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The "Crisis of Critique" in EU Law

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Critique has become one of the latest buzzwords in EU legal studies. Who, after all, would not want to be identified as a critical scholar if the danger is that one's work might otherwise be labelled as reactionary, unsophisticated, naïve or whatever other signifier could be used to demolish the value of scholarly enterprise? But the down-side of this growing interest in being critical as an EU law scholar is that the idea of critique itself is in danger of becoming inflated.

It is clear that critical approaches can have many connotations in EU law scholarship. More worrying is that the idea of critique may sometimes be left vague or undefined on purpose. In the worst-case scenario, a simple opposition between critical and uncritical is expected to do the hard part of analytical work that would otherwise fall on the author's own shoulders.

To avoid these pitfalls, EU law scholars must both come to terms with the broader "crisis of critique" that extends beyond critical EU legal studies and find ways to resolve or navigate this crisis in ways that do not altogether negate the critical project in EU law.

In the face of these challenges, I argue that critical EU law scholars would benefit from considering how critical theorists have wrestled with the crisis of critique over the years. A better grasp of how the critical theory of society, often better known as Critical Theory, understands the project of social critique can also help to see why critical interventions so easily lose their diagnostic and transformative potential. However, instead of uncritically (sic) endorsing Critical Theory as a methodological or a substantive starting point for the critique of EU law, we should also learn from its failures and blind spots.

The dialectics of crisis and critique

Critique and crisis are often depicted in a dialectical relationship. Crisis can even be seen as a necessary precondition for a meaningful critique. In practice, this means that the concept of crisis does a significant amount of analytical work in the critical project. Similarly, the EU's various past and ongoing crises can explain the "critical turn" in EU legal studies.

The proximity between crisis and critique can be traced back to the central role that the concept of crisis played in Marx's critique of political economy, as well as to his (in)famous call for philosophy that would change the world instead of just interpreting it. Against this backdrop, the crisis of critique can refer to the way in which the normalisation of crisis talk has seemingly diluted the more radical political potential of crises. But it can also refer to more general anxiety about how critique has "run out of steam".

This broader crisis of critique reinforces the question of how EU law scholars should embark on the critical project. The question about "[w]hat could be done to revive our understanding of crisis and critique" becomes particularly urgent if we accept that the dialectical relationship between crisis and critique is never one-dimensional and that the critique itself becomes a form of praxis insofar as it can either downplay or induce a particular crisis.

Because the critic him-/herself does not exist outside societal power relations (as pointed out, inter alia, by Judith Butler), it is no longer possible to claim that the critical project is a priori neutral or apolitical. The crisis of critique accordingly points to the impossibility of purely unmasking critique – a problem that has only recently been recognised in EU legal studies. Therefore, it can best be understood as a deeper crisis of critical rationality – and shifting the focus to critical rationality inevitably includes a struggle over methods.

Below I outline why the crisis of critique in EU law calls for a more developed understanding of social critique as immanent critique. Moreover, I suggest that the critical theory of society provides a logical starting

point for such an inquiry in EU legal studies. Here the aim is not to idealise an intellectual tradition that indisputably comes with problems of its own, but to take seriously the crisis of critical rationality that also underlies the critical project in EU law.

Social critique as immanent critique

Social critique is not a singular phenomenon. But the critical theory of society provides one set of answers to what a meaningful social critique looks like. Critical Theory can be broadly defined as a branch of social theory that seeks to critique and transform power relations and structures that thwart political and social emancipation. More narrowly defined, it normally refers to the different generations of the Frankfurt School critical theorists.

It is clear that the early Frankfurt School critical theory was heavily indebted to the Marxist critique of political economy. A more difficult question is whether it nevertheless provides insights that more traditional critiques of political economy overlook and that might be relevant when we try to understand contemporary social phenomena, such as EU law, from a critical perspective.

Although early critical theorists shared Marx's vision of the unity of critical theory and praxis and his materialist outlook, they sought to replace his recourse to the philosophy of history with a more robust agenda of empirical social research, an approach that was termed by Max Horkheimer as "interdisciplinary materialism". A key tenet of Critical Theory was to combine normative and empirical perspectives in the analysis of social reality. But this ambition was simultaneously tamed by a methodological commitment to critique's immanence.

Immanent critique locates the critical potential within the object of critique. Critique can accordingly be viewed as "a reflective form of rationality that is [...] anchored in the historical process itself". From this perspective, the internal contradictions of a distorted social rationality ultimately become seeds for its own overcoming. But this immanent logic arguably ran into a profound crisis when it became obvious that the Marxist account of a historical (revolutionary) subject was no longer (if it ever was) sustainable.

Some argue that this disillusionment explains why some of the early critical theorists turned to "negative dialectics"as the only sustainable mode of critique. But an alternative reading of Critical Theory emphasises that the Hegelian idea of non-identity between the concept and social reality is not an aberration but has informed the critical theory of society from the outset. Therefore, it can also be argued that Critical Theory was never reducible to a mere critique of political economy and that it recasts the Marxist idea of critique's immanence in ways that are relevant for the project of social critique even today.

A critical social theory of EU law in making

Critical Theory places the methodology of critique at the heart of the critical project. But what would a more deliberate commitment to critique's immanence add to critical studies of EU law? At first sight, the call for immanent critique might seem to collapse into a simple tautology that EU law can only be criticised with reference to EU law. But this reading confuses an immanent critique with an internal critique, and it also misses the important point that "immanent" and "social" are equally important attributes for critique.

Although Critical Theory was materialist, it was not strictly determinist. The possibility of change was central to Critical Theory from the beginning. For critical theorists, the crisis of critical rationality is best understood as a crisis of social rationality. The task of the critical project is then to identify those internal contradictions and crisis tendencies within a particular social formation that carry the transformative critical potential within them – and a mere critique of political economy alone cannot complete this task.

It can be argued that the Frankfurt School critical theorists failed to adequately transform "Marxist categories" and to come up with a "different historical dynamic out of which the possibility of another social formation might emerge". It may also be true that political economy dominated Critical Theory to the extent that "culture and socialization [...] were only conceptualized as dependent variables of the economic

base". But this should not obscure the fact that political economy, cultural analysis and social psychology were all viewed as central empirical research areas by the Frankfurt School.

Critical theorists also rejected Marx's simple vision of the unity of theory and praxis as a means of overcoming obstacles that blocked political and social emancipation. Their interest in more nuanced socio-psychological and sociological explanations for "why some possibilities were realized and others not" distinguishes their critique of ideology from a simple critique of false consciousness. Many observers have pointed out that the Frankfurt School critical theorists ultimately failed to live up to their empirical ambitions. But this failure should not obscure the fact that they may still point us in the right direction.

Immanent social critique focuses on the structural and historical conditions that produce the social systems in which the critical project takes place, but these conditions are not viewed as reducible to political economy. From this starting point, the critical theory of EU law requires a holistic social critique that is still largely absent in EU legal studies. Many of the substantive themes endorsed by Critical Theory can also directly feed into the current debates on EU law. For more discussion on why this is the case, see different contributions in Neuvonen and Linden-Retek (eds), *Critical Theory and European Union Law: The Question of Postnational Emancipation* (forthcoming by Hart/Bloomsbury).

Conclusion

Critique is in itself an empty idea that can be filled with many kinds of things, depending on how we understand the nature of the critical project in EU legal studies. Against this backdrop, and with reference to the critical theory of society, I explained why immanent social critique should play a more prominent role in critical studies of EU law.

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