



Living with EU Law

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Abstract

The article is a discussion of Floris de Witte's 'Here be Dragons: Legal Geography and EU Law'. It argues that this essay is a direct challenge to the traditional institutional thinking of European integration. This new approach suggests a turn to new empirical studies. But it also implies the elaboration of a new conceptual language for Europe. This language is still to come.

Keywords: EU law; European integration; life; space; place; concepts

Floris de Witte's 'Here be Dragons: Legal Geography & EU Law' is an overwhelming short essay. I feel close to it, in the way that a text, which anticipates one's thoughts, puts them into compelling words and carries you along in its own wording, is close. Its title is a manifesto. The traditional concept of European Union (EU) law is non-geographic. European integration was originally conceived as a growth-orientated project: virtually unlimited, detached from local ties, expanding its production, its model and its values beyond European territory. Essential to its legitimacy was the notion that its law does not have 'a purely geographical scope'.¹ De Witte's title proclaims otherwise: EU law is, by its very nature, spatial and temporal. It is not located 'in space', as though the latter were some independent, abstract entity external to our experience. We, as citizens, experience Europe and its law spatially and temporally.² This is de Witte's methodological starting point. His piece is in truth about 'legal life' in Europe. Legal geography is nothing but a method for investigating the 'lived experience of European integration' in Floris de Witte's terms. It is about the kinds of life that people manage to live – or do not manage to live – given the law of Europe. According to the author, 'EU legal geography can tell us something about what it means to live in the EU and what it means to live under EU law.'

What does it mean to live under EU law? In EU legal studies, it is usually taken to mean that EU legal rules are turned into subjective rights and, as such, are destined to be incorporated into the lives of individuals. Advocate General Szpunar once stated before the European Court of Justice (ECJ) that individuals are 'merely integrating into their everyday life the status of citizens of the Union conferred upon them by the Treaty'.³ This presupposes, first, that EU law is distinct from

¹Opinion of Advocate General Léger in Case C-214/94, *Boukhalfa* EU:C:1996:174. Data protection is the field where this form of abstraction from any reference to a defined space is the most tangible today. The case law of the European Court of Justice ends up creating an area of protection that tends not to be limited to a given territory, but relates to a ubiquitous infrastructure, the 'backbone' of the Internet.

²On the notion that law frames the temporal and spatial dimensions of life, being itself temporal and spatial, see S Trotter, 'On coming to Terms: How European Human Rights Law Imagines the Human Condition' (PhD thesis, LSE 2018) (available online).

³Opinion in Case C-165/14, *Alfredo Rendón Marín*, para 117 EU:C:2016:75.

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and placed above the everyday and, second, that, through the form of subjective rights and sponsors such as courts, EU law may be put into a direct relationship with individual lives. It seems to me that both sets of assumptions are challenged by de Witte's approach. Our experience as citizens living in European societies and on earth is already shaped and informed by EU law and its concepts. Moreover, EU law does not consist of a set of rules ready to be applied, effectively acting as guides for human behaviour. As the author intimates, 'law is perhaps less determinative than we might expect as legal scholars'. Rights say little about the real modes of existence of Europeans provided with EU subjective rights.⁴ EU law is part of a complex milieu in which 'life in Europe is mediated or negotiated'. De Witte terms this milieu 'space'. In his thinking, space is not one element among others, rather it brings together a multiplicity of elements – actors, social conditions and relations, rights and regulations, material realities and non-human entities – within a single analytical framework.

De Witte relies on space to suggest a movement of 're-territorialisation' of EU legal studies, focusing on sites such as borders, migrants' camps, cities, peripheral retail areas, protected areas covering threatened species and habitats or posted workers' secluded living places.⁵ This is where the struggle to find a place in society and on earth – which today's citizens in Europe (by which is meant all those 'out there', Europeans and non-Europeans on European soil, whether they reside there legally or not) are experiencing – is made tangible.⁶ These are the sites where Europeans live in reality or in imagination, where they project themselves, with their need for security, their life plans, anxiety and lasting resentments. EU law is, along with a wide range of socio-economic and cultural processes, an active part of this real or imagined life. As I write, on 17 November 2021, and from where I do so, Calais (a western border, a city and a camp), the Mediterranean Sea (a southern border, a grave for migrants and a space for trade and diplomacy between Europe and Africa), and the primeval Bialowieza Forest (an eastern border, a Natura 2000-protected area under threat in Poland and a limbo for displaced migrants from the Middle East) stand for the most prominent sites of Europe. These are the sensitive spaces of our liminal European consciousness.

It is hard, in this shift of focus, not to see a direct challenge to the traditional institutional thinking of the European integration that used its authority to de-territorialise EU Member States' territories, open them onto a broader European space without frontiers, displace bounded domestic legal orders, and, in de Witte's words, 'deracinate symbols and markers of state authority'. Traditional European Community or EU law compounds this thinking: its whole point is to offer citizens the possibility to break with 'place' and from local identity and representation. The original meaning of the European experience is to allow people to develop multiple affiliations in diverse societies, cultures and jurisdictions, shifting from one to another, unburdened by the identification with a nation's people. In this sense, de Witte used to label European law 'an instrument for emancipation'.⁷ It was supposed to work as an agent for the 'Europeanization of everyday life' – that is, the sharing of material realities, modes of living as well as socio-economic and political ideals.⁸ This, I believe de Witte would argue, still 'needs to be defended'.⁹ In large part, it has

⁴More broadly, on a similar critique of rights, see C Menke, 'Genealogy, Paradox, Transformation: Basic Elements of a Critique of Rights' in L Mattuta et al (eds), *What's Legit? Critiques of Law and Strategies of Rights* (Diaphanes 2020).

⁵On the concept of 're-territorialisation', and that of 'de-territorialisation', but in the field of philosophy, see G Deleuze and F Guattari, *Qu'est-ce que la philosophie?* (Editions de Minuit 2005 [1991]).

⁶For the connection between EU law and the need to find or keep a safe place, see Editorial Comments, 'Europe is Trembling: Looking for a Safe Place in EU Law' 57 (2020) *Common Market Law Review* 1675.

⁷F de Witte, 'Emancipation Through Law' in L Azoulai et al (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016) 15.

⁸For a sociological approach to the 'Europeanization of everyday life', see E Recchi et al, *Everyday Europe: Social Transnationalism in an Unsettled Continent* (Policy Press 2019).

⁹F de Witte, 'Free Movement Needs to Be Defended as the Core of EU Citizenship' in R Bauböck, *Debating European Citizenship* (Springer 2019).

become a sociological reality and remains a valuable normative project. Yet this is no longer the full truth of the situation. We have come to realise that EU law also works as a form of perpetuation of economic, social and cultural injustices.¹⁰ And we can no longer ignore that it is perceived as being essentially abstract, depriving people of the sense of living concretely on the European soil and within their local communities.

De Witte says that there is ‘resistance against the project of integration’. This is a modest statement. Let us say it clearly: the project has suffered a catastrophe and we, European lawyers, are partly responsible for it. The catastrophe consists in large groups of people around Europe experiencing widespread sentiments of dispossession and distrust towards elites. It consists in European societies structured around growing forms of visceral polarisation and claims to re-establishing all types of boundaries. Large groups in Europe are dangerously and abstractly re-anchoring. It is said that true civilisations are fixed and nation-centred, that the EU threatens its own place and the tissue of social relations that surrounds and supports the union – former United Kingdom (UK) Prime Minister Theresa May said that ‘if you believe you’re a citizen of the world, you’re a citizen of nowhere’.¹¹ It seems safe to assume that this is partly a product of the operation of EU law – its form, substance and ideology. As a result, many people in Europe are reluctant to live under and make sense of their life in terms of EU law. Many have lost faith in grand regulatory projects carried out by ‘Brussels’ and its ambition to build ‘a fairer, greener and more digital Europe’.¹² How can we then make sense of our task as legal scholars in today’s Europe? The challenge, as I see it, is to reconnect our approach with the ‘situated’ perspective of citizens and social groups whilst, on the other hand, not compromising the emancipatory and transnationalist exigencies of the European project to allow Europeans to inhabit European soil concretely and not in a purely abstract way (through abstract references to civilisation and identity).¹³

How can we meet this challenge? De Witte’s essay invites us to explore two kinds of approach. The first is empirical. He suggests a turn to geo-legal research as a way to investigate whether and how EU law – or, rather, the complex mixture of supranational rules and national law that actually makes up EU law – is mediated in certain areas of European societies, and whether it gives rise to incorporation, avoidance or contestation. In this respect, de Witte calls for case studies legal analysis, just as history calls for ‘micro-histories’ and anthropology for ‘thick descriptions’ of specific forms of life.¹⁴ Such case studies are likely to illuminate the tensions, dilemmas and ambivalences in which the operation of law is caught up on the level of the concrete details of our everyday lives. This should allow room for reflection on both the paths taken and not taken. But this is not enough. For this empirical work to be effective, it must be informed by another kind of language. The second approach is conceptual: it seeks to elaborate a new conceptual language where ‘space’ and law are no longer detached in the course of the analysis. This is the author calling for ‘concepts that articulate how the reflexive interaction between EU law and space both literally and metaphorically reshapes Europe’, concepts such as ‘wilderness, localism, order, public, integration or

¹⁰F de Witte, ‘The Liminal European: Subject to the EU Legal Order’ 40 (2021) *Yearbook of European Law* 56.

¹¹This is the famous UK Prime Minister Theresa May’s statement prior to the UK’s exit from the EU on 5 October 2016, *The Telegraph* <www.telegraph.co.uk/news/2016/10/05/theresa-mays-conference-speech-in-full/> accessed 21 November 2021.

¹²European Commission, ‘Europe’s moment: Repair and Prepare for the Next Generation’, COM(2020) 456 final of 27 May 2020.

¹³B Latour, ‘Europe is a soil – not a machine’ 57 (2020) *Common Market Law Review* 1.

¹⁴C Ginzburg, ‘Micro-History: Two or Three Things I Know About It’ 20 (1) (1993) *Critical Inquiry*. On the notion and method of ‘thick descriptions’, see C Geertz, *The Interpretation of Cultures* (Basic Books 1973).

tradition'. De Witte is looking for concepts that are embedded in the life of Europeans rather than thinking of them as mere analytical tools.¹⁵

The conceptual work again becomes key in our field.¹⁶ De Witte's approach reminds us that the traditional concepts that we use to describe EU legal practices (eg. regulation, rights, public policy, primacy and financial stability, among others) are underpinned by ideological choices. He reminds us that we should always be prepared to test the concepts against the development of these practices but also against the 'lived experience' of citizens in Europe. This, however, raises two major issues that we should be aware of. The fact that certain concepts are selected to articulate between space, law and life in Europe itself relies on a powerful assumption about what it is we share in virtue of our attachment to Europe: certain forms of life are implicitly assumed in the production and operation of concepts put forward by Floris de Witte such as 'liveability, wilderness, localism, order, public, integration or tradition'. De Witte opens, yet does not engage in the debate over what we mean when we speak of a liveable life in Europe. This should be the next step. But this, in turn, poses a risk. It cannot be excluded that many people or authorities in Europe are unwilling or unable to find a footing in this new conceptual world. Recent situations in Europe such as Brexit or the Polish reluctance to accept ECJ case law may be seen as various forms of 'loss of concepts'.¹⁷ Rather than an explicit or implicit 'exit' from the EU as a system of rules and institutions, it is a reluctance to share the EU conceptual world, to live with these concepts and to assume the forms of life and modes of being implicit in these concepts. EU legal concepts are key, but we should remind ourselves that they are 'essentially contested' and essentially liable to rejection in today's Europe.¹⁸

¹⁵On the notion of concepts embedded in lives, in the field of anthropology, see A Brandel and M Motta (eds), *Living with Concepts: Anthropology and the Grip of Reality* (Fordham University Press 2021).

¹⁶V Réveillère, *Le juge et le travail des concepts juridiques. Le cas de la citoyenneté européenne* (Institut Universitaire Varenne 2018).

¹⁷The notion that individuals may well refuse the social and human conceptual space that surrounds them can be found in S Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford University Press 1979).

¹⁸WB Gallie, 'Essentially Contested Concepts' 56 (1956) *Proceedings of the Aristotelian Society* 167.