Making Day to Day Sense of European Governance, Review of: Christian Calliess and Matthias Ruffert's Kommentar zu EU-Vertrag and EG-Vertrag. 2nd Edn

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As the EU faces a myriad of challenges from without and within, the practitioner and academic alike are faced with a multi-layered, never-ending stream of “communications,” directives, regulations, and decisions. It takes both prudence and passion to stay on top of these developments, and the combination of these in the daily work of sensitive observers of European Law is nothing but admirable. In the ongoing process of legal proliferation and differentiation, the observer’s task is, indeed, sysiphosian in keeping up with the speed of political and academic debate. Chasing deadlines with editors and publishers, authors face the constant risk of seeing their most recent assessments overtaken by an even more timely turn of events. For legal academic authors, it is a dilemma whether or not to jump on the bandwagon of EU Law: will they succeed in delivering enlightening comments on the “Evolution of EU Law,” or falter by serving up an unsatisfactory mixture of “news of the day” and the most superficial of evaluation of what comes out of the EU machine? Legal publications can have an extremely short life span, as today’s assessments may be rendered pointless not only by a sweeping and trumpeting Court’s revocation of yesterday’s wisdom, but just at least as

1 See THE EVOLUTION OF EU LAW (Paul Craig & Gráinne de Búrca eds., 1999).
effectively by the steady reform and reformulation that marks legal evolution. Placing an article or a book in this virtual forum of public debate and seeing it referred to, built upon and thought about, will always attract both disciples and skeptical onlookers. A lengthy and far-sighted contribution to a Yale legal periodical may achieve this wonderful aim, or a bravely formulated doctoral thesis which short-circuits the opening formula of the U.S. Supreme Court with the conundrical Judicial body in the center of the EU. For the majority of writers, commentators, and spectators of EU Law, however, the grain of salt will remain encapsulated in the daily touching, carving, and chiseling of that “supra-national” coral reef.

Again, we start from the beginning. What is European Law? Who is its author? Where is its cradle, where are its parents, where are its representatives? Is it all on paper? Codified, agreed upon or, simply proclaimed, assumed, held? There are devastating accounts from students from future Accession states to the EU, being asked, cordially invited, or cornered into translating the *acquis* into their future Member State’s tongue. These fall into the context of the expression of total humbleness of a Polish government official when asked by a Western journalist what he thinks his country will add to the EU. The sheer discrepancy between the striving of those outside to manage their way in and their actual success makes us ask repeatedly what it is they are in fact trying to get inside of. Where are these States and their peoples headed? How very clear the eternal identity crisis of the EU becomes when being confronted with external calls for help (Kosovo), for solidarity (September 11), or the internal mystery of striking the right balance between harmonization and regulatory competition! For those inside, these days it is all about “Governance,” the way in which the EU is governed and governs itself. A clear-headed and well-informed understanding and a passionately enlightened observation of “exit, voice, and loyalty” defines the daily practice of EU governance. Without this devotion to an approach that combines a private-eye’s scrupulous love for detail with an open-minded, inter-disciplinary critique of underlying structures and developments, not much sense can be made of the EU and its impact for those inside and outside of it.

It is with great enthusiasm then, that we note the recent publication of a heavy-duty, clear-sighted, and meticulous analysis of EU law, collected in a

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single-volume commentary of the EC and EU Treaties. The book, in its second edition published in July 2002 (first edition 1999), and carefully edited by German legal academics Christian Calliess (Professor at Karl-Franzens University, Graz, now University of Göttingen, and head of the Institute for European Law) and Matthias Ruffert (Professor at Friedrich-Schiller University, Jena) is a collective effort from a number of well-known as well as emerging scholars and practitioners who share an alert sense of awareness of the mobility of their subject and a dedication to identifying and highlighting the procedural, political and historical character of the EU and its law. To do justice to the task of reviewing a commentary of some 2,700 pages, I put a few questions to the volume and set out the (putative) responses received.

First question: how timely and precise are the assessments of legal development?

In light of the much awaited “Golden-Share” judgments, which the Court delivered on 4 June 2002,³ the answer to this first question, admittedly a rather unfair one, considering that the commentator⁴ of Art. 56 EC cannot realistically have had the time to assimilate this new jurisprudence before the volume went to press,⁵ will, nevertheless, consider both the historical account and legal analysis of this section of the Treaty with the future-past case law in mind. Indeed, the commentary of the legislative history of the Treaty provision on the free movement of capital, the secondary law (especially Directive 88/361/EC of 24 June 1988) and the case law in this field is, if succinctly and briefly, employed and analyzed with care and with a good sense for identifying where the “action” is. In competently anticipating the importance of the (then) still pending judgments by the Court, the commentator reports on the opinion of Advocate General Colomer in the Golden-Share filings, indicating the confines within which – if at all – justification of such shares can be considered.⁶ Even if the Court did not build a great deal on the AG’s assessment, the commentator sufficiently prepares the reader in order both to watch out for the imminent case law and to assess its holding and impact. Especially helpful is the analysis of the law of Art. 56 EC in the wider context of a globalization of capital markets and the ensuing pressure on Member States and the actors within them, and, concurrently, on the EU as a whole.⁷

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⁴ Dr Jürgen Bröhmer, Assistant Professor at the University in Saarbrücken.


⁶ Unfortunately, the reference, made by the commentator in footnote 109, to Art. 295, annotations 8a, 12, is a cause for misunderstanding, as it guides the reader nowhere.

⁷ See Bröhmer, Article 56, in KOMMENTAR DES VERTRAGES ÜBER DIE EUROPAISCHE UNION UND DES VERTRAGES ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT, annotation 4 (Calliess & Ruffert eds., 2d ed. 2002).
Second question: how well (or ill) documented and researched is the analysis?

As already suggested in the brief assessment of the commentary to Art. 56 EC, the commentators (and editors) have taken great care in providing the reader with a mixture of up-to-date and “classical” reading relevant to the different Treaty provisions and issues. This should prove helpful for the practitioner, who is searching for a definition, account or summary of “what the law” is as well as for the academic who attempts to sketch the “greater picture,” while trying not to lose ground. Perhaps the editors ought to have followed the examples set in other, comparable commentaries on a Treaty or statute, where each section of the legal text is introduced either by a more or less exhaustive or a truly introductory list of readings. But perhaps not. Meanwhile, exhaustive indications to the allegedly relevant literature at the beginning of each section often prove to survive as unreflected dump yards of once-inserted writings, often enough updated only by a possibly motivated research assistant. The literature drawn upon by the commentators in this volume, however, does reflect an up-to-date knowledge of the relevant literature and a dedication to provide the reader with relevant and useful source material.

Third question: how sensitive do the assessments prove to be as regards emerging trends of scholarly critique as to the core developments of EU Law?

This leads us to the last question that we wish to put to the volume and, in particular, to its editors with regard to their craft in orchestrating a truly grand work of research with a large number of instruments and musicians.

Special mention should be made of the fact that the editors and their authors clearly embrace the idea of innovative and powerful research, both of which are reflected in the selection of authors and the treatment of the various Treaty provisions. In the constant bonfire of vanities of the legal market, inside and outside the academy, the “Who’s Who?” has suffocating weight on individuals and their work. In an elegant and quiet manner, the editors reject the implied dynamics and espouse quality. That many of the contributors to the volume are still quite young, might or might not be purely coincidental.

As regards the music played by this orchestra, let us briefly consider the commentary to Article 1 of the EU Treaty. Without much further ado, Christian Calliess begins his commentary on what he rightly calls the “defining constitutional norm” of both EC and EU, Art. 1 EU, by identifying the constituting principles enshrined in this norm. Calliess places the principles of integration, proximity to citizens (“Bürgernähe”), subsidiarity, solidarity, and coherence, within a framework the outer (or inner, systematic) boundaries of which are the democracy and rule-of-law (“Rechtsstaat”) principles in Art. 6 EU and, connected herewith, the principle of protecting human rights and the fundamental freedoms. Underlining the wording of “a” in contrast to “the” European Union in Art. 1 sent. 1 EU, Calliess pinpoints the inherent openness of this political body, which invites both consolidation and change,
while this process must be based upon the principles just referred to. While
this “roof” or “temple” structure of the EU, an image playing on the three “pil­
lars” on which it has come to rest, might indicate the unchangeable status of
the Union, the persistent debate as to the Union’s legal nature works in keep­
ing the interpretative skies open. Calliess’ commentary, then, manages to
introduce any interested reader to the architectural conundrum of the EU in
the fastest way possible, while striking the right balance between information
and invitation to further reading. The literature referenced in the accompan­
ing footnotes, does reflect the border-crossing, international nature of the
inquiry into modern statehood and governance, lying behind such laconic a
legal norm as Art. 1.8 In his concise exploration of the deep ends of the “legal
nature” debate, Calliess provides the reader with a valuable exposure to the
many unanswered questions. Here, his commentary, while taking explicit
stands in the debate, for example that there is a European constitution, if the
Treaties are understood as fulfilling “essential” functions of a constitution,9
profitably guides the reader into ongoing contemporary research related to
entities such as states and international organizations under conditions of
globalization. The same well-kept balance may be observed in his individual
treatment of the constituting principles identified earlier: the assessment of
each principle and its practical deployment regularly assesses the challenging
sides as well. While thus allowing the exasperated practitioner/academic a
moment of pause with the feeling of momentary understanding of the issue,
this comfort can only be had at the price of exposure to all of the principles’
enduring fragility.

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