“Integration through law” and us

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This article examines the general introduction to the vast and still impressive Integration through Law (ITL) *series, which, if by the force of the title alone, has had a powerful impact on the development of EU studies. This introduction deals essentially with the following question: How does law operate in a non-legal context in order to produce a pluralist form of "federal union" in Europe? While the question remains valid, the context, however, has dramatically changed. The difficulty is to find a way to pursue integration in a context not only of a profound and multifaceted crisis, but in an atmosphere of widespread mistrust in the positive force of law. By engaging a discussion with the ITL project, this article aims to prompt a reflection on integration in light of current social and political conditions.*

1. Introduction

This article examines the general introduction to the vast and still impressive *Integration through Law* (ITL) volumes, which if by the force of its title alone, has had such a powerful impact on the development of EU studies. The eponymous introduction was co-authored by Mauro Cappelletti, Monica Seccombe, and Joseph Weiler. In their "Integration Through Law: Europe and the American Federal Experience," they tell us that "integration is fundamentally a political process" and law is "but one of the many instruments" harnessed to achieve the objectives of integration. Yet, this does detract from the fact that "law has a vital role to play in the process."[1] This set of propositions captures the essence of the project. Indeed, throughout their sixty-eight-page essay, the authors deal with the following question: How does law operate in a non-legal context in order to produce a pluralist form of "federal union" in Europe?

This question still remains valid. The context, however, has dramatically changed. When the ITL project posed this question, law had long been presented as the natural driving force of the process of integration. Walter Hallstein famously stated in the 1970s: "The European Community is a remarkable legal phenomenon. It is a creation

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1 Mauro Cappelletti, Monica Seccombe & Joseph H.H. Weiler, *Integration Through Law: Europe and the American Federal Experience*, *in* 1.1 Integration Through Law 3, 4 (Mauro Cappelletti, Monica Seccombe & Joseph H.H. Weiler eds., 1986).

of law; it is a source of law; and it is a legal system."[2] The rule of law was, according to this conception, supposed to replace force in European politics. Law was conceived of as an antidote to force and a means to achieve peace. At its core, this vision presented law not only as a functional tool but as a cultural or symbolic form, as a carrier of a new spirit of cooperation and solidarity, and as the medium capable of containing political, economic, and social forces, as well as the cement capable of holding these divergent forces together.[3] What the introduction to the ITL project underscored in 1986 was the difficulty of finding a way for this form of integration to flourish in times of crisis when member states had retreated into protecting their own national and economic interests. The authors acknowledged the limits of law as an instrument of change in such a context.[4] Political factors would be essential to the success of this enterprise. Yet, the role of law as an effective and symbolic integrative force was not challenged.

The difficulty we face today is different: it consists in finding a way to pursue integration in a context not only of a profound and multifaceted crisis (prolonged economic stagnation, the rise of nationalism, the crisis of political representation, and external threats) but of a widespread mistrust in the positive force of law. The legal form, long associated with the success of European integration, is now perceived as an appendage to economic forces and governmental machines undermining the social structures of the member states, producing social commodification and cultural standardization. The narrative of an intimate and positive relation between law and integration is over.[5] The question of integration through law must now be defined in the context of a broader process that is legally structured not only by presumed homogeneity, equality, and inclusion, but also by increased forms of heterogeneity, inequality, and exclusion. Indeed, this article starts from the assumption that "integration through law" is what may be called a "conjunctural concept": one that takes on a new meaning depending on the historical time in which it is formulated.[6] It follows that, from the start, we face a twofold problem. The first problem is to ask what it means to integrate Europe through law in a context in which law is no longer considered as the critical factor of success. The second problem is: What form does the ITL question take for us as we wonder about the positive force of law? How does our contemporary

[2] Walter Hallstein, Europe in the Making 30 (1972), originally published in German as Der unvollendete Bundesstaat (1969).

[3] The most prominent representative of this vision of the *Rechtsgemeinschaft* today is Martin Selmayr, the Head of the European Commission President's Cabinet, who interprets this tradition in a rather narrow way by considering the Union as a legalistic construction: *see* Martin Selmayr, *The Foundation of a European Law institute: The Planting of a Little 'Apple Tree' for a European Legal Culture* (June 1, 2011), *available at* https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/_3__Martin_Selmayr.pdf.

[4] Cappelletti et al., *supra* note 1, at 46.

[5] For an early account, *see* Jo Hunt & Jo Shaw, *Fairy Tale of Luxembourg?: Reflections on Law and Legal Scholarship in European Integration*, *in* Reflections on European Integration: 50 Years of the Treaty of Rome 93 (David Phinnemore & Alex Warleigh eds., 2009).

[6] For a slightly different approach focusing on the "revisitation" of the ITL project in light of present conditions, *see* "Integration through Law" Revisited. The Making of the European Polity (Daniel Augenstein ed., 2012).

context of European integration condition and permeate the concept of integration through law?

Before I go any further, I feel compelled to say something about the concept of law used in this text. What is "law" in the ITL project? We might conclude rather quickly that law is both the *object* of integration—the focus being on the legal process of bringing distinct national legal systems together such as to create a new legal order—and the *agent* or *instrument* of integration—the focus being on the process of framing through legal instruments (institutions, concepts, doctrines) the economic, social, and political spheres such as to achieve the basic goals of integration. Note that, in either case, law is constructed in instrumental terms. This dual characterization of the role of law in the process of integration is set out clearly in the introduction and has become a classic observation in European studies since then.[7] However, the introduction actually starts with another account of the place of law which informs the whole research project:

> the law has a vital role to play in the process. It defines many of the political actors and the framework within which they operate, controlling and limiting their actions and relations . . . . At the same time it performs a role in ordering social life, translating the highly visible political acts into more mundane daily applications and, through this implementation, it determines the implications of the political decisions.[8]

Hereby the authors are concerned with the relation of law to political and social life, but more broadly with the relation of the legal system to social and political systems. They write: "integration aims at fundamental restructuring of society and societal attitudes, and these changes are reflected and promoted by the law."[9] Law is an instrument of restructuring society and politics. The classic image of law, underpinned by the "social," is reversed into an image of law forming the "infrastructure of the social."[10] Law affects social attitudes by creating norms and conferring rights and obligations on member states and private parties, but also by *translating* political and social actions into legal forms conveying the values of integration. The claim here is that, although law is pragmatically responsive to social and political factors, it remains amenable to a kind of internal rationality different from the political.[11] Therefore, the elementary question of the ITL project, and indeed perhaps the defining question of any integration study, is: how is law able to structure the integration process when it is assumed that only certain aspects of the process are directly governed by law, and others clearly are not?

[7] As classically conceptualized by Renaud Dehousse & Joseph H.H. Weiler, *The Legal Dimension*, *in* The Dynamics of European Integration 242 (William Wallace ed., 1990).

[8] Cappelletti et al., *supra* note 1, at 4.

[9] *Id.* at 42–43.

[10] The expression is from Armin von Bogdandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16(2) Eur. J. L. 95, 101 (2010).

[11] *See* along the same approach Gráinne de Búrca, *Rethinking Law in Neofunctionalist Theory*, 12(2) J. Eur. Pub. Pol'y 310 (20005); Andrea Grimmel, *The Uniting of Europe by Transclusion: Understanding the Contextual Conditions of Integration Through Law*, 36(6) J. Eur. Integration 1 (2014).

2. Integration through law versus the law of integration

The first author to articulate clear answers to this question was Pierre Pescatore in a small book entitled *The Law of Integration* published in French in 1972.[12] The book offers an account of the experience of the European Communities, famously portrayed as a phenomenon distinct from the classic international experience. It is not by chance that, starting in 1978, ITL has stood in a chiasmic relation to the "law of integration." In many respects, ITL is an attempt to address the shortcomings of the law of integration's construction while sharing the assumption that the integration process is engaged in the building of a new economic, social, and political order. To discuss the ITL concept, it makes sense to situate it with respect to this other construction.

Both projects are predicated on the assumption that integration is engaged in a unique and valuable order-building enterprise without possessing the corresponding means, instruments, or resources to displace preexisting domestic orders. Both assume that integration is a field fraught with contradictions; to name but a few: integration aims to be a self-standing enterprise but it largely depends on member states' structures, rules, and institutions for its implementation; it purports to set up its own institutions with a new overarching authority, but it is deprived of its own enforcement and coercion powers; it is based on an "ever closer relationship between the peoples of Europe," presenting itself as a new political community, but it does not dispose of the corresponding instruments to acquire a popular basis of legitimation. The question therefore is how to overcome these contradictions. To make this tenuous and precarious process sustainable, the law of integration has adopted a twofold approach. It consists, first, in covering up the contradictions by providing, or rather revealing, the structure of support that will sustain the process of integration. Pescatore's approach is a structural approach. The integration process is based on what he calls "new structural constellations"—a set of institutions relying on "new principles of representativity," distinct from the principle of representation of states applied to classical international organizations. Underpinning this institutional construction is a "grand idea of order determined by the existence of common values" "to which participants are ready to subordinate their national interests and their national hierarchy of values."[13] This idea of order is placed above the fray of inter-state relations, and its representatives are the European institutions operating through law. As a result, integration is not only a creative and phenomenal process rooted in an initial clear "plan"; it is an order, a structure, which defines its own *telos*. The operation of European law must reflect this *telos* which underpins the process. No doubt this construction has had a real performative effect in shaping the discourse and practices in the integration process.

But that is not all. The law of integration was also conceived of as a practical device. It was part of a strategy to compel legal and political minds to promote the goals of integration. It should be remembered that Pescatore was both a scholar who studied

[12] Pierre Pescatore, The Law of Integration. Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities (1974).

[13] Cappelletti et al., *supra* note 1, at 50, 51.

integration and a judge deeply involved in the European construction. His milieu included jurists and jurisconsults who circulated among the different institutions and conveyed a shared culture of supranationalism and compelling arguments in support of integration. This mobile and mobilized group of people is what sociologists and historians have come to recognize as a central feature of the integration process. This is where they see "integration through law."[14] The aim of this enterprise was to make the connections, develop the doctrines, control the thinking on integration, and finally force the main players to adopt an internal point of view as participants in the process, as parts of a whole with a clear agenda. In short, there are two ways in which the law of integration attempted to overcome the gaps which the integration process originally left open: by putting forward a structural approach to European law and by blurring the boundaries between theory and practice.

The ITL project may be seen as an effort to expose the fallacies of this enterprise. ITL condemns the ideological prejudices which burden the subject of European integration. It rejects the "temptation of a [supranational] model of integration characteristic of the early days of the European Community" as reflected in the Law of Integration project.[15] Seeking a conception of integration "free of any ideological connotations," it adopts a realist and comparative point of view.[16] ITL relies on two methodological shifts. The first one involves using the comparative method as an instrument to provide "a yardstick for objective evaluation" of the integration process. The authors contributing to the project compare federal regimes, the principal model chosen for comparison being the European Communities, and the United States. The objective of the ITL project is "less to identify the best federalist machinery for universalization than to trace similarities and differences" and ask questions of one system which may prove insightful with regard to another.[17] The advantage of a comparative analysis is that it eschews the appeal to a *telos* or to universal principles by its very nature as a method that relies on an inevitable tension between similarities and differences among local systems. The second shift is from law to governance. The project intends to explore not only the content of law but also the "pre- and post-normative phase," the process of lawmaking, and the impact of law on the ground.[18] Beyond a positivist account of law, the project looks into the real processes by which law is negotiated and implemented. This has prompted a special interest in economic and political factors as well as actors and relations or conflicts among actors, especially judicial organs.[19]

These two methodological precepts have proved extremely fruitful in the field of European studies. However, as a basis for a neutral framework of analysis—what Mauro Cappelletti used to call a "laboratory" for analysis—they have proved to be

[14] Antoine Vauchez, Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity (2015).

[15] Cappelletti et al., *supra* note 1, at 8.

[16] *Id.* at 12.

[17] This is how Daniel Kennedy depicts traditional comparativism in the domain of public law: *New Approaches to Comparative Law: Comparativism and International Governance*, 2 Utah L. Rev. 587(1997).

[18] Reference is made in the introduction to a "'total' approach to legal analysis": Cappelletti et al., *supra* note 1, at 62.

[19] *See, e.g.*, Joseph H.H. Weiler, *Community, Member States and European Integration: Is the Law Relevant?*, 21(2) J. Common Mkt Stud. 56 (1982).

problematic. The reason is that the project remains tied to the vision of integration as a federal experience "with a view to future progress."[20] However, the authors make clear that federal experience does not mean the construction of a homogeneous federal state. The federal idea combines the search for unity with genuine respect for the autonomy of the participant entities.[21] For the authors, the federal structure is essentially flexible. There is much leeway in trying to provide for the unity of such non-unitary polities.[22] Still, this project presupposes the existence of an "overarching frame of reference" underpinning the integration process; the frame transcends the national and European units. There is an *idée de base* (in French in the text) and this is federalism.[23] From this idea they derive "important principles" organizing the system: namely, participation, democracy, legality, rule of law, coherence.

In a central passage of the text, the authors are emphatic that "it is a legal order that we are expounding."[24] This is a rather striking expression. It strongly resonates with what US Supreme Court Chief Justice Marshall famously wrote in 1819 in *McCulloch v. Maryland*: "we must never forget that it is a constitution we are expounding."[25] However, in Europe, there is no federal *demos* to which this legal order may be ascribed. Moreover, the authors refuse to identify the *telos* of the Common Market and the political unification of Europe as the normative foundation of this new order, and that is their core difference with the Law of Integration's construction. Crucially, therefore, ITL places an "ethos" at the core of the integration process. The challenge is to build a European constitutional order based on the fundamental value of personhood in a manner which respects and involves all the participants at all levels of government. As a result, ITL is not only about understanding different federal systems; it is also about constructing a new order. What we have is not comparative law analysis and socio-political analysis as two separate methods of analysis. These two streams flow together under the ITL approach. We should see comparative law, as it is used in this project, as supporting a model of governance, transparently a federal one.

This approach is reflected in the two meta-principles put forward by the authors in order to organize the wider subject matter to be analyzed: the first principle is what they call the "basic European identity" and the second is the "Federal principle." These are not only organizing principles but also normative principles. On the one hand, European identity is a way of bringing about "a new dimension of the rule of law" and justice which is based on the protection of the individual.[26] This new dimension is

[20] Cappelletti et al., *supra* note 1, at 10.

[21] At this point, Cappelletti et al., *supra* note 1, explicitly refer to Pescatore according to whom federalism requires that "two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interest of the particular entities": *see* Pierre Pescatore, *Foreword*, *in* Courts and Free Markets: Perspectives from the United States and Europe x (Terrance Sandalow & Eric Stein eds., 1982).

[22] This is clearly outlined by George Bermann in his review of the whole series: *Book Review*, Fordham Int'l L. J. 232 (1987).

[23] Cappelletti et al., *supra* note 1, at 26.

[24] *Id.* at 26.

[25] McCulloch v. Maryland [1819] 17 U.S. 316.

[26] Cappelletti et al., *supra* note 1, 68.

best encapsulated in the area of free movement of persons. Indeed, European law has granted the individual a "position which begins to resemble a constitutional position." To illustrate, a migrant worker is treated as a person who is granted some basic conditions (a social and family status, including, e.g., the right to social benefits granted by host member states and the preservation of the integrity of family life) in order to be able to move and integrate in any European society, while her "difference" and foreign connections are respected.[27] This is the core of what later became known as the "social integration" approach of the Court of Justice of the European Union (CJEU) particularly well developed in the field of European citizenship.[28] The notion of personhood, in this reading, denotes a certain moral content to European law and policies, and thus offers a means of developing an ethical foundation for European integration.

On the other hand, the Federal principle is meant to ensure that a sufficient degree of participation and pluralism is admitted in European integration. Not by chance, it is in the field of "foreign affairs" that this principle is said to be best encapsulated. It is, indeed, there that the tension between independence and coexistence between States, and with the European institutions, is at its most acute. Moreover, this domain remained foreign to the *ERTA* doctrine of the CJEU, establishing the absolute precedence of the common institutional framework in the conduct of external action. What the authors perceive in this domain is a form of "genuine federal foreign policy," where the equal participation of all players is ensured.[29] They argue that the principle of unity and the doctrine of the "sole organ" in external action are less desirable than solutions based on "mixity."[30] This example points to a broader re-elaboration of the framework of integration which must accept and contend with the existence of a plurality of legitimate subjects of representation, namely, the Member States and their people alongside the Union.

3. Resilience

Unlike the law of integration, the ITL project started as an effort to understand, rather than hide, the contradictions of the integration process, i.e. an effort to analyze the "resilience" of the integration process in the face of recurring crises within and outside.[31] But, just like with the law of integration, it becomes clear in the course of the introduction that the authors intend to reform the process so as to make it resistant to new and

[27] *Id.* at 47–48.

[28] *See* on this approach Loïc Azoulai, *La citoyenneté européenne, un statut d'intégration sociale*, *in* Chemins d'Europe: Mélanges en l'honneur de Jean-Paul Jacqué 1 (Gérard Cohen-Jonathan et al., eds., 2010); Charlotte O'Brien, *Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's "Real Link" Case Law and National Solidarity*, 33(5) Eur. L. Rev. 643 (2008).

[29] Cappelletti et al., *supra* note 1, at 60.

[30] *See further* Joseph H.H. Weiler, '*The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle*' *in* Mixed Agreements 35 (Henry G. Schermers & David O'Keeffe eds., 1983) repr. in Joseph H.H. Weiler, The Constitution of Europe. "Do the New Clothes Have an Emperor?" and Other Essays on European Integration 130 (1999); Marise Cremona, *EU External Relations: Unity and Conferral of Powers*, *in* The Question of Competence 65 (Loïc Azoulai ed., 2014).

[31] Cappelletti et al., *supra* note 1, at 10, 31.

forthcoming crises. Now the questions are: Has European integration effectively proved to be resilient? What can be said of the European identity and the Federal principle in today's European Union? I will briefly explore these two dimensions. On both counts, the overall picture is rather disappointing. Integration has turned to frustration for its three main subjects: the European institutions, the member states, and the individual citizens. One of the reasons for this is certainly the difficulty experienced by the European institutions in departing from the traditional Pescatorian model focusing on a self-standing and self-referential institutional and legal structure.

First of all, the development of a European identity has met with strong resistance. While greatly expanding in scope, the integration process has not been able to connect citizens and their representatives to Europe as a whole. Establishing a genuine European identity would have presupposed a shift in loyalty from member states to the Union, or at least the constitution of a strong community sharing a "collective identity" and agreeing on principles applicable to all Union citizens. [32] However, the conditions for such a political or social pact were never met, as illustrated by the failure of the grand process leading to the rejection of the Constitution for Europe. This may also explain the persistent resistance of the superior courts of member states to the project. Many of these authoritative interpreters, while accepting their responsibility for European integration, do not feel part of a compelling whole. The jurisprudence of the Federal Constitutional Court of Germany on EU law, as reflected in its Lisbon Treaty decision of June 30, 2009, is a case in point. More generally, the superior courts' resistance has focused on the "perceived over-extension of non-discrimination, citizenship and fundamental rights" stemming from EU law.[33] Moreover, many citizens consider that the Union does not deliver in terms of economic growth, social solidarity, and security. The paradox is that these are areas in which the Union has only limited instruments to intervene. Still, this development effectively results in a loss of support for European integration, manifest in the rise of more anti-EU parties and premised on the rhetoric of belonging to national or local communities.

The British Prime Minister's immigration speech delivered on November 28, 2014 is an impressive confirmation of this state of affairs.[34] It may be seen as a clear attack against what ITL perceived to be the core of European identity. While reaffirming the importance for his country's being part of the Union, Mr. Cameron called into question the notion of personhood constructed by Union law. Basically, under EU law, individuals may develop in Europe a set of social relations not based on their national bonds but organized around alternative forms of ties (mainly family and professional ties). The continuity and permanence of these ties are secured. EU law provides an anchor for personal identity beyond and across the boundaries of national jurisdictions. It is

[32] *See* Cathleen Kantner, *Collective Identity as Shared Ethical Self-Understanding: The Case of the Emerging European Identity*, 9(4) Eur. J. Soc. Theory 501 (2006); Pedro Lomba, *Constructing a "We": Collective Agency and the European Union*, *in* Reflections on the Constitutionalisation of International Economic Law. Liber Amicorum for Ersnt-Ulrich Petersmann 97 (Marise Cremona et al., eds., 2014).

[33] Damian Chalmers & Luis Barroso, *What* Van Gend en Loos *Stands For*', 25(1) Int'l J. Const. L. 129 (2014).

[34] JCB Staffordshire: Prime Minister's Speech, Nov. 28, 2014, *available at* https://www.gov.uk/government/speeches/jcb-staffordshire-prime-ministers-speech.

to these forms of identification that Mr. Cameron opposes the notion of a "common home" or what he calls the "national club," which should be preserved. Let us recall that, in contrast to a pure public good, a club is, according to well-known Buchanan theory, an excludable good, meaning that it is possible to prevent people who have not paid for it from having access to it.[35] Accordingly, Mr. Cameron suggests, both more control on free movement of persons and the imposition of new conditions on entry of migrants and on access to social benefits—conditions which ask for proof that those persons have the material or cultural capacities to assimilate and that they will really contribute to the host society.

Mr. Cameron is far from alone in upholding such a conception. It has to some extent reached the supranational institutional world, as illustrated in the recent *Dano* decision of the CJEU.[36] To recall, the case concerns a Romanian national living in Germany who applied for basic subsistence benefits for jobseekers. As provided by the German Social Code, the function of this social assistance "is to enable the beneficiaries to lead a life in keeping with human dignity." In this case, the Court seems to have lost sight of the aim of Union citizenship, which is to ensure the integration of Union citizens into the society of any other member state. Instead, it focused on the objective of preventing Union citizens from becoming an unreasonable burden for the host member state. In this judgment, the Court oscillated between two approaches. One was a culturalist approach which abandons the traditional protection of factually integrated persons for the sake of a logic of assimilation with a view to the maintenance of the perceived cohesion of the host society.[37] This is clearly reflected in the facts of the case, which formed the undertone of the decision: although Ms. Dano enjoyed a residence certificate and had a child born in Germany, it was noted that she speaks German poorly, cannot write in German, and is not willing to integrate into the labor market. The other approach applied in the Court's reasoning was purely formalistic. It consisted in relying on the condition of the applicant having sufficient financial resources to qualify for a right of residence under the EU citizenship Directive. There is no examination of "the personal circumstances characterizing the individual situation of the person concerned" as part of the proportionality analysis of the case.[38] There is no proportionality analysis at all.

This decision shows how difficult it is to resist the re-territorialization of free movement policies in the context of a significant decrease in trust and harmony in the Union, particularly in times of economic and political crisis.[39] It may lead some to conclude that integration through the free movement of persons law has to give way to a more robust economic union in perhaps a more restricted Union.[40] However, this

[35] James M. Buchanan, *An Economic Theory of Clubs*, 32(125) Economica 1 (1965).

[36] C-333/13 *Dano*, Judgement, Nov. 11, 2014, ECLI:EU:C:2014:2358.

[37] On this shift in recent CJEU case law, *see* Loïc Azoulai, *The (Mis)Construction of the European Individual. Two Essays on Union Citizenship Law*, EUI Working Paper LAW 2014/14.

[38] Compare and contrast with C-140/12 *Brey*, Judgment, Sept. 19, 2013, ECLI:EU:C:2013:565, paras 77–78.

[39] See Editorial Comments, *The Free Movement of Persons in the EU—Salvaging the Dream While Explaining the Nightmare*, 51(3) Common Mkt L. Rev. 729 (2014).

[40] *See, e.g.*, Jean-Louis Bourlanges, *Identité européenne et ambition française*, 147 Commentaire 485 (2014).

conception would readily remove any reference to a community of values, which makes space for greater self-determination and emancipation of individuals. Now, it cannot be that the process of integration culminates in the effacement or destruction of the emancipatory dimension of the project. Or if it does, then the way the question of integration through law is answered leads to the destruction of the concept itself.

Second, the institutional practice seems to deviate from the Federal principle. To recall, the Federal principle rests on the idea that European integration constitutes a global system in which viewpoints may vary depending on the institutional level in question but to which all participants, Union institutions, Member states and citizens, are bound and committed, each one in its own place. The strongest claim in federal systems is the claim of commitment and loyalty made upon Member States and citizens.[41] In the European Union, this is mainly reflected in Article 4(3) of the Treaty on the European Union (TEU) and the principle of loyal cooperation as developed by the case-law of the Court.[42] It consists of a principle of sincere cooperation, full mutual respect and a duty of mutual assistance. However, we are now experiencing the development of some disturbing phenomena which affect many aspects of integration, but are perhaps most visible in the field of the Economic and Monetary Union. In the context of the Europe's economic crisis, member states and European institutions have come to occupy positions not assigned to them by constitutional framework of the Union.

The practice pulls in two opposite directions. On the one hand, we see the development of a set of institutional relations that are directly concerned with the objectives and values of the Union, and yet seek to distance themselves from the EU framework. A parallel relational space has developed in which member states' and the Union's institutions develop their actions outside the EU institutional and legal framework (relying on international treaties, contractual arrangements, domestic private law regimes).[43] This shift towards new forms of action and new procedures reflects distrust towards the EU institutional machinery and its effectiveness. However, it reflects more broadly a lack of commitment to the idea of the EU as a whole, that is, to the idea that the Union is more than the sum of its parts. True, these new mechanisms often mention EU law as a condition for their validity, and may involve EU institutions in their operation, as was made clear in the *Pringle* judgment.[44] However, these references are a further manifestation of the impoverishment of integration through law. In this context, EU law refers to strict financial conditionality and to a rigid system of monitoring. Structural principles of EU law, such as protection against an imbalance of power, democratic accountability, and judicial review, are being sacrificed. Significantly, in *Pringle*, just like in the *Dano* case, any reference to fundamental rights has been completely discarded.

41 Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 Va L. Rev. 731 (2004).

42 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. C 306/1.

43 *See further* Loïc Azoulai, *Appartenir à l'Union européenne. Liens institutionnels et liens de confiance dans les relations entre États membres*, in Liber Amicorum en l'honneur de Vlad Constantinesco 27 (2015).

44 Case C-370/12, *Pringle*, Judgment, Nov. 27, 2012, ECLI:EU:C:2012:759.

On the other hand, we can observe the Union or its executive organs interfering in areas where member states are supposed to enjoy some autonomy.[45] Heavily centralized intervention enhancing the power of the European Commission and EU agencies is taking place.[46] This is what has been called a system of "executive federalism."[47] This sort of federalism is alien to the "Federal principle" evoked by ITL. Here, cooperation among actors and representative institutions is replaced by monitoring compliance and executive dominance. In both cases, regardless of whether involving avoidance of the EU framework or strengthened centralization within the EU framework, the normative assumptions underpinning the operation of the law in the EU context are undermined.[48] The EU principle of democracy and the traditional ethos of sincere cooperation, mutual respect, and mutual assistance are hardly compatible with this development.[49]

In a way, these observations on the changes affecting European identity and the Federal principle lead to the same outcome: a profound transformation of the process of integration. This transformation is not equivalent to disruption. Secession does not appear to be seen as a feasible option even if there may be a temptation to exit the Union in some quarters. Resistance to further integration is just another way of relating to Europe. Yet, it is no longer integration through law in a classic sense. In both the *Dano* and the *Pringle* cases, what is left of law is a body of rules without an ethos. What is left of integration is a form of factual interdependence within the Union without a deep sense of mutual membership.[50] So the challenge of integration today is to build a relational space that reflects more than mere economic, legal and political interdependence and a law that does not consist mainly of technical and financial conditions.

It is not a matter, in my view, of returning to the foundational values of the EU. It has been made plain, I think, that the broad *finalités* of integration are no longer driving forces. To a certain extent, I follow Joseph Weiler who suggests that the spiritual dimension of the European project is exhausted.[51] The condition of integration is "without final destination."[52] How, then, do we think about a sustainable process

[45] A good illustration is provided by the Council decisions addressed to Greece in the course of the Euro-crisis: *see* Roland Bieber, *The Allocation of Economic Policy Competences in the European Union*, *in* The Question of Competence, *supra* note 30, 86.

[46] *See* Paul Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, *in* The Constitutionalization of European Budgetary Constraints 19 (Maurice Adams, Federico Fabbrini & Pierre Larouche eds, 2014).

[47] Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18(5) Eur. L.J. 667 (2012); Christian Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15 German L.J. 985 (2014).

[48] *See* Marc Dawson & Floris de Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76(5) Mod. L. Rev. 817 (2013).

[49] This is so despite statements to the contrary by the CJEU: see somewhat indirectly but strikingly the recent C-409/13, Council v. Commission, Judgment, Apr. 14, 2015, ECLI:EU:C:2015:217.

[50] Editorial Comments, *Union Membership in Times of Crisis*, 51(1) Common Mkt L. Rev. 1 (2014).

[51] Joseph H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay*, *in* Philosophical Foundations of European Union Law 137 (Julie Dickson & Pavlos Eleftheriadis eds, 2012). *See also* Neil Walker, *After* finalité*? The Future of the European Constitutional Idea*, EUI Working Paper, LAW No. 2007/16.

[52] Daniel Augenstein & Jennifer Hendry, *The "Fertile Dilemma of Law": Legal Integration and Legal Cultures in the European Union*, Tilburg Institute of Comparative and Transnational Law Working Paper 2009/06 WP.

of integration involving European institutions, the member states and the citizens without positing a "whole" enshrined in its law—be it a *telos* or an *ethos?* This has become the central question for us today. Arguably, there are three possible solutions. The first is to abandon altogether the legal dimension of European integration and rely on other dynamics, such as high politics,[53] traditional routine politicization,[54] or social movements. The second option is to keep defending the traditional legal model by exhibiting its formal qualities but with a risk of being purely decontextualized and largely ineffective.[55] The last option is to rethink integration through law in light of current social and political conditions. To make sense of this project, we need to understand, and attend to, the complex set of *relations* that constitute integration. These relations are made of trust and distrust toward the European Union, engagement with the European order and vindication of national identities or local cultures and values, integration as well as disintegration. My suggestion would be to rethink integration as a regime for dealing with a kind of "relationality" which is no longer sustained by a self-standing and self-referential structure without being a purely factual interdependence. This is a kind of relationality involving distinct cultures, values, particular beliefs, and local sensibilities.

4. Rethinking integration through law in our time

The challenge is twofold: it is both substantive and methodological. The former concerns the reality of European integration and its meaning, the latter concerns the way to approach it. Both issues are closely related.

One way to engage methodologically in the exercise of rethinking integration is to turn the ITL project into a critical project.[56] Various authors are now at work trying to make clear that, under the current conditions of integration, the relations between member states and individuals in Europe may become distorted. The action of EU institutions as well as the joint action of the member states may well generate imbalances of power and the dominance of some states over others, while integration structurally favors certain groups of people and negatively affects others who bear the consequences of EU law through the policy choices that are made internally to adjust to it. Subordination, inequality, and alienation are an integral part to this process. As a result, what has long been seen as mainly a technical legal process is now perceived as a question of social protest. This situation points to a need for analytical critique.

[53] Luuk van Middelaar, The Passage to Europe (2013).

[54] Simon Hix & Stefano Bartolini, *Politics: The Right or the Wrong Sort of Medicine for the EU?*, Notre Europe Policy Paper 2006/19.

[55] *See, e.g.*, Koen Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, *in* Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice 13 (Maurice Adams et al. eds., 2013) and see the critique of this approach by Joseph H.H.Weiler in his *Epilogue*, *in* Judging Europe's Judges, 235.

[56] This is the path suggested by Joseph H.H, Weiler in *Epilogue*, *in* "Integration through Law" Revisited. The Making of the European Polity 175 (D. Augenstein ed., 2012).

No doubt we are witnessing a "critical turn" in contemporary EU legal studies. It takes two forms. One form of critique considers that, while the project of integration is well designed to serve legitimate interests, especially new forms of individual emancipation, in practice it does not deliver the expected outcome. This is so for institutional, structural, and practical reasons but also for conceptual reasons. What is missing is a clear articulation of the deep philosophical foundations of the project. The core of this critique is captured by Andrew Williams stating that "the existing philosophy of EU law rests upon a *theory of interpretation* at the expense of a *theory of justice*."[57] By "theory of interpretation" it is meant a mode of operation of EU law relying on teleological methods of interpretation and self-standing instrumental principles. The call for a "theory of justice" refers, instead, to the development of foundational principles. Depending on the diagnosis and aims of the critique, this re-foundation develops as political theory, moral philosophy, and theory of values or social justice theory for the European Union.[58] An alternative form of critique goes beyond this and argues that the operation of EU law is inherently distorted. For example, what is presented as an emancipatory project would be in fact a form of empowerment of individuals which amounts to nothing else than a form of alienation through subordination to imposed economic performance criteria.[59] EU law negatively affects forms of life—what makes the value of our life in European societies.[60] This form of critique calls for a fundamental transformation of the design and techniques of the European integration project, making its law more sensitive to social interests and local particularities.

We must give credit to these critical approaches for helping us become aware of the many distorted forms of relations that characterize the integration process. If the concept of integration through law is to be maintained, we need to openly look at integration as a complex field without disavowing the forms of distortion in political, economic, social, and legal relationships. Yet, an approach exclusively concerned to deconstruct the operation of law risks obscuring the question of law as a constructive technique. Absent a strong sense of political community, law as a special mode of connecting state organs with Europe as a whole or of allowing individuals to live, at least partially, in social and moral conditions which denote a far-reaching European society is a question that is *still* at issue for the enterprise of integration. Accordingly, EU legal scholarship needs to engage in a reconstructive approach. There are already

[57] Andrew T. Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29(3) Oxford J. Legal Stud. 549, 552 (2009).

[58] The idea of a political refoundation is developed by Jürgen Habermas, The crisis of the European Union. A Response (Ciaran Cronin trans., 2012). The idea to provide the Union with moral foundations may be found in Andrew T. Williams, The Ethos of European Integration: Values, Law and Justice in the EU (2010). The concern for a social justice deficit of the EU is reflected in Floris de Witte, *Transnational Solidarity and the Mediation of Conflicts in Europe*, 18(5) Eur. L.J. 694 (2012); Andrea Sangiovanni, *Solidarity in the European Union*, 33(2) Oxford J. Legal Stud. 1 (2013) 219; and more generally in Dimitry Kochenov, Graínne de Búrca, & Andrew T. Williams, Europe's Justice Deficit? (2015).

[59] Alexander Somek, *Europe: From Emancipation to Empowerment*, LSE *Europe in Question,* Discussion Paper Series, Paper No. 60/2013.

[60] Gareth Davies, *Internal Market Adjudication and the Quality of Life in Europe*, EUI Working Paper 2014/07.

candidates. One is "doctrinal constructivism."[61] Another one is "constitutional pluralism."[62] Both follow ITL in two essential ways. First, they aim to avoid what they perceive to be the confusion of two levels of analysis in traditional EU legal scholarship: the descriptive and that of normative justification. Second, they reject the functionalist and material approach they associate with Pescatore's law of integration. However, what these approaches concretely signify in terms of analysis is not entirely clear. Our concern should be to build on this to give light to new approaches. We must attempt to develop an approach which gives credit to the legal categories and instruments that allow such a thing as integration to exist whilst constantly bringing into question the political and cultural preconceptions through which we look at it.

This new methodological approach relates to the substantive challenge. European integration can no longer rely on the basis of the traditional assumption that law is the natural cement that holds the member states, their peoples, and social and legal structures together. To make sense of integration through law implies, in the current context, two conceptual shifts. First, the meaning of integration should not be reduced to the legal operation whereby states confer powers to the European institutions and make use of these institutions to advance the objectives they have in common. Rather, integration should be taken as primarily to refer to *transfers of loyalty* amongst member states and their peoples as part of a common whole. Absent a strong sense of trust in the EU institutional machinery, it may be that the question of how to conceive of the Union depends upon the trust that member states and their peoples place in each other. No integration project is sustainable in the absence of some form of concrete mutual trust. This means reconfiguring the relationships of the parts to the whole. A supranational whole is no longer credible. We should rather be attentive to all forms of interconnectedness among states, state constituent entities, and more broadly between the Union citizens. The recognition of interconnectedness is the precondition for mutual trust.[63] Second, integration does not simply boil down to the legal requirement of cooperation in a spirit of loyalty. It cannot simply mean abiding by the most fundamental and abstract rules of EU law and referring to a coherent whole.[64] It means assuming a *form of responsibility* for the choices made individually or collectively and for the concrete consequences of these choices throughout the Union. This clearly departs from the abstract concept of individual and limited responsibility of Member States enshrined in the Treaties (Article 125 TFEU) and reflected in the German Constitutional Court's jurisprudence on the euro-crisis law.[65]

[61] von Bogdandy, *supra* note 10.

[62] Klemen Jaklic, Constitutional Pluralism in the EU (2014).

[63] *See* Hans-Dieter Klingemann & Steven Weldon, *A Crisis of Integration? The Development of Transnational Dyadic Trust in the European Union, 1954–2004*, (2013) *European Journal of Political Research* 457 (2013).

[64] This model of membership is to be found originally in Cases 6/69 & 11/69, Commission v. France, Judgment Dec. 10, 1969, ECLI:EU:C:1969:168.

[65] *See* Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], Sept. 12, 2012, 2BvR 1390/12 et al. (on the Treaty establishing the European Stability Mechanism); BVerfG, Order, Jan. 14, 2014 2BvR 2728.13 et al. (on the OMT Decision of the Governing Council of the ECB). More generally, *see* Peter-Christian Müller-Graff, *The Legal Readjustment of the European Economic and Monetary Union*, *in* The Rising Complexity of European Law 207 (Peter-Christian Müller-Graff & Ola Mestad eds., 2014).

This concept does not allow us to identify positive and negative external factors produced by the decisions taken locally throughout the Union. The recognition of external factors is the precondition for assuming responsibility.

Transfers of loyalty and forms of collective responsibility are the critical conditions under which interdependence may turn into mutual membership. The challenge is to find those legal structures and to trace those legal relationships which are capable of generating these conditions. As EU lawyers, we must ask not whether mutual trust and overall coherence can be somehow assumed as and when EU law operates, but we should ask whether Union law is capable of generating the preconditions necessary to foster genuine collective action. This is the only way for us to continue making sense of the experience of integration *as a whole* now that the possibility of referring to a grand structural plan or to a compelling ethical rule is no longer available.