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Volume XCVII

PUBLIC LAW: TWENTY YEARS AFTER
LE DROIT PUBLIC: VINGT ANS APRÈS

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PART I / IÈRE PARTIE

versity diminishes durably in a way that may even be detrimental to our opportunities for dialogue among different traditions and World-views?

Les processus vers une "réunification" non seulement de l'Allemagne, mais aussi de (parties de) l'Europe après la chute du mur de Berlin et un grand nombre d'autres événements importants qui se sont déroulés il y a environ 20 ans, ont pu créer le sentiment que nous nous dirigeons vers une unité plus grande dans le domaine du droit public aussi. Dans une certaine mesure, cela pourrait même être considéré comme l'objectif primordial des organisations internationales régionales, y compris le Conseil de l'Europe et l'Union européenne. Dans quelle mesure une proposition similaire est-elle crédible? Ce rapport traite du sujet en distinguant *i.a.* entre "*Europarecht*" et droit public au niveau National, entre des règles juridiques posées d'un type plus ou moins technique ou "de surface" et des modèles culturels profondément enracinés, entre différentes formes d'unité ou au moins d'uniformité dans le droit public et entre des versions différentes de droit comparé en tant que moyen pour parvenir à l'unité (avec un regard particulier sur les systèmes juridiques nordiques). Le message principal de ce rapport est le scepticisme - premièrement, mais pas uniquement, quant à l'unité au niveau de cultures juridiques (y compris constitutionnelles). Il se termine par une question normative: En dépit de la crédibilité de l'hypothèse empirique, dans quelle mesure vaut-il la peine de rechercher l'"unité" dans le droit public (en dehors du champ de l'"*Europarecht*" plus ou moins superficiel) sur un continent caractérisé si fortement par sa diversité? L'"Europe" serait-elle vraiment l'Europe si cette diversité se réduit constamment d'une façon qui pourrait même finir par nuire à nos chances d'un dialogue entre des traditions et des visions du monde différentes?

K. Papanikolaou

PUBLIC LAW: TWENTY YEARS AFTER

GENERAL INTRODUCTION

AGUSTÍN GORDILLO*

Dear friends,

IT IS indeed a very special honor to have been invited to address you, and I am very much thankful for it. This is proof of the meaning of the word friendship that has always characterized these meetings. I am not going to refer to the evolution of European Public Law during the last twenty years, which has been thoroughly presented by my predecessors, but rather, how it was received outside of Europe.

I am going to refer specifically to what attendance to these annual meetings for the last fifteen years has meant for a non-European practitioner such as me. I cannot refer to the whole two decades, for I have not been here that much, but I think my personal experience of fifteen years may reasonably be extrapolated in the same way to the remaining five years.

Before the creation of the European Group of Public Law and later its parallel organizations, all that a foreigner to Europe could do to try and keep up to date on the evolution of European Public Law, was to go to specific countries where one could find colleagues willing to put the foreigner up to date on the specifics of the evolution of the law of the country and of the European Union.

I did that for a long part of my life, and though it was immensely helpful and enriching for my own development, it could also prove to be an impossible task even in the most optimistic approach.

The sources of information were then always limited by the very fact that they were being gathered at a single nation or at most two or three at a single visit, in descending levels of success of one's effort. Sometimes one could gather a true gem of wisdom on just one occasion, as when I met

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Pierre Pescatore in a boat trip on the Berlin lake in 1983. It was a conference, in what was then still West Berlin, by the International Institute of Administrative Sciences, of whose Editorial Committee I had been a part since 1974, and where I presided a section of the Congress on "Public enterprise as an instrument of public policy." And I indicate this just to pinpoint an example of how deeply the law has changed in the last twenty years. Pierre Pescatore provided me with an eye-opening explanation of the evolving case law of the European Court of Human Rights, which he presided at the time, and its foreseeable future. It was a tremendous insight, but it required the help of chance and too many visits to too many places to gain such occasional extraordinary insight.

Then my life changed in the last part of my fifty years of dedication to public law practice. Coming to these EGPL and EPLC, now EPLO, meetings, every year, has substantially reversed the problem for me and anyone else in my position: I was now able to access simultaneously a huge amount of information as well as the approach of every attending European country, to acquire in a single place a large part of what was written in Europe about its Public Law, to consult a marvelous library, the European Public Law Library, to take home for further study the very important and high quality EPLC publications of all kinds, such as the *European Review of Public Law* and its many special series: the *European Public Law Series*, the *Central and Eastern European Legal Studies* and the *European Papers*, all of them historical and scientific achievements on their own.

I even had the chance of participating in the Academy of European Public Law, another melting pot of the legal intellect of Europe and the world, which has done marvelous things over time and still continues to do so, as the ever growing EPLO is as well. It is worth noting that the Academy is now in its 15th session and is proud to have more than 50 Universities around Europe, and several more from all over the world, as members of the consortium of its partner institutions. Not to mention its graduates - more than 500 - who have then pursued remarkably successful careers.

At each EGPL reunion I was able to listen to the lectures, read the papers, pay attention to the questions and answers, and even more importantly, to have now and then a few words with some of the attending scholars and judges in the many fundamental breakfasts, lunches, dinners, travel to and from the premises, excursions, short interchanges with one's eventual companions, etc. New friends of different countries were made at each occasion, more interchange followed, books were sent and received, papers translated and published, minds met in person and at the distance.

The process goes on and on, always gaining in depth and extension at the same time.

That was the most astounding experience, for which I shall always be indebted. It is by force a slow process, but it is the best there is.

I cannot venture to say that I have quite grasped the extent of the *acquis communautaire*, an impossible task for a non-European also interested in other systems of law. Yet, little by little, I felt I was gaining at least some sort of insight into the meaning and the limits of European Public Law, and of national public laws.

I was at times honored by the EPLC by being invited to address these or other similar meetings, and though I always thought that I was somehow out of sync and out of place, I could always sense the understanding and, again, the friendly reception by all of you of my doubts and my mistakes.

I am not sure I have corrected the latter, but at least I have tried to think more about them. Much of that is due to my own provenance. One never truly escapes the reality of the life one has led, the country where one was born and has lived. Since five years ago, I am an emeritus professor at the University of Buenos Aires, but it always pains me to try to explain the status of our national law, even to our graduates.

Yet, the effect of attending these annual and sometimes more frequent meetings gave me, each year, a renewed interest, a hope for a better future, an improved *raison d'être*, and a feeling of roots, of belonging, in the sense that even those of us who come from an emerging non-European continent, we imagine that, despite our practices, we are somehow still tributaries to the different approaches of the old Roman law and then to the further millennia of legal evolution by your own countries, which have come to a point of synthesis here.

It is perhaps no coincidence that at the same time that I was visiting your reunions, I was also attending the sessions of different international administrative tribunals, where the same process of mutual influence was taking place.

It was not European Public Law, but the principles were still the same even if it was the Administrative Tribunal of the Organization of American States, or the Administrative Tribunals of the Inter-American Development Bank, of the International Monetary Fund, of the Organization of the United Nations, of the International Labor Organization. The same will be, I am sure, with the newly installed EPLO Administrative Court.

The meeting of the minds was also happening *there*, as it has always been happening *here*. But this European Group of Public Law and its parallel and successive organizations have the advantages of their guiding principles of *friendship, commitment and excellence*. I am quite positive

that those were some of the fundamental keys to its resounding success, to its ever wider-reaching effects, to its worldwide influence and gigantic scope of action.

More importantly for me, reading your papers and hearing your debates, exchanging a few words here and there with the most prominent legal scholars, judges and public officials of Europe, have prompted further thought about my own legal system and the influence of other legal systems on it.

Before these meetings, I was more likely to think of comparative public law in national terms, choosing haphazardly half a dozen countries or even more, for each comparative exercise, by the simple crude test of easier accessibility to their publications and languages.

Nowadays, after the cumulative effect of the last fifteen years of attending these meetings, comparative and European Public Law have acquired a new meaning to me, and prompted me to write two small books which the EPLC graciously published through Esperia Publications, with a kind Preface by Professor Spyridon Flogaitis. He honored at the time the memory of Jean Rivero, who had a profound impact on both of us, and had in his lifetime suggested that we mutually develop each other's intellects.

I did meet with Spyridon Flogaitis at Louvain-La-Neuve in the early eighties, but it was at the EGPL and EPLC that our respective knowledge of each other's thoughts flourished. We sometimes disagreed on legal issues, and I learnt that he was immensely respectful of other people's legal opinions. He epitomizes the words tolerance, generosity, understanding, creativity, knowledge. I also had the opportunity to be a part of the United Nations Administrative Tribunal, which he presided at the time, and profited immensely, both personally and intellectually, from our mutual work there. Had we not had the previous experience of the EGPL, EPLC and its sister institutions, we might not have had such a rewarding collaboration at that tribunal.

One of those two small books that were born out of these meetings dealt with a vision of a futuristic better integration between Latin America and Europe; the other tried to see the whole legal world order as a single unit of thought. Both tasks were daunting and, even though I may perhaps not have much succeeded, at least I think I bettered myself in the process. I have been lecturing in the Americas with the fruits of those endeavors, not just with my national or international ruminations.

And just a few months ago this year, Professor Flogaitis and myself both attended an International Administrative Law conference in Mexico dealing generally with global administrative law and the general principles of international administrative law. Some professors from the Global Admin-

istrative Law Project of the University of New York were also there, as well as other members of the EPLO and various other countries, at the invitation of the International Association of Administrative Law in Mexico. They then founded the Mexican branch of the EPLO, and this 2009 session has the advantage of their distinguished presence here, which I respectfully salute.

The broadening effects of the activities of the EGPL and EPLO are easily seen almost everywhere in the world, as each year's catalogue of activities clearly shows: The EPLO authorities, membered by some of the most well-known jurists worldwide, its premises that have grown to this wonderful building by the Temple of Poseidon at Cape Sounion, its Offices abroad, the projects run successfully by the EPLO throughout the world (Europe, Mediterranean countries and Middle East, Africa, Central and South-eastern Asia, Latin America and the Small Island Developing States), the Academy of European Public Law, the numerous events organized by the EPLO (seminars and conferences, visits, missions as well as the two international lectures "John Anastopoulos" and "Manuel Chrysoloras", held annually, and which have hosted some of the most prominent legal and political personalities worldwide), and the EPLO publishing activity, are the fruit of your efforts for the last twenty years. Allow me to congratulate you with all my heart for the far-reaching effects of your work here for the last two decades. Some are sadly gone, like President Guy Braibant, but the residual result of his, and others', effort is forever growing.

Last year at Sciences Po in Paris, some of those who meet here every year honored both Professor Gérard Timsit and Professor Spyridon Flogaitis for their work, at a seminar about "Values in Global Administrative Law." It was not the EGPL or the EPLC or the EPLO, but some of its members that organized the initiative. So, in a sense, that was also an offshoot of its own activities, one of the many branches and activities that are being founded or taking place all over the world.

Thus, the reach of the influence of the European Group of Public Law and all that it further evolved into, have created ever widening circles of new creative interaction worldwide. As for me, even if the task was overwhelming in the short period of each visit, it gave me the lead to more likewise experiences, and, as I said before, most importantly it provided me with the possibility of personal access to the most distinguished scholars and judges from all over Europe.

It is of course impossible for a single person to obtain guidance and information from all European scholars and judges attending these meetings, yet something useful and meaningful always remains in the mind. I cherish

in my mind and in my heart all those memories, which have fundamentally changed me and my perspective of European Public Law. I am trying and will keep trying to convey elsewhere the principles and practices that I have learnt here, and to stress the importance of your work during the last two decades.

So, if I may judge by my own experience, your joint effort has not only been fruitful for yourselves, for your countries and for Europe, but for the legal system of the whole world as well.

Thank you very much indeed for all of that.

ABSTRACTS / RÉSUMÉS

These EGPL and EPLC, now EPLO, meetings enable everyone to access simultaneously a huge amount of information as well as the approach of every attending European country, to acquire in a single place a large part of what was written in Europe about its Public Law, to consult a marvelous library, the European Public Law Library, to take home for further study the very important and high quality EPLC publications of all kinds, such as the *European Review of Public Law* and its many special series: the *European Public Law Series*, the *Central and Eastern European Legal Studies* and the *European Papers*, all of them historical and scientific achievements on their own. The reach of the influence of the European Group of Public Law and all that it further evolved into, have created ever widening circles of new creative interaction worldwide. The joint effort of the EGPL members has not only been fruitful for themselves, for their countries and for Europe, but for the legal system of the whole world as well.

Ces réunions du GEDP et du CEDP, maintenant OEDP, permettent à chacun d'avoir accès simultanément à une énorme quantité d'informations ainsi que l'optique de chaque pays européen participant, d'acquérir en un seul endroit une large partie de ce qui a été écrit en Europe sur son Droit public, de consulter une bibliothèque merveilleuse, la Bibliothèque Européenne de Droit Public, d'apporter avec lui de retour à son pays, pour les étudier davantage, les publications importantes et de haute qualité du CEDP portant sur tout sujet, telles que la *Revue Européenne de Droit Public* et ses nombreuses séries spéciales: la *Bibliothèque de Droit Public Européen*, les *Etudes Juridiques d'Europe Centrale et Orientale*, les *Cahiers Européens*, qui constituent toutes seules des accomplissements historiques et scientifiques. La portée de l'influence du Groupe Européen de Droit Public et tout ce qu'il est de plus devenu, ont créé des cercles constamment élargis de nouvelle interaction créative partout dans le monde. L'initiative commune de tous les membres du GEDP a été fructueuse non seulement pour eux-mêmes, pour leurs pays et pour l'Europe mais aussi pour le système juridique du monde entier.

K. Papanikolaou

THE NEW DOMAINS OF PUBLIC LAW / LES NOUVEAUX TERRITOIRES DU DROIT PUBLIC