On the "Academic Other"

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I

Fyodor Dostoyevsky portrays *Fyodor Pavlovich Karamazov* as "one of those senseless persons who are very well capable of looking after their worldly affairs" and yet adding that "[a]s a general rule, people, even the wicked, are much more naïve and simple-hearted than we suppose. And we ourselves are, too", thus postulating a universality in *Fyodor*'s character.

II

It has been held (a self-evident truth) that Britain is no longer an empire; and that, therefore, it has been delusional to vote by referendum to leave the EU, since the British are now discovering that they will be withdrawing from the EU constellation without having sufficient "imperial-like" resources to stand in the world on their own. But this is only a partial analysis. There is more at stake. There may no longer be vast territories held under colonial rule as was once the case, and, yet, "imperialism" is an enduring state of mind. One cannot under-estimate this state of mind, so diffused these days across much of Europe, and its potential to make things intelligible. To summarise a common understanding on the matter, this *mentalité* is about taking advantage and being confrontational, as opposed to an ethic of sharing, engagement and acknowledgement of the value of the "European other". Ultimately, "*Brexit*" may be explained as signifying the attempt by parts of the population and of the élites to re-engineer these attitudes.

But, once again, there is more to this story of the renovated fortune of the imperial-like *mentalité*. The idea that the law of England should be subject to the "new legal order" has always been received with hesitation and reservations - despite *Factortame*. Despite the notorious zeal with which Britain appears to conform to the details of EU secondary legislation, a conception of British sovereignty could materialize that resists (one *caveat*: I use the present tense since, until further political developments, the UK is still a member of the EU) adapting and subjecting itself to a constitutional regime whereby determinations are not just political (legislative) but must also be justified in terms of the broader framework of a shared constitutional law as developed around the EU project. Let us contrast A.V. Dicey's notion of parliamentary sovereignty:

> "Parliament" has "the right to make or unmake any law whatever; and further .no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

The broader framework of the shared constitutional law encompasses "the European *other*", and yet it is equally "constitutional" also in a national sense (Georges Scelle *docet*). From this vantage-point, parliaments cannot do "everything" (*pace* Dicey). The contentious debate about the place of fundamental rights in the UK is there to exemplify the enduring force of this peculiar attitude and its constitutional implications. The "Brexit" vote is not just an isolated fact happened on a rainy day on the British islands that make up the UK, but it is part of this broader structure of meanings. Continental jurists appear to be portraying "Brexit" as though they are associating, symbolically, Britain with the *Dostoyevskian* vagabond character ("un-tied" as it is, today even more so, from the continent) so eager and apt to take care of its interests nevertheless - as though Britain embodied what, to continental jurists, appears to be an almost "senseless" juridical position due to its resisting that "thing" central to continental laws, that is, the "order" of a constitution. In Europe's predicament, it is legitimate to articulate an (open) discourse about the value of the place ("*Land*" or "*Ortnung*") but recourse to the transnational (constitution) tells us something about preventing the trap of the doings of the *Ortnung*

whenever (falsely) universalised; to say it in another way, it helps us avoid forms of constitutional obscurantism. This looks all the more problematical if one only considers transnational academic exchanges as a result of the exposition of the English common law, and of Scots law, to the "irritations" of "the academic other", as I am about to discuss them.

III

To take up the theme just mentioned - has it not been equally counter-intuitive the fact that, despite the phenomenon of the significant academic migration of continental legal scholars to Britain, it is difficult to discern a broader movement of change in British legal culture towards the acceptance of the consideration that accommodating emphatically, as opposed to reluctantly, European constitutionalism would be about (contributing to) "civilising" the law - rather that leaving it entirely (or almost entirely) to the determinations of politics (turning the language of "civilising", coming from the imperial past, to contemporary good use)? By "civilising", one must mean a polity's coming to normality once it accepts to open itself towards conceptions of human rights as universally acknowledged via judicial dialogues (so as to entrench conditions for "human dignity" not to be "assaulted easily" - to express it with the words of a poet) as opposed to clinging to exclusively "local" human-rights conceptions and limitations thereof (the *Ortnung* closed off from "the other" as opposed to openness). This is about reminding ourselves of how limited, and only potential, the role of the "academic other" may be in influencing the surrounding legal culture and culture at large - despite the, no doubt, successful role played by EU law scholarship produced in the UK over the past four decades in relation to the development of European law as a discipline, and despite the fact that it has been an experiment in academic exchange to which, it should be acknowledged, few other countries in Europe have exposed themselves, at least in similar proportions.

IV

"Brexit" must concern, deep down, all of us living in this part of the world - Europe (including the UK). It is not just about the British ("out" of the EU) *versus* the European continentals ("in" the EU). And this is so not just for the obvious consideration that more than forty years of UK membership cannot just vanish overnight - the deep relationships between the continent and the islands that make up Britain are more complex than we might think (take the case of private law and the debate regarding the ambiguities of the dichotomy of common law *versus* civil law). More relevant is the consideration that, in Europe as a whole, there is now a tendency to praise the sheer force of power politics and its legislative manifestation over everything else. Here, one must think of the Euro crisis and its aftermath. In this respect, one can see a defeat of key democratic and fundamental rights credentials (for this opinion, see, for example, and respectively, Christian Joerges; Claus Offe; and Damian Chalmers). The most advanced sectors of Europe's academic citizenship have had the merit of raising these critical issues. However, there are forces that insist in placing power politics above everything else, even when this may lead to utter disintegration - to return to *Dostoyevsky*'s prose, to a "senseless" disintegration. These forces go hand in hand with the positions of those who defend perspectives on law that resist the thematisation of the EU and of its law in relation to its institutional potential for mediation and resistance (contrast Michelle Everson *VerfBlog* 2016/11 on the role of the European Parliament in relation to the TTIP negotiations; and Leone Niglia ERPL 2001 on judicial resistance in European private law, and *idem ELJ* 2016 on the potential for mediation of European constitutional law) to the point that we are left with "senseless" interpretations of European law which are hostage to contested and arguably authoritarian forms of politics (on authoritarian politics in Europe, see, critically, the contributions in *ELJ* 2015 285 *et seq*; and Damian Chalmers, Markus Jachtenfuchs and Christian Joerges, 2016). This must all be brought under the same umbrella of "the continentals" and "the British". Considered against the backdrop of those Europeans firmly voicing their concerns in relation to economic policies that produce so much damage to societies (see Claus Offe (2013) 19 *European Law Journal*, p. 595), the British referendum emerges as a variation on the same theme, with the peculiarity of alerting "the continentals", in its idiosyncratic ways, to possible alternative worlds.

V

Seen in the light of the above, Habermas' thoughts on the post-"*Brexit*" dilemmas in law and politics need to be seen in a new light and re-interpreted. If it is true that the individual nation-state in Europe can no longer sustain the nexus of welfare state and democracy (Habermas, *Die Zeit* 2016), then to reframe the European transnational constitution by re-organising it around intergovernmental politics (Habermas, *Die Zeit* 2016: the idea of a "properly functioning core Europe") looks counter-intuitive. It is, in fact, about taking distance from the challenge to transnationalise this "nexus" in a way that is, ironically, complementary to what the British would be doing were they to simply exit from the EU (independently of whether it will be a "hard" or a "soft" exit). Both patterns are oblivious to the ideals enshrined in accepting a transnational constitution. Whilst "common interests" are required, they cannot be all that is needed to commit a polity to constitutionalism. Habermas' idea of a "properly functioning core Europe", I would argue, seems to me to be equally out of line with the experience of "academic citizenship" based upon establishing a climate of sharedness beyond, and independently of, the alleged necessity of some "commonality of interests". Europe's predicament is less about common interest fuelled by the sharing of risks (see Habermas, *Die Zeit* 2016) and more about (or, at the very least, co-terminus with) constitutional culture, that is, about the possibility for, and a demand on the entire political and academic class (see Section III above) to claim the value of (constitutional) law as an autonomous force (Leone Niglia, *The Struggle for European Private Law: A Critique of Codification*, Oxford, 2015). No doubt this is in tune with early Habermas thinking. Christian Joerges has rightly pointed our attention to the fact that that there is too much un-commonality of interests in Europe (Christian Joerges, "Introduction" to this Working Paper). I agree with this argument and would add the consideration that the complementary argument about constitutional culture that I am putting forward poses dilemmas that must interrogate *all* Europeans - until, and beyond, the moment (if there is one) that Article 50 of the Treaties is triggered. In this specific sense, I also agree with Simon Deakin's argument (*German Law Journal* 2016) that EU-based market rights need to be related to a serious debate about federal structures and contexts (see, also, Leone Niglia, "Eclipse of the Constitution. Europe Nouveau Siècle", (2016) 22 *European Law Journal*, pp. 132-156; idem, "Beyond Enchantment – The Possibility of a New European Private Law", (2010) 29 *Yearbook of European Law*, p. 60). From this vantage point, the discussion surrounding "*Brexit*" only confirms the beginning of the emerging importance of a new range of constitutional challenges for European law, such as those sketched above – rather than the beginning of the end of European constitutionalism.