

## GUEST EDITORIAL

### *Reviewing the Review: From ideology to morality in the Editorial Board*

In 2013, I was approached by Dr Morten Rasmussen, who explained that one of his researchers wished to use the archive of the *Common Market Law Review* for her work on the nature of European law.<sup>1</sup> Naturally, we gave our consent, and the research duly took place. This also led to a published article about the journal.<sup>2</sup> The research used the archive from the founding in 1963 to 1993. It seems appropriate, now I have retired as Managing Editor, to take up the thread there, and look back over the last 30 years. These comments are based on personal recollections rather than historical or archival research. For some statements, I cannot give a source, beyond my memory. It is a personal account: but one of the developments I would like to pick out is the evolution of what I would call a moral outlook within the Editorial Board, shared within a close-knit group. It's not quite the same as an ideological stance in favour of the European Union as such – which has, of course, been characteristic of much of the study of the EU right from the start. And it's also not the same as editorial ethics.

I started working at the Editorial office on 1 February 1990. The Editorial Board was then made up of Hein Schermers (Editor in chief), Piet Jan Slot, Claus-Dieter Ehlermann, Jan Winter and David O'Keeffe. The following ten years were marked by huge changes in the European Community. The Single European Act was in place (July 1987); but soon we were into the great swell of the negotiations leading up to the Treaty of Maastricht. That Treaty did not achieve all that was hoped for, and the subsequent complicated structure of Union and Community (the famous “Pillars”) involved many pitfalls, but it was revolutionary: the creation of the European Union, with a foreign policy focus, Union citizenship, Economic and Monetary Union, and so much more.<sup>3</sup> In the next eight years, the Treaties of Amsterdam and Nice were also drafted and signed.

1. Director of a collective research project on the history of European law, based at the University of Copenhagen.

2. Byberg, “The History of Common Market Law Review 1963–1993: Carving out an academic space for Europe”, 23 *European Law Journal* (2017), 45–65. The broader PhD project analysed the history of the academic debate on the nature of European law 1963–1993 – with a special interest in tracing the constitutional understanding of European law.

3. See e.g. Curtin, “The constitutional structure of the Union: A Europe of bits and pieces”, 30 *CML Rev.* 17–69.

So in those first years of my tenure, there were major developments in Community law, which naturally required analysis in the *Review*. There was the first big standoff with the UK, and de facto “variable geometry”,<sup>4</sup> as the Social Policy Protocol was needed to resolve the impasse over the social policy provisions of the Treaty of Maastricht.<sup>5</sup> Union citizenship had been invented, but it was unclear what it might mean. The problems of the Community’s democratic deficit and so-called “competence creep” were in the limelight. We were still in a period where national top courts were gradually accepting the doctrines of primacy and direct effect, as case law brought details to their notice. And ratification of the Maastricht Treaty was an issue in national constitutional orders of particular Member States.

In the following, I will try to show how the existence of a moral dimension within the Editorial Board has become clear in more recent years; but that does not mean it was entirely absent previously. In fact, the first occasion I can think of was in the early 1990s, when the big questions of the reunification (or unification) of Germany and the unravelling of the Soviet system were on the table. What should the Community’s stance be? Claus-Dieter Ehlermann – Director General of the Legal Service of the European Commission – had been a member of the Editorial Board for 15 years, and on resigning as Editor, retained his affiliation as a member of the Advisory Board;<sup>6</sup> he was an awe-inspiring man. I will never forget the seriousness with which he said: we have a moral obligation towards the countries in Eastern Europe. East Germany was de facto taken up in 1990, when Germany reunified. But we *have* to offer the others membership. That conviction was regardless of whether it was actually beneficial for the Community to expand in that way.

### *Idealism from the start*

The impulses behind the creation of the Communities are well known, as are the arguments about whether it should be a more political union, or a (far-reaching) common market. The *Review* was set up in 1963, in a period where there was a conscious desire to strengthen the view of the EEC that it was a special phenomenon, worth separate study and analysis.<sup>7</sup> Moreover, as the archival research on the *Review* also demonstrated, it seems that early academic work was geared to supporting and providing legitimacy for the

4. Also with regard to Denmark.

5. The UK was opposed to the provisions of a new Social Chapter of the EC Treaty, which the other 11 Member States agreed on.

6. Schermers, “Special foreword: Claus-Dieter Ehlermann”, 27 *CML Rev.* (1990), 637–638.

7. See *inter alia* Byberg, *op. cit. supra* note 2. On the early years of the *Review*, and its founding, see Brinkhorst, “Guest Editorial, A farewell to arms: Some reflections on 50 years Common Market Law Review”, 50 *CML Rev.* (2013), 1537.

well-known case law of the ECJ, on the Community as a “new and special legal order”, by differentiating the law of the EEC from international law.

In any case, most people studying and specializing in EEC law, and a fortiori the Editors of the first dedicated academic journal in the field, had “a fervent ideological dedication to their cause”.<sup>8</sup> Byberg argues that after the first fifteen years, during which the “community of lawyers” had been protective of the Court of Justice, the time was considered ripe for more critical approaches, and the *Review* exemplified this development. Byberg identifies a more critical approach in the *Review* in the second half of the period she researched, and I would say this continued to be the case in the 1990s and beyond. The ideological thrust was still clear, though, and continued to be so: to support European integration and the Community – even as its name changed to the Union. So, for instance, criticism of the Court of Justice expressed in the *Review* was more usually on grounds of shortcomings in its reasoning or organization. A notable early exception was the decision in 1992 to publish an (unsolicited) article which argued that the Court was using fundamental rights instrumentally, in order to extend its jurisdiction into areas previously within domestic courts’ purview.<sup>9</sup> With regard to the Commission, too, criticism was perfectly acceptable to the Editorial Board, but was often couched in very constructive terms.<sup>10</sup>

#### *Consolidation and rejuvenation – in the 1990s and 2000s*

In the 1990s, the Editorial Board was extended, and included Wulf-Henning Roth, Jacqueline Duteil de la Rochère and Chris Timmermans. Schermers had retired, and the Board had decided to work without an Editor-in-Chief. Alan Dashwood and Jean-Paul Jacqué joined, marking the period with the strongest links with lawyers from institutions.<sup>11</sup> On many occasions, the Board discussed whether or not to continue the practice of having the Editorial comments unsigned. This was often seen in relation to the fact that at least one

8. Byberg, *op. cit. supra* note 2.

9. Coppel and O’Neill, “The European Court of Justice: Taking rights seriously?” 29 CML Rev. (1992), 669. At the following FIDE conference, a certain member of the ECJ looked at me fiercely when I said who I was, and what journal I ran: “You published THAT article”! There was also an academic rejoinder: Weiler and Lockhart, “‘Taking rights seriously’ seriously: The European Court and its fundamental rights jurisprudence”, part I, 32 CML Rev. (1995), 51–94 and part II, 32 CML Rev. (1995), 579–627.

10. See e.g. Van Gerven, “Guest Editorial: Ethical and political responsibility of EU Commissioners”, 37 CML Rev. (2000), 1: “Ethical responsibility, then, is concerned with the rules of good behaviour in public life. And it is to be hoped that the Commission as an institution may grow in moral strength”; “Editorial comments: The report of the Committee of Independent Experts: an ill wind...” 36 CML Rev. (1999), 269–272.

11. Timmermans was at the Legal Service of the Commission when he joined. Dashwood and Jacqué had both worked in the Council Legal service.

member of the Board was a Commission official. Each time the issue was discussed, however, the advantages of leaving them unsigned were predominant: the Editorial comments are the expression of the Board “as a whole” – though one person “holds the pen”. The understanding is that the author takes into account that all members of the Board must be able to “live with them”.<sup>12</sup>

In 2005, the Editors realized that they were all due to retire at about the same time.<sup>13</sup> They decided to appoint some new Editorial Board members, so as to have a period of overlap. The *Review* was running well, and the Board wanted to keep it along the same course. In 2007, Christophe Hillion, Michael Dougan, Sacha Prechal and Thomas Ackermann all joined, in a major rejuvenation of the Editorial Board; was it the start of a new era?<sup>14</sup>

I will mention a number of examples of decisions of, or contributions by, the Editorial Board from the last decade or so which show characteristics of a more moral outlook. By that, I mean something more than “ideological” or support for the Union project as such. These examples have a more universal character, calling on the most fundamental ideas of what is right and just. They imply upholding values such as human dignity, equality, justice. Such an approach reflects the values of the Union, as per Article 2 TEU, but at the same time is aware that those values are not special or limited to the Union. In the context of this Guest Editorial, I can give only a brief indication. I will mention a number of Editorial comments, but also some communications from the Editorial Board outside the pages of the *Review*.

### *An evolving attitude*

I chose three of the Editorial comments from 2015 which indicate views within the Editorial Board which tend to go further than support of the Union as such, resonating with universal values, for instance with regard to protection of human rights.<sup>15</sup> The first Editorial comments of 2015 were on the Opinion 2/13, on the draft accession agreement to the ECHR.<sup>16</sup> The

12. The author of an Editorial comment which was rather critical of the Commission said that while drafting, they imagined that Ben Smulders – then a member of the Editorial Board and Commission official – was looking over their shoulder. Criticism had to be well-reasoned.

13. See minutes October 2005 meeting of the Editorial Board.

14. Stefaan Van den Bogaert joined in 2010; Loic Azoulai in 2011; Ben Smulders in 2011; Niamh Nic Shuibhne in 2015; Marise Cremona in 2016; Giorgio Monti in 2017; Sara Iglesias and Eleanor Spaventa in 2023. Siofra O’Leary was Editor from 2013 to 2015.

15. Although all 3 examples are from the same year, they are representative insofar as there was a different author in each case.

16. “Editorial comment, The EU’s Accession to the ECHR – a ‘NO’ from the ECJ!”, 52 *CML Rev.*, (2015), 1–15.

comments immediately contrasted the Court's findings with the View of the Advocate General, who thought the draft agreement would be compatible with EU law, with some modification. The comments were rather critical of the Court's approach; in general, the comments state, "the Opinion of the Court, . . . appears to reflect a somewhat formalistic and sometimes uncooperative attitude in defence of its own powers *vis-à-vis* the European Court of Human Rights (ECtHR)". In fact, an earlier Editorial, from 2012, might also be mentioned here, which pointed out that the protection of fundamental rights within the Union was not free of problems: the Union seemed to lack tools to guarantee protection of fundamental rights on a par with the conditions for accession of new Member States.<sup>17</sup>

The Editorial comments in the December issue of 2015 concerned the protection of the fundamental values of the Union, and, though carefully worded, clearly reveal a desire for the Union institutions to act in order to safeguard those values.<sup>18</sup> There is a feeling of impatience here, going beyond mere analysis. In my view, that is due to the universal and moral character of the values in question, which were (and still are) under threat in certain Member States. This attitude could be contrasted with a Guest editorial by Tim Koopmans, from 2005, which was critical of the very language of "values", as it lacked clarity; Koopmans argued that the institutions needed "a clear relationship between the proclaimed purposes and the necessary activities."<sup>19</sup> Of course, that was a Guest editorial, not an Editorial comment from the Board. But certainly the Editorial comments from 2015 grasp values as something fundamental to our whole society.

Finally, I mention the Editorial comments in the August 2015 issue, entitled "The critical turn in EU legal studies".<sup>20</sup> That Editorial noted that academic studies were pinpointing serious shortcomings in EU responses to *inter alia* the financial crisis and "the dislocating and de-socializing effects of EU law designed to manage the euro crisis." It grappled with questions of justice, and how to take account, within legal analysis, of the doubts as to whether the very process of European integration was actually "of benefit to the greatest number of individuals". Such considerations are concerned with people, and go far beyond (legal) structures.

17. "Editorial comment, Fundamental rights and EU membership: Do as I say, not as I do!", 49 CML Rev. (2012), 481.

18. "Editorial comment, Safeguarding EU values in the Member States – Is something finally happening?", 52 CML Rev. (2015), 619–628.

19. Koopmans, "Guest Editorial: in search of purpose", 42 CML Rev. (2005), 1241.

20. "Editorial comment: The critical turn in EU legal studies", 52 CML Rev. (2015), 881.

*Communications outside the pages of the Review*

On a few occasions, the Editorial Board has turned to social media or websites to make their views known on matters of grave importance, even outside the pages of the *Review*. The first to mention here was in April 2017, following the attacks targeting the Central European University in Budapest, which the Editors considered an attack on academic freedom and part of an anti-liberal campaign with an anti-semitic flavour. The Editors drew up a full statement, declaring that the Hungarian government's proposals were an attack on academic freedom, a core value of the EU, and that in targeting the CEU they were acting discriminatorily, thus infringing another core value. The statement praised the CEU and its staff. This statement was posted on the Facebook page of the *Review*, under the heading "CML Rev stands with CEU" on 4 April 2017.

With regard to the whole Brexit story, of course rivers of ink have flowed. On two occasions, the Editorial Board was led to make a public statement. As for the choice of the UK electorate itself, the Board could not do more than express regret at a potential choice to leave. On 16 June 2016, the Editorial Board published a statement (on the journal's Facebook page): it was simply an expression of the hope that the people of the United Kingdom would choose to remain in the EU.

On the other hand, the Board was highly critical of the way the campaign leading up to the referendum was conducted, and in particular the Leave campaign. This triggered a moral response, and led the Board to publish a statement on our own website (of the Europa Institute, Leiden) under the title "CML Rev. Editorial Board critical of Brexit referendum campaign". Among other things, the Editors denounced "the manner in which leading figures in the Leave campaign have presented inaccurate and misleading information which is not supported by reliable evidence and does not stand up to objective scrutiny." The statement mentioned some examples of "disinformation", and concluded that "by normalizing systematic dishonesty as a tool of political campaigning, those responsible within the Leave campaign are doing a grave disservice to the British people – and indeed to the very quality of our democracy, not just in the United Kingdom, but elsewhere in Europe and beyond."

I think it is remarkable that an Editorial Board takes such steps, going beyond the "usual" bounds of the work of producing an academic journal. Together with the choice in Editorial comments not to be limited to examining developments in the EU in legal terms, but also raising issues of human concern in the broadest sense, this supports the existence of a moral outlook. This is also strengthened by the ongoing practice of having Editorial

comments “unsigned”, so they engage the responsibility, and carry the authority, of the whole Board.

*Nature or nurture?*

Was it the rejuvenation of the Editorial Board, starting from 2007, and the (dare I say “happy”) choice of new Editors, which created the conditions and possibilities for a close-knit group of academics to share their concerns even above and beyond the normal academic preoccupations, in a field which already tended towards idealism? Or was it the developments in the outside world – “migration” crisis, “rule of law” crisis – which called for unusual reactions, “statements” and probing editorials, and led this group to exchange ethical concerns as well as academic insights?

Possibly changes in the scope of the Union’s competences were a relevant factor, as more sensitive areas of social exchange were affected. Probably the personal interaction within the Editorial Board over time extended beyond strictly “law journal” questions. That evolution would fit into a growing general tendency in all legal disciplines to combine “strictly legal” points of view with (positive and normative) perspectives on the corresponding social phenomena. As for the Union itself: Putin’s war on Ukraine seems to stimulate further integration – as well as raising moral questions. On the other hand, at present several Member States openly deny the primacy of EU law and try to limit the application of EU law on their territory.<sup>21</sup> So, whether the shift from idealism towards moralism will continue, and whether it is overall a good or bad thing, I wouldn’t dare say.

Thomas Ackermann has written about what he thinks is the essence of what has made CML Rev. successful: collegiality and academic rigour of the Editorial board, the wealth of ideas and perspectives from contributors, the receptiveness of readers, and sharing the joys and sorrows of the turbulent development of the EU.<sup>22</sup>

That last is revealing, as it involves feelings! This is not a dry scholastic subject, to turn on at 9 in the morning and turn off at 6 in the evening. While those involved remain critical and realistic, there is a strong sense that this matters, to all of us, in our daily lives. I hope and trust that the *Review* carries on thriving.

Alison McDonnell

21. See Dougan and Hillion, “The EU’s duty to respect Hungarian sovereignty: An action plan”, 59 CML Rev. (2023), SI/181-202, arguing that Hungary has already de facto chosen to leave the EU.

22. Ackermann, “Extraterritorial protection of human rights in value chains”, 59 CML Rev. (2023), SI/143.

