An Invisible Giant: A 'Snapshot' of the EU's Legal Portrait

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1. Introduction

From its inception, the European integration process was designed to be a vehicle for a positive change fueled by both pragmatic idealism *a la* Jean Monnet and idealistic pragmatism of politicians like Konrad Adenauer. Defying skeptics worldwide, such a potentially explosive mixture, in spite of some visible periods of "immobilism" (Jones 1985, p.234), did not combust in a large-scale conflict. On the contrary, it drove the nations of Europe towards the creation of the European Union (EU), a political survivor with presumably long-term perspectives. What backs this successful ride?

One may think of the European political visionaries who were determined to escape disastrous memories of the past by introducing new goals of the "broader common interest" (Monnet 1978, p.523). One may emphasise the desire of the political West to counterbalance the USSR by uniting democracies in their stand against communism (Irving 2002, p.59). Whatever the reasons (or their combination), without a consistent and comprehensive legal framework, these integrative political ideas would not have endured a single day. In the second half of the 20th century, a revived tradition of the European West to respect law was translated into a basis of a unique political community on the continent previously torn by conflicts and wars.

Fundamentally, law is the spinal cord of any initiative or concern driven by a state-like entity (in this case, either an individual EU Members State or the EU as a supranational inter-state body). Structurally, law frames the will to synchronize any of the unifying "efforts at regional level" (Ortega 2004, p.125). Functionally, law counterbalances an operational chaos in the environment where, according to Pedersen (1998, p.14), states are still the dominant (yet, not the only) actors. Theoretically, any existing

conceptualisation of political integration, such as neo-functionalism, federalism, intergovernmentalism and institutionalism, taken separately or in segmental combination, keeps its empirical credibility only provided that law rules. To support this claim, Moravcsik's formula of "credible commitments" (Moravcsik 1998, p.4), as a vital part of his view on integration in Europe, was clearly based on the assumption of the universalism of law – a country-participant is not expected to be legally bound against its will, but it is expected to follow the rules of the unified establishment after it became a signatory and consequentially a member state.

For both international and internal observers, the present-day EU may provide an insight into how Europe has been responding to the notion of interdependence (Pedersen, p.23) grounded in the concept of law. The Union has been a widely recognised economic power – consider such colourful descriptions as economic giant, economic powerhouse and even "fiscal Gargantua" (Bell 2004). At the same time, the EU is also ubiquitously labeled as a military dwarf and political pigmy who failed "to translate its economic power into political or military might" (Bot 2007). Yet, as a maturing international actor, the EU has been recently raising its performance responding to the demand for "more European Union" (Ortega, p.117) in global affairs. According to Ferrero-Waldner (2007), "[f]or over a decade the EU's foreign policy has been adding more tools to its repertoire, including, crucially, a military dimension and crisis management functions". The EU's hefty economic presence worldwide, as well as its increasingly visible international profile, has been the subject of numerous insights by academics and practitioners. However, the visions of the EU's legal portrait encompassing legal characteristics and capabilities are arguably less clear for both Europeans and outsiders.

Respectively, this paper aims to explore a relatively overlooked facet of the EU's identity – the Union's legal composition. More specifically, the paper chooses to survey how the EU's legal mechanisms relate to the integrationist nature of the establishment in terms of supporting the Union's existence and reinforcing its efficiency. To achieve this goal, the paper assumes the EU to be a subject of law in general and of the EU's law in particular. The study's main objective is to go beyond a simplistic analysis with regards to the EU's traditional legal concerns, such as justice, freedom and security (Maastricht Treaty on European Union, 1992), and to

provide a novel approach. Namely, the paper attempts to link the EU's activities as a lawmaker with its activities as a subject of juridical interactions, and then to ground this link in the context of ongoing European integration. Subsequently, this paper will address the EU's legal personality in terms of its legal order. Using such key notions as legal decisions, framework, principles and structure as a theoretical base, the paper will investigate operational concepts, such as the Union's normative and systematic character, law enforcement and law equality, in their contribution to the process of the European integration.

2. Facets of the EU Legal Identity in the Context of Integration

2.1. Key Notions of the EU's Legal Order

The EU's legal order is argued to be essential for the existence of this integrated polity (Nugent 1999, p.243). A number of the key legal notions – namely, legal settings, decisions, framework, principles, structure and consequences – constitute this order and are used to build a theoretical base for this investigation.

It is suggested that since the 1950s, the EU and its predecessors – the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) – have succeeded in the creation of a solid legal 'reputation' for itself among existing and potential Member States. According to Nugent (p.242), there is no possibility to make a legal *decision* unless it is based on the *settings* provided by the law. The European Community (EC) and its political predecessors were established within one of the crucial elements of democracy – an "enforceable legal framework" (Nugent, p.242). This legal *framework* absorbed, firstly, the leading European legal *systems* (in particular, the Roman-Franco-German continental system, the Anglo-Saxon system and the Scandinavian system), and secondly, the *structure* of the EU law (namely, its primary and secondary legal documents). The aggregate is led by the *principles* of law – a sophisticated set of "positive liabilities" (Skakun 2005, p.221) that establish the imperative rules for the subjects to follow. According to Skakun, these principles are represented by directions of legal *activity*, and the European integration is indeed one of many examples of such directions.

It was a group of Member States that outlined a particular direction for their legal *activity* in terms of unification, integration and common vision on security. This activity led to the creation of the ECSC (later the EU) and presented this supranational establishment to the world as a legal *consequence* and a *juridical fact*. Unsurprisingly, the process has stimulated a number of significant changes in the Member States' societies, foremost in their civil society sector (Barak 2006). For example, almost immediately after joining the EU, the majority of the Polish civil society recognised benefits of membership in the world's most prosperous political union (Mastalerz 2005), and felt empowered to successfully tackle such constraining ideological cliché as the 'European East', a concept that has now become "no longer defensible" (Magocsi 1996, p.13). A similar trend was also observed in other EU Member States (for example, in the Baltic States, Hungary, Slovakia and the Czech Republic). Several decades earlier, in the 1950s, the German civil society had successfully battled the destructive legacies of the NAZI ideology and eventually became one of the most pro-integration societies in the EU.

2.2. The EU in the Prism of Normative and Systematic Character of Law

A legal *norm* is a unit within a comprehensive set of "social practices" (Cass 2001), which are usually defined and treated as law. The social productivity of a legal norm, i.e. how well it is accepted and understood by a society, depends on a degree of systematisation of such norms and their historic-legal links. When it comes to the EU, its law can arguably be treated as "a single internal system" (Kapteyn & Themaat 1989, p.34). In order to be operational, this system and its elements need "popular understanding […and…] popular support" (Edwards & Nuttall 1994, p.103). Respectively, the EU law is intended to be a structured, normative, regulative and formal system designed not only to establish legal order in the Union, but also to meet social needs of the citizens of the Member States.

In the contemporary history of the EU, there are several vivid examples illustrating what happens when the Union's legal action lacks both understanding and support of its people. Among the most frequently cited cases are the non-ratification of the EU Constitutional Treaty (2004) by

France and the Netherlands in 2005. The most recent example is yet another 'No', this time expressed by Ireland on 13 June 2008 towards the ratification of the Treaty of Lisbon (2007). Irrespective of their negative outcomes and influences on the perceptions of the European integration progress, these votes paradoxically demonstrated a major achievement of the unity – the power of law and legal order in the Union. Indeed, those rejections occurred within the strictly observed process of implementation of the law. The Republic of Ireland carried out the referendum, following previous legally binding commitments and accordingly to a legally observed protocol. The feedback from French and Dutch citizens has resulted in a series of relevant adjustments to the EU reformation framework.

With the EU Constitutional Treaty and the Treaty of Lisbon having already been mentioned in this paper, it is necessary to comment in detail on treaties as one of the EU law sources. In the classification of the legal *sources* in terms of being *primary* and *secondary*, the EU's treaties are the only example of the Union's *primary sources* of law. Treaties are usually framed by general principles and identifications of policy sectors that are intended to be developed (Nugent, pp.243-245). A firm legal link between the treaties is ensured throughout the history of the EU. For example, the *Treaty establishing the European Coal and Steel Community* (1951) expired only on 23 July 2003, being in legal power for decades and representing an unfading symbol of the European integration. Almost in every case, a subsequent treaty has provided a set of provisions in order to make alterations to the activities launched by a previous treaty. For example, the Treaty of Nice (2001) had provisions "to complete the process" that was started by the Treaty of Amsterdam (1997) in order to functionally prepare the EU institutions for the Union's next enlargement. Similarly, the Treaty of Lisbon has been intended to amend, but not to replace, the already-existing EU and EC treaties.

Importantly, the theme of integration is the most prominent ever-present feature of any of the EU treaties. The Maastricht Treaty's aspirations for the EU to become a true global actor, not just an umbrella for "coordination of individual national foreign policy goals" (Smith, p.185), were intended to be revisited by the Treaty of Lisbon. Apart from featuring provisions to enhance the Union's solidarity in a variety of policy areas both domestically and internationally, the Treaty also aimed to reinforce the

roles of the European Parliament (EP), the European Council and the parliaments of the Member States. Additionally, the Treaty has intended to enhance the Union's status of a signatory of the international law to get a stronger legal presence for the EU on the international stage (in contrast to the presence of individual Member States). For example, in the recent past, the EU as a signatory and reinforcer of the Kyoto protocol has successfully profiled the united political establishment as a leader in global environmental issues. In another case, several influential European politicians (e.g. Juncker 2006, p.12) advocated the EU's membership in the Council of Europe. This is argued to be a critical step towards the Union's integrationist international legal identity.

At the time of this paper's submission – the end of June 2008 – the Treaty of Lisbon was ratified by 19 Member States and rejected by one. Despite this procedural setback, the Treaty is still argued here to be a major step towards updating the EU's legal profile, as well as facilitating the EU's single voice in the world. Measures to present the EU as a single legal personality have been suggested to go hand-in-hand with a variety of actions to enhance the EU's efficiency and capacity to act within and beyond the Union's borders. For instance, in the EU's external relations perspective, the Treaty of Lisbon has been addressing the EU's legal ability to produce its common vision even on highly sensitive issues of foreign policy, which concern sovereignty and security of the Member States. As an example of such efforts, the role of the High Representative of the Union for Foreign Affairs and Security Policy has been brought up to the level of the Vice-President of the European Commission. In the legal context, the Treaty of Lisbon has advocated the EU's single legal personality ending the 'double act' of the Union and the Community, established a set of new citizens' rights, and reinforced new mechanisms guaranteeing the implementation of those rights. The latter included full recognition of the Charter of Fundamental Rights and established the European Human Rights Convention, compliance with which would be controlled by the Strasbourg Court of Human Rights.

The *secondary* sources of EU law are represented by the EU legislation. Such legal documents are adopted by the Union's institutions in order to translate "the general principles of the treaties into specific rules" (Nugent, p.245). The EU legislation encompasses various regulations, directives, decisions, recommendations and opinions. With the EU's legal core

designed to support on-going integration, the main EU institutions have to collaborate with each other in a decision-making process. In the vast majority of cases, the European Council has to make a decision following a proposal from the European Commission and work in close association with the EP through different procedures (The Council of the European Union 2007). The European Commission, which is described as "the driving force behind the policies" (Smith, p.7), currently adopts most of the EU regulations focusing on "highly specific and technical adjustments to existing EU law" (Nugent, p.246). The integrative political nature of the EU institutions is reflected in the legislative procedures and outcomes. For example, the EP, established by the Treaty of Rome (1957), does not act in national blocks but in eight pan-European groups of policy-makers, an arrangement which makes the institution's functioning and legal outputs bound by the idea of integration.

The rulings of the European Court of Justice (ECJ) (the so-called *judicial interpretations*) and the international law (international declarations and treaties, the World Trade Organisation's documents, etc.) complete the list of the EU's *secondary sources* of law. Even though the judicial interpretations are traditionally not considered to be a major form of law in Europe (with notable exceptions of countries with the Anglo-Saxon legal system), they still shape the EU law, making it integrative and comprehensive (Nugent, p.257). Uniquely for the EU, the ECJ's juridical interpretations are particularly important for eliminating linguistic discrepancies in translations of legal documents from one official EU language to another (currently, the EU has 23 official languages). According to Klimas and Vaiciukaite (2005, p.2), the "uniqueness of the language" (*on par* with a Member State's legal system and legal traditions) is among the main factors, which could lead to a number of "divergent language versions of a legal text".

2.3. Law Enforcement and the European Integration

The next item of this survey is the EU's law enforcement actions considered in the integrative context. By being able to enforce the law, the EU shows its capability to maintain the present legal order in the Union. The institution that ensures "the uniform interpretation and application" (The European Court of Justice 2007) of the EC law is the ECJ which is

composed of twenty seven Judges, representing each Member State, and eight Advocates General. Despite being rightfully treated as intergovernmental, this institution is playing a crucial role in the process of the European integration in the area of law enforcement. In particular, it supervises the acts of Member States as well as the EU institutions, and implies various actions, including action for annulment and action against failure to act (Kapteyn & Themaat, pp.273-281).

The integrative dimension of the law enforcement facet was specially highlighted during the EU's two latest enlargements in 2004 and 2007, with ten out of the twelve newcomers to the Union being parts of the former communist bloc – among those, Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and the Czech Republic. For decades, these countries had experienced the 'Kremlin' ways in both law making and law enforcing, ways which were conceptually different from the modern legal Western approaches. The extensive exposure to a principally different legal system resulted in numerous instances of major differences between the legislations of the then EU candidates and the members of the club. Unsurprisingly, a continuum of legal visions and interpretations among the EU newcomers led the *Equality, Diversity and Enlargement* report of the European Commission for Employment and Social Affairs (2003) to conclude that the "legal framework for protection against discrimination varies considerably in the candidate countries". In this case, just an introduction of new laws was not sufficient – the EU's common and integrative approach had to be taken (Diamantopoulou 2003, p.3). For example, Estonia, having no specialised institution to fight against discrimination, had amended its Law on Legal Chancellor to allow that body to deal with different types of discrimination – on the basis of sex, race, ethnic origin, colour, language, social status, disability and others (Equality, Diversity and Enlargement, p.62).

3. The Manifestation of Equality in Law–Where Does It Lead the EU To?

The ongoing European integration, despite its tangible successes, is still recurrently argued to be in conceptual contradiction to the existence of the nation-states as the core actors of this process. The question remains open – what is an optimum legal arrangement that would allow the integrative

process to advance and flourish? Arguably, a possibility for the 27 different countries to exist and to successfully cooperate 'under one roof' is linked to the fundamental notion of *equality* between the EU Member States guaranteed by the EU's laws. From the Union's point of view, the true equality was and is to be achieved only through respecting "the national identities of its Member States" (Maastricht Treaty on European Union, Title 1, Article F). This legal support to the notion of equality builds a solid foundation for a political union of sovereign states based on their free will and firm commitment and enables the EU to "assert its identity on the international scene" (Maastricht Treaty on European Union, Title 1, Article B). If otherwise, the idea of EU citizenship would have never been launched and contentious debate on the so-called 'European identity' would have lacked some of its empirical evidence.

The EU's legal interpretation of equality could become even more pronounced when compared to the historical and legislative realities of integration in the former Soviet Union, another supranational entity on the Eurasian continent. *The Constitution of the Union of Soviet Socialist Republics* (1936, Article 13) formulated that the Soviet Republics formed a union "on the basis of the voluntary association […] having equal rights". However, *de jure*-proclaimed equality turned into *de-facto* "Russian-dominated Soviet state" (Bremmer & Taras 1993) where law was used to justify a number of political purges and the appalling man-made famine (Brzezinski 1989, p.24). Notably, Jean Monnet (pp.171, 178), a visionary of the European integration, in his *Memoires*, had considered the USSR as the monolith, never mentioning any of the Soviet Union's constitutional territories, except Russia.

With equality argued to be a leading legal concept for European integration, two other factors are suggested here to also contribute to the process. Firstly, the Member States' governmental institutions are founded on the principles of democracy, and, secondly, all Member States comply with the power of the "combined influence" (Maastricht Treaty on European Union, Title 5, Article J2). Respectively, as a communal actor, the EU imposes a legal obligation on its Members to make sure that they will avoid any involvement into any activity that could undermine the interest of the Union (Maastricht Treaty on European Union, Title 5, Article J1).

4. Conclusions

This paper attempted to outline some key features in the EU's legal portrait against the background of European integration process. The main question of this investigation was to assess which legal mechanisms in the EU's existence facilitate and ensure the process of integration. The notions of equality, normative and systematic character of law and law enforcement practices within the EU in their application to the integration commitment were scrutinised.

While a complementary research could analyse the EU's legal issues from historical, demographical, humanitarian, economic or cultural perspectives, several conclusions surface from this brief survey of the EU's legal mechanisms in the context of the ongoing integration. Firstly, the system of EU law is an essential element of EU integration. Expressed in a comprehensive range of forms and sources and driven by a high level of social acceptance of legal norms, it provides a fundamental, structural, political and theoretical basis for the process of European integration.

Secondly, despite its core nature, the EU's legal persona is relatively invisible at present, especially when compared with the Union's economic stance. Yet, raising the EU legal profile is a realistic option, in particular if the Treaty of Lisbon gets ratified by EU Member States. With the implementation of this Treaty, visions of the EU as a potent single-voiced lawmaker and a powerful subject of juridical interactions have a chance to be recognized globally. This may become a reality when the EU and its Member States' actions acquire coherence and efficiency on the international stage following outlines of the Treaty. Examples of the EU's successful international leadership within a firm legal framework – such as the EU's role in implementation of the Kyoto protocol or its activities in the spheres of humanitarian aid and development – will also help to cement the EU's legal image worldwide.

Finally, the EU's legal personality is an ever-changing phenomenon. That is why this paper must be treated as a 'snap-shot' of the EU's legal profile at a particular moment of time – half a century of European integration. Undoubtedly, more changes to the Union's legal portrait are ahead. Nevertheless, the EU's legal presence, interpreted here as a warranty of a

unique process of integration, is already exuding a global impact. The legal part of the EU's 'personality' ensures that the EU is introduced to the world as a realistic model of integration resulting in a vibrant prosperous polity with a growing political communal weight.

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