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Thorben Klünder*

The Age of a European Empire or the Time to Jettison some Terminological Ballast?

* Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main, kluender@lhlt.mpg.de

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The Age of a European Empire or the Time to Jettison some Terminological Ballast?*

Oliver Jürgen Junge's dissertation draws a legal comparison between the European Union (EU) and other political entities. His analytical tool is the concept of empire (*Imperium*). He compares the EU with a variety of different empires, including the Roman and British ones. His central question concerns the legal nature of the EU. Is Europe a federation, a confederation or something in between?

Junge begins his book by reflecting on the existing concepts that describe the legal nature of the EU (3–102). He outlines how, over the last decades, EU legal scholarship has continuously invented new concepts in order to overcome the supposed dichotomy between federalism and confederalism. Neologisms like supranationalism, neo-functionalism and multilevel constitutionalism don't convince Junge. He is sceptical of the claim that the EU is *sui generis*, a political entity that cannot be subsumed under pre-existing categories and legal concepts of political structures. By introducing the concept of empire to this discourse, he wants to show similarities between the EU and non-state entities such as the Roman empire or the British Empire.

According to Junge, the legal nature of the EU is a controversial question mainly because of its ambivalence: the EU is at the same time universal (185–219) and heterogeneous, and culturally very diverse (220–258) as it continuously expands its sphere of influence. However, the EU has a number of competences that go beyond those of any traditional international organisation. By introducing the concept of empire, Junge adds a perspective that is helpful for legal historians in understanding that ambivalence. For instance, like historical empires, the EU has no pre-determined exterritorial borders (141–184). Even the borders of the status quo are difficult to determine. Junge compares the EU with its various stages and levels of integration to the Roman and British empires. Externally, the EU has numerous, differentiated relations with its neighbours, so that Junge considers the terms »informal European empire« or »imperial periphery« appropriate (259–299).

Junge highlights that the legal order of an empire is highly dynamic and pluralistic. This implies that an empire does not have a united legal order (*Einheit der Rechtsordnung*) as we know it from states (396–405). Junge points out that this is a fundamental difference between an empire and the modern constitutional state. In the latter, all power is held and exercised in accordance with an encompassing constitution.

What can lawyers learn from considering the EU as an empire? Junge's concept is first of all an innovation. Of course, there is lively research on empires, but it is mostly done in political science. Although the concept of empire has been discussed by lawyers, also in the debates on the legal nature of the EU, to my knowledge no one has yet elaborated it in detail. In German legal scholarship, the field of research in which Junge is moving has primarily and historically been part of *Allgemeine Staatslehre*. However, the criteria employed in political science research on empires naturally differ greatly from those of *Allgemeine Staatslehre*. The former is primarily concerned with empirically measurable power, the latter with adequate normative concepts. Borrowing political science's understanding of empire to analyse the legal nature of the EU thus entails certain difficulties. Junge has to translate the concept from one epistemological community to another. Due to the large scope of the comparison, the legal observations he draws are necessarily somewhat simplistic.

* Jürgen Junge, Imperium: Die Rechtsnatur der Europäischen Union im Vergleich mit imperialen Ordnungen vom Römischen bis zum Britischen Reich, Tübingen: Mohr Siebeck 2018, XXII, 609 p., ISBN 978-3-16-156279-2

Junge presents a host of details drawn from many different time periods, which are better examined by those more familiar with these periods. In this book review, I would therefore like to limit myself to interpreting and evaluating the book in terms of its underlying premises.

Junge's study is itself initially based on an interpretation of contemporary European legal studies. He seems to suggest that European legal scholarship rather simplistically divides associations of states (*Staatenverbindungen*) into two groups, federal states and confederations of states, with nothing in between (*tertium non datur*). However, the current doctrine of the state is not really as orthodox as Junge repeatedly implies. There is no doubt that such a theory can be found, for example, in Paul Laband's *Staatsrecht*. But already in the Weimar Republic, defining the distinction between a federal state and a confederation of states was no longer considered particularly important. For Hans Kelsen, it was merely a matter of degree; for Carl Schmitt, an obfuscation of the politically relevant questions. Even in the first decades of European integration, the question was raised whether the distinction between federal state and confederation of states was not actually a »false problem« (Walter Hallstein). Junge does draw on such literature, but he interprets it as a minority, whereas these texts were, and continue to be, very influential.

A second premise of Junge's book is that it makes sense to look for the »legal nature« of the EU. Now, legal »entities« do not have natures, they have usages; it is, therefore, a metaphor to think of the EU as having a legal nature. In European legal studies, asking for the legal nature of all manner of things is common, and perhaps the metaphor of »nature« misleads us into believing that we are working in a similarly verifiable way as the natural sciences. The search for something's »legal nature« would not be problematic if there existed a shared understanding about which conventions of classification we are discussing when using this umbrella term. This is, however, not the case. Thus, Junge's suggestion that the EU is more similar in nature to historical empires than, say, to a federal state, is also due to the fact that he bases his comparison on criteria that are typical for empire research. But other criteria would also be conceivable, such as the protection of fundamental rights, democracy, and the resolution of jurisdictional conflicts through judicial dialogue. Using these criteria, the EU's similarity to empires would decrease and the parallels with a constitutional state come to the fore.

Determinations of the »nature«, »spirit« or »essence« (*Wesen*) of a legal concept are subject to criticism because they are accompanied by the temptation of what in German legal scholarship is called an *Inversionsmethode* (inverse conclusion) that induces indeterminate concepts and then deduces from them legal consequences that would be implausible if only law was considered. This criticism does not quite apply to Junge, because he does not seek to deduce legal consequences from his use of the concept of »empire«, nor – more importantly – does it serve to justify a certain teleology of integration. Nevertheless, I am left wondering whether attempts to define the essence of European integration are not particularly susceptible to conceptual metaphysics (*Begriffsjurisprudenz*): Junge, too, tends toward an essentialist perspective on empires, as a number of quotations show. For instance, early on his book he asserts that »[t]he legal nature of an order is regarded in a narrower sense as the search for its essence in the totality of its distinguishing legal features« (4); towards the end he concludes that »[o]ne can give the empire a new name, one can reform, change and improve it. But none of this changes the essence of its abstract characteristics« 508), and asserts on the next page that »[t]he essence of European integration did not lie in overcoming the international essence of Europe in favour of a national unity, but neither did it lie in overcoming might by law« (509).

Junge's final premise is that using the concept of empire is better than having no concept at all. I agree with that in part. At least what Junge does is not misleading. Anyone wondering to what extent the EU is an empire can look it up in his book. Therefore, his choice of term is better than many other semantics that circulate unreflectively in European law scholarship. However, the term »empire« also causes problems, because Junge understands it to refer to very different legal phenomena at very different times. This hardly allows for concrete legal doctrinal observations to be made.

Junge's book is very topical. Readers from other disciplines should note that for some years now, and particularly in German European legal scholarship, there has been much discussion about appropriate overarching concepts (*Begriffe*). By its own

admission, this European legal scholarship wants to be »constructive«. But what constitutes an appropriate concept? One that we read a lot into, or whose meaning we know well? I believe the latter.

For European legal scholarship, it would perhaps be more consistent to examine semantics more critically in terms of what they actually mean doctrinally. Instead of introducing ever more new concepts to EU law, it seems more productive to assess the analytical value of the concepts we already have. We should eliminate those that are characterised more by political and historical suggestiveness than legal substance. I believe it is not the vocation of our age to explain the whole of European integration by just one holistic legal concept. But it might be the vocation of our age to weed out a few of the options.

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Thorsten Keiser

Softes Recht und harte Politik*

Wenn man diesem Buch eines nicht vorwerfen kann, dann einen Mangel an Haltung. Es versteht sich in erster Linie als Plädoyer für ein ökologisches und soziales Europa. Der Klimawandel sei eine Chance zur endgültigen Überwindung des Neoliberalismus und damit zur Herbeiführung eines nachhaltigen Paradigmenwechsels (im Sinne von Thomas Kuhn, 322 ff.). Man müsse die Wirtschaft auf erneuerbare Energien umstellen. Dadurch entstünden viele neue Arbeitsplätze (emplois verts, 313 ff.), allerdings auch Probleme für die Beschäftigten in den klassischen Industriesektoren. Der Wegfall von Arbeitsplätzen könne mit einer allgemeinen Reduzierung der Lebensarbeitszeit und der Lösung der Erwerbsbiographien von überkommenen Kategorien der Produktivität aufgefangen werden. Die zentrale Antwort auf die Frage der Beschäftigung sei, dass man weniger arbeiten solle, denn es komme nicht auf die Quantität, sondern auf die Qualität der Arbeit und des Lebens an (etwa 325). Hier sieht der Autor die Lösung für die Verwerfungen einer sich notwendig von der Kategorie des Wachstums verabschiedenden Wirtschaftspolitik. Solche Anti-Wachstums-Philosophien sind inzwischen weit verbreitet. Ein zentraler Punkt sind dabei stets die Kosten und sozialen Folgen der Transformation, zumal nicht alle arbeitenden Menschen die radikale Umstellung ihrer Lebensentwürfe als Fortschritt begrüßen werden. Der vorliegende Beitrag begnügt sich an dieser Stelle mit einem allgemeinen Verweis auf einen europäischen Unterstützungsfonds, der Übergangsprobleme zugunsten arbeitender Menschen abfedern soll (328).

Die Diskussion über solche Themen kann hier nicht vertieft werden. Stattdessen stellt sich die Frage nach der Relevanz des Buchs für die Rechtsgeschichte. Bemerkenswert ist, dass der Autor seinem Zukunftsszenario eine ausführliche Bestandsaufnahme der von der Ebene der EU ausgehenden Sozialpolitik voranstellt. Diese wiederum wird an große Entwicklungslinien angeknüpft, die bis zur Entstehung der Europäischen Gemeinschaften reichen. Insofern könnte das zwischen Politikwissenschaft und politischer Publizistik anzusiedelnde Werk auch von Interesse für die Geschichte des Arbeitsrechts der EU sein. Schnell wird jedoch erkennbar, dass sich die thematisierten Trajektorien europäischer Sozialpolitik und Arbeitsrechtsgestaltung im Rahmen einer telelogisch-linearen Geschichtserzählung bewegen. Ohne Ironie ist von »goldenen Zeitaltern« die Rede (54 ff., 146 ff., 194 ff.), immer gekennzeichnet von einem »Mehr« an (europäischer) Sozialpolitik, der, ungeachtet

* Philippe Pochet, A la recherche de l'Europe sociale, Paris: puf 2019, 376 p., ISBN 978-2-13-062616-9