginal influence on the way we teach European law. While some text books devote some space to constitutional values or principles (Shaw 2000) and others even attempt to make use of political theory, philosophy and international relations and use the term constitutional law in their title (Douglas-Scott 2002; Lenaerts and Van Nuffel 2005), most of the textbooks on EU law deal with the issues in the traditional ('orthodox') doctrinal fashion.

#### Critical Approaches and the Law-in-Context

Even more marginal in European legal scholarship are some of the alternative approaches that play a role in almost all other legal disciplines. While the critical legal studies, for instance, have played a role in international law for some time, it never really developed as a separate approach in European law. Like most 'critical studies', the critical legal studies are mostly critical towards the discipline itself and the way in which it approaches and analyses the issues. It often attempts to deconstruct the arguments made by mainstream studies in order to see whether or not the relevant questions are posed (Kennedy 1994). At other occasions, they analyse a debate or a process and critically examine the arguments (Kennedy and Webb 1993). While critical studies and post-modernism are these days credited as important approaches to the study of European law, their influence on how European law is studied has remained marginal. The same holds true for the way we teach European law. Among the hundreds of textbooks on EU law, I know of only one which explicitly takes a critical approach, the reason being – according to its preface – that 'European law, like indeed any other area of law, warrants the most rigorous critical examination' (Ward 2003). The author phrases the special character of the critical approach as follows: '[...] such a critique

remains both "internal", in its desire to uncover inconsistencies and injustices, and "external", in its deployment of broader critical and sceptical commentaries from beyond the narrow confines of legal scholarship. The role of the sceptic remains one that could be constructive, and such a role must be interdisciplinary and contextual'.

While critical legal studies are sometimes placed under the heading of 'law-in-context', the latter term is usually reserved for the approach that explicitly links law to society (Shaw 1997). Law-and-society scholarship enjoys great popularity among other academic disciplines as it accepts the existence of blurred boundaries between law and morality, law and tradition, law and economics, law and politics, and law and culture (Twining 1997; Selznick 2003). The characteristics of the approach are nicely repeated by Selznick (2003: 177):

We see how legal rules and concepts, such as those affecting property, contract, and conceptions of justice, are animated and transformed by intellectual history; how much the authority and self-confidence of legal rules fit into broader contexts of custom and morality. In short, we see law as in and of society, adapting to its contours, far less self-regulating and self-sufficient, than often portrayed by its leaders and apologists. [...] Indeed, for a well-ordered legal system, nothing is more important than social support.

So far, the law-in context approach has not established itself as a separate school in EU law. One reason may be that the approach focuses on law as such and the discourse is not related to a particular area of the law. The 'contextual' approach in European law is therefore above all visible in the interdisciplinary approaches to legal studies, which seek to develop an understanding of the role of law within the wider context of European integration (Snyder 1990; Shaw and More 1995; Armstrong and Shaw 1998; Weiler 1999a).

#### CONCLUSION

Not related to the social sciences, European law has traditionally found difficulty in connecting to other disciplinary approaches to European integration. European law – like any other branch of law – has its own world, its own

methods and, above all, its own research priorities. From the outset European law has been characterized by a doctrinal approach, in which reflection was related to the solution of legal questions, rather than to putting the legal approach itself into perspective. This explains the marginal role of alternative approaches, such as critical legal studies or the law-in-context approach.

The legal approach of EU studies is characterized by a strong focus on legal texts: treaties, decisions and case law. European legal scholarship is busy solving the legal puzzles that emerge from the texts. Indeed, it is about norms – but orthodox European law is not a normative science. While some regard law as a means to make Europe 'better', in the sense of more democratic, more legitimate or with a stronger focus on human rights or social standards, mainstream European law is interested in studying the 'positive' law as it is to be found in the legal texts.

Nevertheless, the past 15 years has shown an increasing interest in interdisciplinary research. While there have always been lawyers borrowing insights developed in other academic disciplines, their number seems to have increased as the European integration process started to pose new questions that could not be answered on the basis of a mere legal analysis.

As European law has developed into a discipline with many specializations it is difficult to name landmark studies. A study on one aspect of the free movement of goods may have had an influence on the group of specialists in that research area, but none on other European lawyers. Nevertheless, it seems fair to say that if a poll would be organized on the most influential publications in European law, those of Joseph Weiler would be in the higher ranks. A reason may very well be the combination of a strong doctrinal and the reflective approach that seems to be lacking in so many other studies. At the same time, *EU Law* by Craig and De Búrca (2003) is generally considered to be the leading text book. These publications continue to be quoted and have certainly left their mark on the collective conscience of European legal scholarship.