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Comment

The Increasing Extraterritoriality of EU Sanctions Law

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While the United States (US) has increasingly been applying its sanctions law extraterritorially since the mid-1990s, the European Union (EU) has traditionally taken the view that such an extraterritorial application of sanctions is contrary to international law and has opposed the US practice. Instead, the EU has previously based its sanctions strictly on the principle of territoriality (i. e. the authority to legislate and adjudicate over all persons, property, and acts within its physical borders) and the active personality principle (i. e. the authority to legislate and adjudicate on the acts committed by its own nationals, regardless of where the act was committed). However, in the wake of the tightening and expansion of EU sanctions against Russia in reaction to its full-scale invasion of Ukraine in 2022, the EU has been moving away from its previous position. Even though the EU formally maintains its position that sanctions should in principle not be applied extraterritorially, EU sanctions against Russia are increasingly designed to cover situations that have no genuine link to the EU. Against this backdrop, this comment reviews

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the EU's evolving sanctions policy and demonstrates that the scope of the EU sanctions that target Russia increasingly resembles the US sanctions law and practice.

The EU's move towards extraterritorial application is understandable in view of the goal of ensuring the effectiveness of EU sanctions regulations.[1] From the EU's point of view, it may be frustrating to impose far-reaching economic restrictions on itself in response to Russia's blatant violation of international law, while other countries or third-country companies financially profit from this situation. The increasing extraterritorial application of EU sanctions against Russia is thus a response to the realisation of the difficulty for the EU in enforcing its sanctions effectively without exerting a certain amount of pressure on actors from third countries. However, the increasing extraterritorial expansion of EU sanctions is a double-edged sword.

It is argued here that this new approach is incompatible with the legal opinion previously held by the EU regarding the illegality of extraterritorial application of sanctions under international law. Although the EU's extraterritorial sanctions still fall short of those imposed by the US in terms of scope and content and due to their more cautious application, the mere fact of an increasing application of EU sanctions to certain extraterritorial situations is a slippery slope, as this bears the risk that other countries or regions will do the same in the future. This, in turn, would lead to a tangle of conflicting requirements and prohibitions that would ultimately make global trade impossible and force economic actors to confine themselves to specific regions.

I. Background

Traditionally, the EU and the US hold fundamentally different views on the scope of sanctions. While the EU has previously linked its sanctions law to a close territorial or personal connection to the territory of the Union (see 1.), the US has always applied its sanctions broadly and in some cases, the requirement of a nexus to the US is entirely waived (see 2.). The EU has criticised the extensive application of US sanctions law in the past as contrary to international law and has responded with blocking measures (see 3.).

[1] See ECJ, *Siegfried Aulinger v. Bundesrepublik Deutschland*, judgement of 8 March 2006, case no. C-371/03, ECLI:EU:C:2006:160, para. 34.

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1. Criteria for the Application of EU Sanctions

The EU has exclusive legislative competence in the area of embargo measures – an area that affects the foreign trade of the EU. As a result, EU economic sanctions based on decisions of the Council of the EU within the framework of the Common Foreign and Security Policy (CFSP) are regularly implemented through the adoption of EU regulations that apply directly and immediately in all EU Member States (see Arts 215 and 288 TFEU) and are enforced by the competent national authorities of the individual Member States.

Each EU embargo and sanctions regulation defines the scope of its application based on a standard clause in the Sanctions Guidelines of the Council of the European Union.[2] This standard clause stipulates that the regulation shall apply within the territory of the EU and on board any aircraft and any vessel under the jurisdiction of a Member State as well as to EU nationals and to legal persons, entities, or bodies (PEB) incorporated or constituted under the law of a Member State inside or outside the territory of the Union, and to those in respect of any business done in whole or in part within the Union.[3]

With regard to the scope of EU sanctions law, the Council of the EU states in its Sanctions Guidelines that 'EU restrictive measures should only apply in situations where links exist with the EU', as set out in the standard clause (para. 51). It further stresses that the EU 'will refrain from adopting legislative instruments having extra-territorial application' just as the EU 'has condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law' (para. 52).

EU sanctions are thus based on the principle of territoriality and the principle of active personality, i. e., EU sanctions law is linked to actions that take place either within the territory of the EU (e. g., exports from the EU, imports into the EU, or the provision of services in the EU) or outside the EU by natural or legal PEB that are subject to the jurisdiction of an EU Member State on the basis of its nationality or its establishment or registered office. Third-country subsidiaries of EU parent companies are therefore not bound by EU sanctions law with regard to transactions they conduct outside the EU, as they are not legal PEB established or registered under the law of a

2 Council of the European Union, Sanctions Guidelines, Doc. no. 5664/18, 4 May 2018, para. 88, <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>, last access 11 March 2026.

3 See, for example, Art. 13 Regulation 833/2014/EU and Art. 17 Regulation 269/2014/EU.

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Member State within the meaning of the pertinent rules. Dependent branch offices of EU companies in third countries, on the other hand, are considered to be fully bound by EU sanctions.[4]

2. Criteria for the Application of US Sanctions

Two US authorities are primarily responsible for enforcing US sanctions: the Bureau of Industry and Security (BIS), which reports to the Department of Commerce, and the Office of Foreign Assets Control (OFAC), which reports to the Department of the Treasury. BIS sanctions are set out in Part 746 of the Export Administration Regulations (EAR)[5] and include restrictions on exports, re-exports, and in-country transfers of 'items subject to the EAR' within the meaning of Sec. 734.3 EAR to or within sanctioned countries[6] or to sanctioned persons listed on the Entity List. The Entity List lists companies from across the globe that are involved in activities deemed 'undesirable' by the US, which includes, weapons proliferation, supplying or supporting foreign military or intelligence end users, and human rights abuses. OFAC sanctions, on the other hand, are laid down in a variety of different laws, executive orders, and determinations, and include person-related restrictions (primarily listings on the US Specially Designated Nationals and Blocked Persons (SDN) List) as well as import, service, investment, and payment restrictions.

a) BIS Sanctions

The US sanctions restrictions administered by the BIS already have a very broad scope of application. According to Sec. 734.3 EAR, 'items subject to the EAR' are (1.) all items in the US, (2.) items of US origin wherever located, (3.) foreign-made commodities that incorporate controlled US-origin components above the *de minimis* threshold, and (4.) certain foreign-produced direct products of certain controlled US technology or software or of a plant that is a direct product of certain controlled US technology or software (Foreign Direct Product Rule, FDPR).

4 See Bärbel Sachs, 'Kapitel IV Sanktionen und Embargos der EU' in: Bärbel Sachs and Christian Pelz (eds), *Außenwirtschaftsrecht* (3rd edn, C. F. Müller 2023), para. 349.

5 Part 746 EAR – Embargoes and Other Special Controls.

6 Currently: Cuba, Iraq, North Korea, Russia, Belarus, the occupied territories of Ukraine, Iran, and Syria.

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Unlike EU sanctions, US restrictions are therefore not only linked to the export of items from the US, but also to the 'US nationality' of the items. Any subsequent re-export of items that were manufactured in, exported from, or transited through the US at any time are subject to the US re-export control restrictions of the EAR, including Part 746 EAR and the restrictions relating to entities listed on the Entity List.

Furthermore, items manufactured abroad can also be subject to US re-export control restrictions. This applies, on the one hand, if the items contain a certain percentage of US components in terms of value that would be subject to US export control restrictions, if exported separately to the destination country of the main item;[7] while the *de minimis* value threshold for exports to most countries is regularly 25 %, it is 10 % for some US embargo countries.[8] Additionally, foreign-produced items without US content are subject to US re-export control restrictions if the FDPR applies, i. e., if the items manufactured abroad are the direct product of certain controlled US technology or software or were manufactured in a plant that is itself the direct product of certain controlled US technology or software, and the foreign-produced items are supplied to certain critical countries or recipients.[9]

Although all restrictions under the EAR have a US nexus, this nexus is sometimes very weak, meaning that US re-export control restrictions under Part 746 EAR and the Entity Listings have a significant impact on transactions by non-US persons.

b) OFAC Sanctions

OFAC sanctions are even more far-reaching in terms of their extraterritorial scope. Regarding US sanctions administered by OFAC, a fundamental distinction must be made between primary sanctions and secondary sanctions.

In principle, US primary sanctions only apply to US persons. 'US persons' are defined as US citizens and permanent residents regardless of their place of

7 Items that are not listed on the US Commerce Control List (so-called 'EAR99' items) are generally not considered 'controlled' content that must be included in the *de minimis* calculation. The only exception to this rule is if the destination is Cuba, Syria, North Korea, or the occupied territories of Ukraine, in which case 'EAR99' items must also be included in the calculation of the controlled US value share. However, 'EAR99' items listed in the supplements to Part 746 are not to be included in (re-)exports to Russia and Belarus.

8 See Sec. 734.4 EAR. The 10 % value threshold applies to re-exports to Cuba, Syria, North Korea, and Iran.

9 Sec. 734.9 EAR.

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residence, persons residing in the US, and companies/institutions organised under US law or the laws of a US jurisdiction, including foreign branches. Third-country subsidiaries of US companies are generally not subject to US primary sanctions. There are, however, two exceptions to this principle: the US Cuba sanctions[10], and the US Iran sanctions[11], which also apply to third-country subsidiaries of US companies. The dependent branch offices of US companies are always bound by US sanctions law.

In principle, non-US persons are not to be bound by US primary sanctions. However, non-US persons who cause a US person to violate US sanctions can be held liable for violating US primary sanctions.[12] Since electronic payments in USD require clearance by a US financial institution – and thus a US person – this also triggers the application of US primary sanctions.

In addition, the US claims the right to prohibit transactions that have no nexus whatsoever to the US in certain cases and to impose sanctions on non-US persons who engage in such transactions (so-called 'secondary sanctions'). The US first adopted such secondary sanctions in 1996 as part of the Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act) and the Iran and Libya Sanctions Act (ILSA). Subsequently, further secondary sanctions were imposed. Currently, the US has far-reaching secondary sanctions in place with regard to Iran, Russia, Belarus, and the occupied Ukrainian territories.

The US justifies its jurisdiction with a very broad interpretation of the principle of territoriality. According to the US understanding, secondary sanctions can always be imposed if the conduct of non-US persons in matters unrelated to the US could potentially have an impact on the US territory. Accordingly, non-US persons are prohibited from conducting transactions with certain countries in certain economic sectors or with certain SDN-listed persons.

While violations of the EAR and US primary sanctions carry significant civil and criminal consequences, violations of US secondary sanctions generally result 'only' in administrative penalties, with the most serious administrative penalty being the inclusion on the Specially Designated Nationals and Blocked Persons (SDN) List. Such an SDN listing has significant implications. Not only does it lead to complete exclusion from the US market and the USD-dominated financial system, but many non-US companies, espe-

10 See Sec. 4305 Trading with the Enemy Act of 1917, 50 USC 4305.
11 See Sec. 218 Iran Threat Reduction and Syria Human Rights Act of 2012, 22 USC 8725.
12 See IEEPA Enhancement Act, Pub. L, No. 110-96 (2007).

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cially banks, will also be unwilling to continue business relationships if their business partner is listed on the SDN List.

3. EU'S Reaction to the Extraterritorial Application of US Sanctions Law

As clarified earlier, the EU has always taken the view that the extraterritorial extension of a sanction regime is contrary to international law.

It was in response to the first US secondary sanctions in 1996 that the EU adopted Regulation 2271/96/EC[13] ('Blocking Statute'). The Blocking Statute prohibits EU persons from complying actively or by deliberate omission with requirements or prohibitions based directly or indirectly on the laws listed in the Annex (Art. 5 Blocking Statute). Furthermore, it grants EU persons the right to compensation for damages incurred as a result of the application of the laws (or the resultant measures which are based on these laws) listed in the Annex to the Blocking Statute (Art. 6 Blocking Statute). The Annex to the Blocking Statute originally listed three US laws and regulations concerning Cuba[14] and one law concerning Iran and Libya.[15] After the US terminated the Joint Comprehensive Plan of Action (JCPOA)[16] in May 2018, which resulted in the full reinstatement and subsequent tightening of extraterritorial US sanctions against Iran, the Annex to the Blocking Statute was supplemented in August 2018 to include the current US laws and regulations against Iran,[17] thereby reactivating the Blocking Statute. In the recitals of the Blocking Statute, the EU states that 'a third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of the Member State' and that these laws, regulations and other legislative instruments 'by their extra-territorial application' violate international law.

13 OJ EC 1996, L 309/1.

14 Cuban Democracy Act 1992, Cuban Liberty and Democratic Solidarity Act of 1996, Cuban Assets Control Regulations.

15 Iran and Libya Sanctions Act of 1996.

16 The 2015 JCPOA stipulated that Iran would submit to technical restrictions and control mechanisms to ensure that its nuclear program was exclusively for peaceful purposes; in return, existing EU and US sanctions against Iran would be gradually lifted.

17 Commission Delegated Regulation 2018/1100/EU of 6 June 2018 Amending the Annex to Council Regulation 2271/96/EC Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, OJ 2018 L 199 I/1.

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In its Guidance on the Blocking Statute,[18] the European Commission states that the Blocking Statutes 'aims at countering the unlawful effects of third-country extra-territorial sanctions' on natural and legal EU persons, and that its main purpose is thus 'to protect EU operators engaging in lawful international trade and/or movement of capital as well as related commerce activities with third countries in accordance with EU law'.

II. EU Sanctions Against Russia

The first EU sanctions against Russia were imposed in 2014 in response to Russia's annexation of Crimea and its incitement of unrest in eastern Ukraine. Based on Regulation 269/2014/EU of 17 March 2014[19] (REG 269/2014), 21 individuals were listed in Annex I of that regulation on the grounds that they were involved in actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine. Such a listing by the EU entails the freezing of assets of the listed PEB in the EU and a prohibition on making available funds and economic resources to them. In addition, Regulation 833/2014/EU (REG 833/2014) of 31 July 2014[20] imposed items- and services-related restrictions against Russia. In response to Russia's recognition of 'statehood' of Donetsk and Luhansk and Russia's invasion of the whole of Ukraine in February 2022, there has been an incremental expansion and tightening of sanctions against Russia through a total of now 19 sanctions packages, and the addition of more PEB to Annex I of REG 269/2014.[21]

While the initial focus of the sanctions packages was on imposing additional restrictions on the import and export of items, the provision of services and the financial and capital markets, eventually, the prevention of circumvention and frustration of existing sanctions increasingly became the centre of attention. To this end, the EU has extended the import restrictions to goods originating in third countries that incorporate certain products originating in Russia (see 2. a)), is putting pressure on third-country companies and governments not to circumvent or frustrate EU sanctions (see 2. b)), and is increasingly requiring EU companies to demand compliance with EU sanctions from

18 European Commission, Guidance note – Questions and Answers: Adoption of the Update of the Blocking Statute, OJ 2018 C 277 I/4.

19 Council Regulation 269/2014/EU of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ 2014 L 78/6.

20 Council Regulation 833/2014/EU of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2014 L 229/1.

21 Currently, almost 2,000 natural persons and almost 700 legal entities are listed in Annex I to Regulation 269/2014/EU.

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their contractual partners and their subsidiaries in third countries (see 2. c)). These new sanctions provisions have an increasingly extraterritorial effect.

1. Extension of Import Restrictions

Like previous EU embargo regulations, REG 833/2014 lays down prohibitions to import certain goods that originate in Russia or that have been exported from Russia. The prohibition to import goods that 'have been exported from Russia' applies to goods that are imported directly from Russia into the EU, regardless of their origin.[22] The import of goods that 'originate in Russia', on the other hand, is also prohibited if the goods are first exported to a third country and from there imported into the EU. The origin of goods is determined based on Art. 60 of the Union Customs Code. Under this provision, goods that have been wholly obtained in a single country are considered to have their origin in that country. Goods whose production involves more than one country are considered to originate in the country where they underwent their last, substantial, economically-justified processing resulting in the manufacture of a new product or representing an important stage of manufacture. For example, wood grown and cut in Russia initially has Russian origin. Its import into the EU is therefore prohibited, regardless of the country of dispatch. Yet, if the logs are subsequently transported to Turkey and processed there into wooden chairs, they become a new product and thus acquire Turkish origin and therefore are no longer subject to the import ban on wood originating in Russia.

With regard to some products whose import into the EU is prohibited if they originate in or have been exported from Russia, it was found that these sanctions were significantly undermined by exporting the sanctioned goods from Russia to third countries, processing them there in a manner that conferred origin, and then importing them (lawfully) into the EU. In response, the EU extended the import prohibitions for certain goods to also include goods originating in third countries if certain materials originating in Russia were used in their manufacture. Such import prohibitions for goods originating in third countries were laid down for iron and steel products[23], petroleum products[24], gold[25], and diamonds[26].

22 ECJ, *Criminal Proceedings against S.Z.* judgement of 5 September 2024, case no. C-67/23, ECLI:EU:C:2024:680.

23 Art. 3g(1)(d) Regulation 833/2014/EU.

24 Art. 3ma Regulation 833/2014/EU.

25 Art. 3o(2) Regulation 833/2014/EU.

26 Art. 3p(3) and (4) Regulation 833/2014.

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This is the first time in EU sanctions law that there has been an extension of import prohibitions to goods originating in third countries that have been manufactured using materials from a sanctioned country. Such an extension had always been avoided in the past, as it significantly interferes with the economic freedom of third-country economic operators. Due to this extension, manufacturers from third countries are now forced to decide whether to continue to source the relevant materials from Russia and thus be excluded from the EU market, or to switch their sources of supply to be able to continue delivering their goods to the EU. As a result, they are, to a certain extent, forced to adhere to the EU embargo against Russia.

2. Obligations on Third-Country Corporations and Governments

With each successive sanctions package, the EU has increasingly tried to force companies incorporated in third-countries to comply with certain EU sanctions against Russia by threatening administrative measures in case of non-compliance. Furthermore, the EU reserves the right to completely prohibit the delivery of certain particularly sensitive goods to certain third countries if, at the EU's request, those third countries refuse to take measures to prevent the onward delivery to Russia.

a) Frustration of EU Sanctions as Grounds for Inclusion in Sanctions List

As part of the 8th sanctions package adopted on 6 October 2022, another ground for including a PEB in Annex I to REG 269/2014, which leads to an asset freeze and a prohibition of making available funds and economic resources, was added. According to the newly inserted Art. 3(1)(h) REG 269/2014, it has become possible to list PEB 'facilitating infringements of the prohibition against circumvention' of the EU sanctions against Russia or 'otherwise significantly frustrating those provisions'. In terms of wording, the reason for listing is similar to the possibility of listing a PEB on the US SDN list due to a violation of extraterritorial US secondary sanctions.

In contrast to the US Secondary Sanctions, there is still a certain nexus to the EU, as the new listing reason is intended to deter non-EU persons from participating in prohibited circumvention of sanctions by 'EU persons' within the meaning of Art. 13 REG 833/2014 and Art. 17 REG 269/2014. Nevertheless, the possibility of listing non-EU persons for participating in activities

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of EU persons that are prohibited under EU sanctions law but do not apply to non-EU persons is a departure from the principle of not applying EU sanctions extraterritorially.

b) Trade Restrictions on Companies with Links to the Russian Defense and Security Sector

REG 833/2014 provides for the possibility of listing PEB that have commercial or other links with or otherwise support Russia's defence and security sector in its Annex IV, with the result that the supply of goods listed in Annex I to the Dual-Use Regulation 2021/821/EU[27] and in Annex VII to REG 833/2014 (advanced technologies), as well as the provision of related technical or financial assistance to them, is prohibited under Art. 2b REG 833/2014. While originally only PEB based in Russia were included in Annex IV, the 10th package adopted on 25 February 2023 saw companies based outside the EU included in Annex IV for the first time. Initially, the listing of third-country companies was limited to Iranian companies. Gradually, however, companies from other third countries (Armenia, China, Hong Kong, India, Kazakhstan, Kyrgyzstan, Serbia, Singapore, Sri Lanka, Syria, Thailand, Turkey, United Arab Emirates, Uzbekistan, and Vietnam) were also included in Annex IV and thus made subject to sectoral trade restrictions, which are similar to restrictions imposed on companies listed on BIS's Entity List. Consequently, third-country companies were sanctioned for actions that did not fall within the territorial and personal scope of EU sanctions law and were legal under the national laws applicable to the third-country companies.

c) Transaction Prohibitions in Response to Certain Undesirable Behaviours

Art. 5ac(2) and Art. 5ad(2) that were inserted into REG 833/2014 as part of the 14th sanctions package adopted on 24 June 2024 are another example of the extraterritorial application of EU sanctions law. Under Art. 5ac(2) REG 833/2014, EU persons are prohibited to engage in any transaction with legal PEB listed in Annex XLIV, which shall include legal PEB established outside Russia that use payments systems established by the Central Bank of

27 Regulation 2021/821/EU of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, OJ 2018 L 206/1.

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Russia, the Russian state or any other Russian entity. Likewise, Art. 5ad(1) REG 833/2014 prohibits EU persons from engaging in transactions with legal PEB listed in Annex XLV that shall list PEB established outside the EU that provide crypto-asset or payment services to PEB listed by the EU or for operations that frustrate the purpose of REG 833/2014. Several third-country PEB have since been listed in Annexes XLIV and XLV.

The 19th sanctions package adopted on 23 October 2025 introduced the possibility of listing third-country ports and locks that are used for the transport of certain sanctioned goods in Annex XLVII, thereby making them subject to transaction prohibitions. So far, however, no third-country ports or locks have been listed.

These transaction prohibitions pursue the goal of forcing non-EU persons, who are not bound by EU sanctions, to comply with certain EU sanctions by threatening them with exclusion from the EU market, i. e. with similar implications as a USD SDN-listing (minus the asset freeze).

d) Export Prohibitions on Certain Items to Certain Third Countries

Art. 12f, which was inserted into REG 833/2014 by Regulation 2023/1214/EU[28] as part of the 11th sanctions package adopted on 23 June 2023, goes beyond the possibility of sanctioning third-country companies for undermining EU sanctions against Russia by excluding them from the EU market.

Instead, Art. 12f REG 833/2014 provides that the sale, supply, transfer, or export of certain particularly sensitive goods, and the provision of related services, funds and financial assistance, as well as the transfer of related intellectual property rights and trade secrets to natural or legal persons in certain third countries may be prohibited altogether. The goods-related restrictions applicable to individual third countries are to be listed in Annex XXXIII, and as Art. 12f(3) REG 833/2014 states:

> 'Annex XXXIII shall only include third countries that have been identified by the Council as having systematically and persistently failed to prevent the sale, supply, transfer or export to Russia of goods and technology, as listed in that Annex, exported from the Union, despite the Union's prior outreach and assistance to the country in question.'

28 Council Regulation 2023/1214/EU of 23 June 23 amending Regulation 833/2014/EU concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2023 L 159 I/1.

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In the recitals to Regulation 2023/1214/EU, the Council provides lengthy explanations of the conditions under which third countries can be included in Annex XXXIII. According to these recitals, listing should be used as an 'exceptional, last-resort measures' against third countries 'whose jurisdiction is demonstrated to be at a continuing and particularly high risk of being used for circumvention' and where neither 'bilateral and multilateral cooperation through diplomatic engagement with, and the provision of increased technical assistance' to the respective third countries nor individual measures against individual PEB in those countries can effectively prevent the circumvention of EU sanctions.

Art. 12f REG 833/2014 represents a departure from the principle that EU export control law is linked to the export of an item from the EU and not to the 'nationality' of an item. Even without prior collusive collaboration with an EU person for the purpose of circumventing the EU sanctions against Russia, the onward delivery of certain goods that were previously exported from the EU to Russia is prohibited, and entire states can be subjected to trade restrictions if they do not take effective measures to enforce the EU sanctions relating to goods on their territory. Consequently, it is no longer only EU companies that are prohibited from (indirect) exports to Russia, and individual third-country companies that face consequences if they participate in sanctions circumvention. Instead, the EU's export control restrictions with regard to Russia can also be 'imposed' on third countries in the form of re-export control restrictions. This bears resemblance to the US re-export control restrictions and their risk-based classification of countries into country groups.[29] So far, the EU has refrained from including third countries in Annex XXXIII, presumably in recognition of the sensitivity of the issue in terms of foreign policy.

3. Obligations for EU Companies to Exert Influence on Third-Country Companies

In addition to the possibility to exert direct influence on third-country PEB and governments – which have so far been used only very cautiously – the EU's efforts to apply its sanctions as widely as possible increasingly focus on obliging EU companies to demand compliance with EU sanctions from their third-country contractual partners and subsidiaries.

29 Suppl. 1 to Part 740 EAR.

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a) 'No Russia' Clause

The obligation of EU companies to enforce EU sanctions law extraterritorially against third-country companies was first introduced as part of the 12th sanctions package adopted on 18 December 2023 and expanded in the course of the 14th sanctions package adopted on 24 June 2024.

Pursuant to Art. 12g REG 833/2014, EU persons are obliged to contractually prohibit the re-exportation to, or for use in Russia when selling, supplying, transferring, or exporting certain sensitive sanctioned items to most third countries and to ensure that the contractual agreement contains appropriate remedial measures in the event of a breach. According to FAQ 6 of the European Commission's FAQ[30] on the 'No Re-Export to Russia' clause, such appropriate remedial measures require the provision of a contractual penalty. In addition, the contractual partner must be obliged to undertake its best efforts to ensure that the purpose of the 'No Russia' clause is not frustrated by any third parties further down the commercial chain, including by possible resellers.

Consequently, Art. 12g(1) REG 833/2014 stipulates restrictions that are comparable to the re-export control restrictions under the EAR.[31] Just like under US law, the items-related restrictions shall no longer be linked to the export from the EU, but shall also apply to all future re-exports of goods that were exported from the EU at any point in time. The EU restrictions shall therefore be linked to the 'nationality' of the items, and the classification as 'EU item' will not be lost even in the event of subsequent re-exports. This represents a significant expansion of the scope of EU sanctions and a move closer to US re-export control restrictions.

However, a key difference from the US (re-)export control restrictions under the EAR is that the latter are legal prohibitions against non-US persons, which are enforced by the US authorities through criminal and civil penalties. The EU, on the other hand, shifts the obligation to enforce EU sanctions extraterritorially to EU economic operators by requiring

30 The European Commission has published an extensive list of FAQs on the interpretation of the EU sanctions against Russia. The Commission Consolidated FAQs on the Implementation of Council Regulation No. 833/2014 and Council Regulation No. 269/2014 are available online under <https://finance.ec.europa.eu/document/download/66e8fd7d-8057-4b9b-96c2-5e54bf573cd1_en?filename=faqs-sanctions-russia-consolidated_en.pdf>, last access 11 March 2026. These FAQs are intended to ensure uniform application of EU sanctions against Russia and to provide EU economic operators with practical guidance. They are, however, not legally binding.

31 See Sec. 734.14 and 736.2(b)(1) EAR and the re-export control restrictions in Part 746 EAR.

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them to enforce re-export control restrictions based on contractual provisions.

As part of the 14th sanctions package adopted on 24 June 2024, the obligation to implement a 'No Russia' clause was extended by imposing an additional obligation on EU economic operators through the newly-inserted Art. 12ga REG 833/2014, which requires these operators to contractually prohibit third-country contractual partners from using intellectual property rights or trade secrets related to goods listed in Annex XL to REG 833/2014 in connection with the delivery of Annex XL goods to Russia or their use in Russia, and to contractually oblige the third-country contractual partner to prohibit potential sublicensees from doing so as well. This provision ultimately amounts to a FDPR for Annex XL goods to be enforced contractually by EU economic operators, as the export of certain goods produced outside the EU on the basis of EU know-how to Russia is to be prevented.

b) 'Best Efforts' Obligation

A further significant extraterritorial extension of EU sanctions was brought about by Art. 8a REG 833/2024, which was added as part of the 14th sanctions package adopted on 24 June 2024. These impose an obligation on EU persons to

> 'undertake their best efforts to ensure that any legal person, entity or body established outside the Union that they own or control does not participate in activities that undermine the restrictive measures provided for in this Regulation'.

Compared to the original wording of Art. 8a REG 833/2014, which ultimately did not get incorporated into the final version of the 14th sanctions package, the extraterritorial effects have been significantly weakened. In the original draft, Art. 8a read:

> 'Natural and legal persons, entities and bodies shall be presumed to be responsible for any actions frustrating the provision of this Regulation that are performed by a legal person, entity or body established outside the Union that they own or control.'

This original wording would have meant that EU companies would have had to require their third-country subsidiaries to comply fully with EU sanctions law to avoid violating EU sanctions themselves.

The current wording only requires 'best efforts' which shall be understood 'as comprising only actions that are feasible for the Union operator in view of its nature, its size and the relevant factual circumstances, in particular the

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degree of effective control over the legal person, entity or body established outside the Union'.[32]

Although Art. 8a REG 833/2024 – as well as the similar-worded Art. 15a REG 269/2014, which was inserted with the 16th sanctions package adopted on 24 February 2025 – ultimately seeks to extend the EU sanctions against Russia to third-country subsidiaries of EU parent companies, it remains unclear what exactly is required of EU parent companies.

c) Ensuring the Implementation of a Risk Management System by Third-Country Subsidiaries

While scope and content of the 'best efforts' obligation and the consequences for EU parent companies that fail to comply remain unclear, Art. 12gb(3) REG 833/2014, which was also inserted in the course of the 14th sanctions package adopted on 24 June 2024, is more explicit in this regard.

Pursuant to Art. 12gb(1) REG 833/2014, EU economic operators that sell, supply, transfer, or export common high priority items as listed in Annex XL or sensitive goods listed in Annex XLVIII to REG 833/2014 (also) to third countries that are not Annex VIII partner countries, are required to identify and assess the risk of exportation to, or for use in Russia and to implement appropriate policies, controls, and procedures to mitigate and manage effectively these risks of exportation.

Pursuant Art. 12gb(3) REG 833/2014, EU economic operators are also required to ensure that legal PEB established outside the EU that are owned or controlled by them and that sell, supply, transfer, or export goods listed in Annex XL or Annex XLVIII to REG 833/2014 also comply with the requirements of Art. 12gb(1) REG 833/2014.

Unlike Art. 8a REG 833/2014, this is an obligation to achieve a specific result and not merely an obligation to undertake an effort. EU economic operators are only exempted from this obligation if they are unable to exercise control over a legal PEB due to reasons that they did not cause themselves (Art. 12gb(4) REG 833/2014).

The new Art. 12gb(3) REG 833/2014 is clear in its extraterritorial thrust. Third-country subsidiaries must be obliged by their EU parent companies not to supply certain goods to Russia, even if these have no nexus to the EU,

32 Recital 30 of Regulation 2024/1745/EU of 24 June 2024 amending Regulation 833/2014/EU concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2024 L 1745.

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and even if no EU person is involved in the transaction. The EU thus intends to enforce compliance with EU sanctions from third countries (once again) in such a way that it does not place the obligation directly on the third-country subsidiaries, but on the EU parent companies. Ultimately, however, EU parent companies have no choice but to actively intervene in the business activities of their subsidiaries and oblige them to comply with certain EU sanctions legislation, even if there is no EU nexus, to avoid exposing themselves to the risk of criminal or administrative offenses. The new Art.12gb(3) REG 833/2014 thus represents a clear departure from the EU's previous position that sanctions shall not have extraterritorial effect.

III. Concluding Reflections

Given the legislative developments in the gradual expansion and tightening of EU sanctions against Russia, the EU itself no longer meets its own principle – that sanctions are not to be applied extraterritorially. However, while the US publicly advocates the view that it has the right to apply its sanctions extraterritorially, the EU has never formally abandoned its position that sanctions must not be applied extraterritorially. Instead, it uses a 'trick' to maintain the appearance of non-extraterritoriality of its own sanctions. While the US punishes violations of its (re-)export control restrictions and the causing of a US person to violate US sanctions with criminal and civil sanctions, the EU primarily imposes the obligation to enforce EU sanctions extraterritorially on EU economic operators by requiring them to enforce re-export control restrictions on the basis of contractual provisions. Such an approach by the EU to impose extraterritorial enforcement of EU sanctions law primarily on EU economic operators is to be rejected. The enforcement of EU sanctions falls within the competence of the EU Member States and must not be passed on to private actors. If the EU seeks to apply its sanctions extraterritorially, in deviation from its previous legal position, it should communicate this openly, as the US does, and ensure enforcement through the authorities of the Member States.

Whether the extraterritorial application of sanctions – albeit understandable in terms of intention – is ultimately desirable remains doubtful. Since the imposition and enforcement of sanctions for serious violations of international law such as Russia's aggression against Ukraine is not possible at the international level due to the current state of international institutions, the EU ultimately has no choice but to either apply its sanctions extraterritorially or to accept that they only have a limited effect. In view of the gravity of

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Russia's violation of fundamental principles of international law, the EU's action appears justified. In the long term, however, the EU's actions could weaken international law.

States and groups of states may have different motives for seeking to maximise the impact of their sanctions, which may not be shared by other states and groups of states. For example, many Arab states have attempted to enforce an extraterritorial boycott against Israel, against which many Western states have enacted defensive legislation. China, too, is increasingly attempting to apply its own export control laws and sanctions extraterritorially. The extraterritorial application of sanctions law could ultimately lead to the fragmentation of world trade in such a way that trade is only possible within certain like-minded states. Furthermore, sanctions could be used by economically strong countries as an excuse to impose trade rules on economically weak countries. Consequently, although the EU's intention behind the extraterritorial application of its sanctions against Russia is to enforce international law, this could ultimately accelerate the deterioration of the rules-based international order.

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Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Viktor Bruns and the Orderly Order: Reflections on 'Völkerrecht als Rechtsordnung'

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I. Introduction

'International law is a legal system for the community of states, a system of legal principles that are interrelated in an orderly context.'[1] With this

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1 'Das Völkerrecht ist eine Rechtsordnung für die Gemeinschaft der Staaten, ein *System* von Rechtssätzen, die untereinander in einem *Ordnungszusammenhang* stehen' (my emphasis). All translations from German are mine (except otherwise noted), often quite liberal.

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sentence, Viktor Bruns, the founding Director of the Kaiser Wilhelm Institute for Comparative Public Law and International Law, opened his article 'International Law as a Legal Order' ('Völkerrecht als Rechtsordnung').[2] The article marked the launch of a new journal, the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV, English title: Heidelberg Journal of International Law, HJIL). The first issue, which contained Bruns' programmatic piece, was published in 1929, five years after the Institute took up its work.

In this contribution, I critically assess the scholarly pursuit of legal order that Bruns proclaimed as the research programme of his institute, a programme that then was executed by generations of scholars.[3] In this light, the topic of my paper is not the status of the law as such, but the scholarly ordering claims. While Bruns and his disciples did not explicitly acknowledge such effects, their scholarship not only 'finds' or identifies order in the law but at the same time actively contributes to creating or even imposing order, as will be shown.

Section II clarifies the key concepts, 'order' and 'system'. Section III examines how the quest for legal order resonates in our times of shifting world order. Section IV analyses Bruns' approach and arguments in their historical context. Based on archival material, the underlying motive of conducting lawfare for Germany is unveiled. Section V discusses the most important critiques (practical, epistemic, and political) of the scholarly pursuit of ordering the law, and discusses how 'order' might convey a modicum of thin legitimacy to international law. Section VI shows how the recent International Court of Justice (ICJ) Climate Advisory Opinion performed an 'ordering' task and thereby strengthened international (climate) law. The paper concludes in Section VII that the scholarly programme of ordering international law is not only for the dustbin of history, but has a (modest) value in our era in which the international legal and political order seems to unravel.

2 Viktor Bruns, 'Völkerrecht als Rechtsordnung I', HJIL 1 (1929), 1-56. The follow-up was Viktor Bruns, 'Völkerrecht als Rechtsordnung II', HJIL 3 (1933), 445-487. Bruns was the director of the Kaiser Wilhelm Institute from 1924-1943.

3 In a companion contribution, I compare Bruns' vision to the one espoused by his successor Hermann Mosler and ask to which extent their approaches foreclosed or facilitated a critique of the law (Anne Peters, 'International Law as a Legal Order: 1929 – 1976 – 2025', Max Planck Law Perspectives, 8 August 2025). I re-use some passages from that blogpost in this article.

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II. Legal Order and Legal System

In 'Völkerrecht als Rechtsordnung', Viktor Bruns did not explain in any detail what he understood by 'legal order'. He only mentioned that a legal order is not an '*unstructured* compilation of rules and institutions *unrelated* to each other'.[4] He also postulated that the international legal order was an 'order in a twofold sense': It (supposedly) creates order in social reality precisely through its own (internal) order.[5] Put differently, Bruns argued that the existence of this inner structure is indispensable for enabling the law – particularly international law – to fulfil its task of 'ordering' the world. Bruns saw the 'imperative of peace' as 'the essence of the legal order'.[6] For making and securing peace, dispute resolution through (arbitral) courts was central – without it there could be neither order nor law at all.[7] Both underlying premises are debatable: many observers wonder whether, to what extent, and how international law is conducive to the stabilisation and pacification of international relations. It seems even more problematic to claim that *the ordering* of the law would contribute to order in the real world, too. I will come back to this below (section V. 3.).

Otherwise, Bruns' conceptualisation of order as 'structured law' resonates today. Dana Burchardt writes that 'law is indeed characterized by a multitude of interrelations between legal norms, which cause the interacting legal norms to form a structured entity. In this case, individual legal norms transcend themselves, creating a structure that is more than its elements.'[8] This is a helpful circumscription of legal order in a broad sense, as a 'structured entity'. Such type of 'order' is an inherent feature of law, simply because legal norms coexist and interrelate.[9]

A more demanding, narrower conception of 'order' asks for a particular pattern, for an 'orderly order'. An orderly legal order is present when the rules and principles do not contradict each other (consistency) and when they are in normative terms compatible (coherency, sometimes also called 'harmony').[10]

4 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 10 (emphases added).

5 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 10.

6 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 26.

7 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 28.

8 Dana Burchardt, 'The Functions of Law and their Challenges: The Differentiated Functionality of International Law', GLJ 20 (2019), 409-429, (413).

9 Burchardt (n. 8), 413.

10 The terminology varies. I here follow Raphaël van Steenberghe, 'The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-Based Approach to Dealing with both the "Interpretation" and "Application" processes', Int' l Rev. of the Red Cross 104 (919) (2022), 1345-1396. 'Consistency' is also called formal coherence. See below text with notes 133-135.

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For example, three years before the launch of the ZaöRV, Alfred Verdross had postulated 'that international law is not merely a collection of individual fragments with no internal connection, but rather forms a *harmonious order* of norms anchored in a uniform basic order'.[11]

Such a demanding conception of order is mostly connoted with the word 'legal system'. For example, 'the effort to envision the various legal norms as arranged within a hierarchy, composing together a *coherent, logical order*' has been called the '*systemic vision*' of public international law.[12] In the fragmentation debate at the turn of the millennium, the fear was articulated that specialised courts and tribunals would 'develop greater variations in their determinations of general international law', which would 'damage the *coherence* of the international legal *system*'.[13]

Many traditional scholars with a doctrinal penchant use the word 'legal system', probably not with much thought given to possible differences between 'order 'and 'system'. James Crawford structured his General Course at the Hague Academy in three parts, with the headings: 'International law as law', 'International law *as a system*', and 'The rule of international law'.[14] In the Max Planck Encyclopedia of International Law, Rüdiger Wolfrum writes: 'International law is, as far as its sources and its foundation are concerned, not uniform. Nevertheless, it should be seen as *one system*'.[15] The very first sentence of a leading German textbook defines international law as follows: 'International law as the *legal order* of the international community – or, in a broader sense, of the international system – is especially close to the political realm […].'[16]

It seems that in those writings, the words 'order' and 'system' could be used interchangeably. Bruns himself in his programmatic article did so, already in the introductory sentence cited above.[17] Bruns missed saying much

11 Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926), V.

12 Eyal Benvenisti, 'The Conception of International Law as a Legal System', GYIL 50 (2008), 393-406 (393).

13 Jonathan I. Charney, 'Is International Law Threatened by Multiple International Tribunals?', RdC 271 (1998), 105-382 (347) (emphases added).

14 James Crawford, 'Chance, Order, Change: The Course of International Law. General Course on Public International Law', RdC 365 (2013) (emphasis added).

15 Rüdiger Wolfrum, 'International Law', in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (Oxford University Press, November 2006), para. 20 (emphasis added).

16 Jost Delbrück, 'Das internationale System der Gegenwart: Staatengesellschaft – Staatengemeinschaft – Rechtsgemeinschaft' in: Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht*, Band I/1 (2nd edn, de Gruyter 1988), 1-21 (1). In this opening sentence, 'international legal order' comes in one breath with 'the international community' which is also a German theme of predilection. See on the 'German' obsession with order and system below section V. 2.

17 See text with note 1.

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about the kind or degree of 'order' he was searching. But from the entire article it transpires that he was indeed seeking and proclaiming an 'orderly' order, a consistent and coherent order, indeed a 'system'.[18]

III. Revisiting Bruns in Times of a Global Shift of Order

The big question of this contribution is whether Bruns' ideas published almost one hundred years ago can inspire timely answers or whether his essay should rest in peace as a purely historic document. I submit that especially in the current era of a global shift of order, the ordering claims of Bruns (and his likes) deserve renewed attention.

1. Ordering the Law – and With it the World?

Importantly, in the contemporary period of shift of order, the idea of order refers both to international law and to the real world. This duality is a constant feature of all ordering debates, also in Bruns' paper. In most of the usages in international political and legal life, the 'order' of the law and the 'order' of the world have been easily conflated, and most catch-phrases seem to imply that law has some power to shape the economic and governance conditions on the ground.[19] In the widespread talk of 'international order', most observers seem to suggest that this 'order' is a matter of degree, that the quest for 'order' is a never-ending task – in short: that 'order' is more an ideal than a reality.

In the 1960s and 1970s, in the ultimately lost struggle for a 'New International Economic Order', international law was seen by the states emerging out of decolonisation as a vehicle for the transformation of the global economic system.[20] With regard to the young European Union (then still called European Economic Community), the European Court of Justice employed the topos of the 'legal order' and (synonymously) 'legal system'

18 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 3, 10, 44. Bruns also conflated the scholarly 'system' with the legal system (e. g. on p. 2 and 8). Overall, Bruns' goal was no less than 'to find a system and method for international law' (Bruns, 'Völkerrecht als Rechtsordnung I', 8).

19 See on the 'realist' scepticism in this regards below text with notes 101-102.

20 See e.g. 'Declaration on the Establishment of a New International Economic Order', UN Doc. A/RES/S-6/3201 of 1 May 1974; 'Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order', UN Doc. A/RES/41/73 of 3 December1986.

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for strengthening the new organisation's legal existence outside general international law.[21] In the 1980s, the new United Nations Convention on the Law of the Sea (UNCLOS) was called a 'world order treaty', with the connotation that it set up a comprehensive legal regime embodying the international or global public interest.[22] After the dissolution of the socialist block and in the context of the first UN Security Council-authorised military operation against Iraq, US President George H. W. Bush coined the phrase of the 'new world order':[23] 'A world where the United Nations, freed from cold war stalemate, is poised to fulfil the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.'[24] The slogan of the new world order was 'used and overused to refer to the post-9/11 […] geopolitical landscape', wrote Anne-Marie Slaughter, who set out her own conception of a '*New World Order*' to describe 'a system of global governance that institutionalizes cooperation and sufficiently contains conflict', a 'web of links between disaggregated state institutions'.[25]

Generations of political scientists working in a 'realist' paradigm that focuses on power politics in international relations have downplayed or outrightly denied any power of the legal order to contribute to order in the real world. In contrast, the more 'idealist' or legalist analysts assume that the law has some (however weak) impact on the workings of international relations, and thus deploys some (modest) ordering power, and this was also Bruns' view. I will come back to the controversy below in section V. 3. Against the background of such diverging assessments about the relevance and notably

21 The ECJ spoke of a '*new legal order* of international law', ECJ, *Van Gend & Loos v. Administratie der Belastingen*, judgement of 5 February 1963, case no. C-26/62, ECLI:EU:C:1963:1, ECR 1963, 12 (emphasis added). 'By contrast with ordinary international treaties, the EEC Treaty has created *its own legal system.*' ECJ, *Costa v. ENEL*, judgement of 15 July 1964, case no. C-6/64, ECLI:EU:C:1964:66, ECR 1964, 593 (emphasis added).

22 Christian Tomuschat, 'Obligations Arising for States Without or Against their Will', RdC 241 (1993-IV), 195-374, 247 and 269.

23 George H. W. Bush, 'Address Before a Joint Session of Congress on the Persian Gulf Crisis and the Federal Budget Deficit', 11 September 1990, in: Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: George H. W. Bush*, Book II (1990), 1218-1222 (1219); George H. W. Bush, 'Address Before a Joint Session of the Congress on the State of the Union', 29 January 1991 in: Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: George H. W. Bush*, Book I (1991), 74-80 (74 and 79).

24 George H. W. Bush, 'Address Before a Joint Session of Congress on the Cessation of the Persian Gulf War', 6 March 1991 in: Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: George H. W. Bush*, Book I (1991), 218-222 (221).

25 Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004), quotes at 15.

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the 'ordering' power of international law, we can concede that – especially in comparison to domestic law – 'international law as a whole has a weak character of order',[26] if at all. It is probably adequate to say that international law is not a full-fledged order but an 'amalgam of orders, built around often inconsistent and competing norms, principles, and political projects',[27] at best a 'superficial unified global pattern of political and legal order for the whole of humankind'.[28] The pattern is that this order aspires to be global ('universal') but is in many ways divided or fragmented along functional, regional, ideational, and economic lines. The international order is especially shaky nowadays, as will be discussed next.

2. Shift of Order

There is the general sentiment that the so-called 'liberal' order of international law and of the world, as established after the second world war, is waning or collapsing.[29] Due to shifts in power and ideas, the 'liberal international order' is under enormous strain.[30] The strain results from the dual hacks against both pillars that normally uphold a given legal order's functioning: its effectiveness and its legitimacy. Many of its rules and principles (especially in the realm of free trade and human rights), are not or no longer appreciated by many players (the problem of legitimacy). The legitimacy crisis is all the more serious as it is fuelled by an unholy alliance of actors from different, even antagonist ideological camps, ranging from socialism/Marxism to far right nationalism and conservatism. Since 6 January 2025, the 'enthronisation' of Donald Trump as the 47th President of the United States,

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26 Burchardt (n. 8), 422.

27 G. John Ikenberry, 'Liberal Internationalism and Cultural Diversity', in: Andrew Philipps and Christian Reus-Smit (eds), *Culture and Order in World Politics* (Cambridge University Press 2020), 137-158 (137).

28 Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press 2002), 122.

29 See for many and from various perspectives: G. John Ikenberry, 'The End of Liberal International Order?', Int'l Aff. 94 (2018), 7-23; Hanns W. Maull (ed.), *The Rise and Decline of the Post-Cold War International Order* (Oxford University Press 2018), with the main claim that we are in a liberal order 2.0; Anne Orford, 'The Sir Elihu Lauterpacht International Law Lecture 2019: The Crisis of Liberal Internationalism and the Future of International Law', Austr. Yb. Int'l L. 38 (2020), 3-28; Rebecca Adler-Nissen and Ayse Zarakol, 'Struggles for Recognition: The Liberal International Order and the Merger of Its Discontents', IO 75 (2021), 611-634; Monika Polzin, 'The Global Illiberal Dawn: Toward a Definition of "Authoritarian International Law Norms"', Nord. J. Int'l L. 93 (2024), 237-266.

30 Anne Peters, 'International Law and its Scholarship in the Times of Monsters', LJIL (forthcoming).

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it is moreover the principal architect of the international liberal legal order who is tearing it down from within. And even those rules and principles that enjoy wide recognition such as the prohibition of the use of force, territorial integrity, and self-determination, to name a few, are not complied with, and violations are not followed up by sanctions (which manifests the problem of effectiveness).

At the same time, an illiberal or anti-liberal 'New World Order' seems to emerge. China, together with its junior partner Russia, is openly articulating this – most recently in the 2025 Tianjin Declaration of the Shanghai Cooperation Organisation which begins with the statement that '[t]here is a growing desire to create a more just, equitable and representative multipolar world order'.[31] Indeed, China has been 'quietly crafting the initial building blocks of a so-called parallel order that is already now complementing and potentially challenging and superseding the current international legal order […].'[32] This parallel order – which might in due course become a 'counter order' – is being built up with institutions such as the New Development Bank, the Asian Infrastructure Investment Bank, the Road and Belt Initiative, besides the above-mentioned Shanghai Cooperation Organisation. The normative conflict between the old 'liberal' international order and the new 'illiberal' order has become obvious in the 2024 Convention on Cybercrime sponsored by Russia.[33] Civil society organisations such as Human Rights Watch have warned that the vaguely worded convention endangers journalists, activists, researchers, and dissenters, can be misused to imprison bloggers or block entire platforms, and therefore fails to comply with the liberal international

31 SCO, 'Tianjin Declaration of the Council of Heads of State of the Shanghai Cooperation Organisation' of 1 September 2025, <http://en.kremlin.ru/supplement/6376?utm_source=substack&utm_medium=email>, last access 12 March 2026). See the Prior Sino-Russian Declarations: Ministry of Foreign Affairs of the Russian Federation, 'Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions, unofficial translation', 23 March 2021; President of Russia, 'Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development', 4 February 2022; Joint Statement Between the People's Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership of Coordination for a New Era on the Occasion of the 75th Anniversary of the Establishment of Diplomatic Relations Between the Two Countries, 16 May 2024.

32 Oliver Stuenkel, *Post-Western World: How Emerging Powers are Remaking Global Order* (Cambridge University Press 2016), 10 and 203.

33 United Nations Convention Against Cybercrime: Strengthening International Cooperation for Combating Certain Crimes Committed by Means of Information and Communications Technology Systems and for the Sharing of Evidence in Electronic Form of Serious Crimes of 24 December 2024, UN Doc. A/RES/79/24, (not yet in force).

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order's freedom of expression standards.[34] I submit that – exactly in this constellation – reflections on international law as a legal order are urgent, and that Bruns therefore deserves to be revisited.

IV. Re-Reading Bruns in Context

The political context of Bruns' programmatic article of 1929 was marked by Germany's defeat in the First World War. The intellectual context was lively: new trends in other fields emerged which would later become highly significant for international law and scholarship. The Muslim Brotherhood, whose offshoot Hamas is today designated as a global terrorist organisation,[35] was founded in 1928. In the same year, Margret Mead published *Coming of Age in Samoa*, a work that would later become important in debates on cultural relativism and legal pluralism.

1. Ordering the Law as a Doctrinal, Practice-Oriented, and Traditionalist Activity

Viktor Bruns, given his academic and social connections, was likely aware of the spectrum of the above mentioned contemporary intellectual trends in the humanities and social sciences.[36] Yet, he deliberately opted for a strictly doctrinal approach, eschewing inter- or transdisciplinary contextualisation or methods. For Bruns, arguments had to be system-conforming in order to be accepted as valid. His effort to establish the *orderliness* of international law was an exercise situated *inside* the law as an intellectual edifice. It took the form of 'proving' the absence of legal gaps and identifying ('necessary') general legal principles.[37] Bruns did not offer any theoretical underpinning, his approach was based on legal logic and was self-referential, with the arguments entirely dependent on their own legal premises. Bruns dismissed several lines of reasoning as legally 'unthinkable' or inconceivable in legal terms, while his own thoughts were supposedly '*a priori*' or 'in accordance

34 Open letter of 22 December 2021 to the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communication Technologies for Criminal Purposes, <https://www.hrw.org/news/2022/01/13/letter-un-ad-hoc-committee-cybercrime>, last access 12 March 2026.

35 From the EU side: Council Common Position 2003/651/CFSP of 12 September 2003, 42; Council Decision 2003/646/EG of 12 September 2023, 22.

36 I thank Alexandra Kemmerer for this observation.

37 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 27 and passim.

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with the 'essence' ('*Wesen*') of international law, or of order, and thus correct.[38]

Bruns' doctrinal approach was a response to the flourishing of international and transnational arbitration, which produced extensive case law to address the Great War's consequences, particularly in determining compensation claims against the German state. These arbitral courts made the international law 'material' and 'tangible', according to Bruns.[39] Yet, 'today's systems' (by which Bruns meant scholarly systems) were insufficient to 'capture this legal material' and weave it into a fabric of law. Accordingly, Bruns tried to 'fulfil the most important task of scholarship, which is to be ahead of the courts' work and reveal to them [to the courts] *the law's systemic interconnections in a complete legal order*'.[40] Bruns' quest for order was thus primarily practice-oriented (which goes on par with doctrinalism[41]). This is underlined by the many examples he took from treaties and court rulings.

Hermann Mosler, the third director of the Max Planck Institute as it was called by then, regarded Bruns' argument for the coherence of the international legal order, constituted 'through rational argumentation and state practice', as 'one of the main achievements of Bruns' work'.[42] However, the purely doctrinal work (in the style of Bruns) had little (if any) critical bite.[43]

From international law's quality *as a legal order*, Bruns deduced that it is international law itself that positively assigns competences to states and that the states' 'right to personality and freedom' must be 'generally limited'.[44] (Bruns' vision was a strictly inter-state legal order in which non-state actors did not count.) The states' right to freedom is intrinsically bounded because it needs to respect the rights of 'the other members of the community which are equal in rank'. Otherwise 'legal order would not be conceivable'.[45] Bruns concluded that states could not (as a matter of legal logic) enjoy a general freedom of action, and he drew this conclusion from his concept of legal order.[46] Put differently, Bruns theorised that it is international law which

38 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 4, 6, 7, 17, 19, 31, 36, 37, 39.

39 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 2.

40 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 2 (emphasis added).

41 See text with notes 109-111.

42 Hermann Mosler, 'Völkerrecht als Rechtsordnung', HJIL 36 (1976), 6-49 (12-13). Hermann Mosler succeeded Carl Bilfinger who was the second director of the Institute from 1943-1954.

43 See below section V. 4. on the inherently conservative nature of the 'systemic approach' to law.

44 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 54.

45 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 54.

46 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 11, 22, 33, and passim.

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defines the states' powers and their limits.[47] Bruns thereby rejected the *Lotus* principle of the Permanent Court of International Justice (PCIJ), which presumed a general freedom of action for states unless prohibited by international law.[48]

With this idea, Bruns positioned himself – as his successor Mosler put it – against 'the contemporary proponents of the doctrine of absolute state sovereignty'.[49] Today, some voices in the (German) literature tend to follow Bruns' position, 'derived' from the nature of international law as a legal order, arguing that the states are competent to act on the international plane or with extraterritorial repercussions only when international law allows this.[50] By contrast, in its *Kosovo*-opinion, the ICJ reverted to the *Lotus*-style presumption that states are free to act, also with extraterritorial effects, if not specifically prohibited by international law.[51]

It may well be that Bruns' argument – that state powers are constituted by international law – was a 'progressive idea for the time'.[52] However, Bruns was clearly not progressive or visionary in his choice of scholarly themes. He failed to address key international law issues that were emerging in 1929 and remain central today: the prohibition of the use of force was absent in his article, despite the Briand-Kellogg Pact coming into force that year. Bruns did not mention the law of armed conflict, although the Red Cross movement was formalised in 1929, and two Geneva Conventions were signed in the same year. Bruns did not discuss human rights despite likely having been aware of the *Institut de Droit International*'s ongoing work on a 'Declaration of the International Rights of Man', published on 12 October 1929.[53] Bruns made hardly any mention of the League of Nations either, except in the context of a lengthy discussion of the *domaine réservé* of states.[54] His article lacks any reflection on the potentially innovative character of this young international organisation and its work.[55] Bruns was not committed to the

47 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 9-11.

48 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 12, 13, 22, 33, 54. PCIJ, *The Lotus Case* (*France v. Turkey),* judgement of 7 September 1927, PCIJ Ser. A, No. 10 (1927).

49 Mosler (n. 42), 13.

50 Ulrich Fastenrath, *Lücken im Völkerrecht* (Duncker & Humblot 1991), 245.

51 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports 2010, 403, para. 56.

52 Again in the words of his successor Mosler (n. 42), 9, 12.

53 Institut de Droit International, Annuaire 35 (1929), 298-300.

54 See Art. 15(8) of the Covenant of the League of Nations of 19 June 1922 (108 LNTS 188); Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 40-50.

55 See, in contrast: Paul Guggenheim, *Der Völkerbund: Systematische Darstellung seiner Gestaltung in der politischen und rechtlichen Wirklichkeit* (B. G. Teubner 1932), 273-274 on the new 'League of Nations method'.

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'Geneva spirit'.[56] Thus any later critique of interwar international law scholarship as naively idealistic does not apply to him.[57]

2. Ordering the Law as a Tactic in the Lawfare for Germany

Bruns was not a legal idealist, and he was highly attentive to the political moment. After the lost war, Germany was weakened as a state, even regarded as a *pariah* among nations, and was struggling to regain its place in the community of civilised nations. In this constellation, international law could be used to advance German interests on the international political stage. At the occasion of the Institue's 50th anniversary, Director Hermann Mosler explicitly acknowledged that the Institute as founded by Viktor Bruns was motivated by 'the struggle against the Treaty of Versailles, which was perceived as unjust'.[58] 'The legal means provided for in the treaty itself were to be exhausted.' 'The Institute owes its existence largely to the need *to take part in the struggle* with solid international legal arguments based on an extensive documentation.'[59]

This ambition and objective is amply confirmed both in official (non-public) correspondence and in a private diary. It was Bruns' intention that research conducted at the Kaiser Wilhelm Institute should primarily if not exclusively serve German foreign policy interests, and that the new journal would be its platform. In a 1925 draft memorandum on the Kaiser Wilhem Institute, Viktor Bruns noted: 'Anyone familiar with the *highly organised scholarly propaganda of our neighbours* to the west and east knows how necessary it is to systematically monitor the academic statements made abroad. They know how to influence academic opinion in their favour long before a legal issue leads to diplomatic negotiations or is submitted to an international court for a decision. For example, not only have several monographs and entire series of journal articles been written in France over the past year in favour of Poland in its relationship with Danzig, but a number of

56 Joseph Kunz, 'The Swing of the Pendulum: from Overestimation to Underestimation of International Law', AJIL 44 (1950), 135-140 (136-137); see also Robert de Traz, *L'esprit de Genève* (Bernard Grasset 1929).

57 Edward H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (first published in 1946; 2nd edn, MacMillan 2001), 29-31. Wilhelm Grewe, who wrote his main work utilising the Kaiser Wilhelm Institute's library, sharply attacked the 'normativistic hypertrophy of international law' in the inter-war period, which was eventually lost in the swirl of the second world war: Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (2nd edn, Nomos 1988), 717.

58 Mosler (n. 42), 14.

59 Mosler (n. 42), 14 (emphasis added).

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international law experts in England and the United States have also represented the Polish position. The Danzig postal dispute clearly demonstrated that such works have a far greater impact on an international court than the expert opinions submitted for a case already pending. *It is precisely here that the institute will have a particularly important task to perform in the interests of Germany*.'[60] In his annual report 1928/29, Bruns wrote: 'Only in this way will it be scientifically possible to promote German ideals of law and justice in the international formation of concepts of law and justice.'[61]

These ideas did not remain within in the realm of the Kaiser Wilhelm Society, but were deposited with the Foreign Office. In 1925 Bruns expounded to a consular officer his projected network of correspondents, to be employed by the Institute. Konsul Mundt's *note verbale* written for his superiors at the AA explains: 'Prof. Bruns wants to use this to counter French scholarly propaganda in this field. The correspondents are also to write expert reports on legal issues of international interest, which, if necessary, can represent the German position abroad *and be used to Germany's advantage*.'[62] To this end, the Foreign Office distributed the ZaöRV to German embassies abroad with the request to disseminate in the receiving states: 'In the interests of German scholarship and the dissemination of German views on international legal issues, it would be highly desirable for the journal to become known among interested circles of foreign legal scholars and relevant foreign authorities.'[63] Interestingly, Bruns' objectives did not change after the Nazis came into power. In his correspondence with the legal department of the Geman Foreign Office (*Auswärtiges Amt*) asking for subsidies for printing the ZaöRV, Bruns still in 1938 underlined that the journal serves 'the dissemination of the German standpoint abroad'.[64]

With this appeal to disseminate the German standpoint, Bruns did not merely make a strategic argument in order to extract some funding for his Institute, but articulated his genuine ambition based on his personal convictions, as his wife's personal diary proves. In October 1924 (some months before the actual establishment of the Kaiser Wilhelm Institute) Marie Bruns

60 Viktor Bruns, 'Memorandum on the Institute of 30 October 1925', in: PA (Politisches Archiv) AA (Auswärtiges Amt) R 54245, emphases added. I thank Dr Robert Stendel and Dr Richard Dören for sharing their archival research with me.

61 Institute for Comparative Public law and Public International Law, Report on the Fiscal Year 1928/1929 by Viktor Bruns, academic work programme, PA AA R 54245, 1.

62 Note verbale of 12 October 1025 on a conversation between Viktor Bruns and a consular officer (Konsul Mundt) on 7 October 1925, PA AA R 54245, 2 (emphasis added).

63 Letter of the AA of 18 December 1930 to selected German representations abroad, PA AA R 54245.

64 Viktor Bruns, Letter to AA, Legal Department, of 30 May 1938 in: PA AA R 43147 KWI Volk, p. 2.

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noted: 'In the coming year, Viktor will found a journal, for which his fellows and assistants will write articles on the questions of the time. After all, one had to witness the publishing of essays on international law cases of the greatest relevance to Germany in the Paris journals every other week – while the country it was really about, did not raise its voice. *If Germany's voice is cast aside by the Entente time and time again, it's certainly better than to remain silent like a slave in chains,* who does not dare to even move.'[65]

Understandibly, the official (self-)representation of the Kaiser-Wilhelm Institute was a scholarly one, eclipsing the politics. Bruns' seminal article made explicit the Institute's task of collecting and systematising the material, while avoiding obvious instrumentalism and epistemic nationalism. Also the already mentioned post world war II Director Hermann Mosler hastened to say, after explaining the historical origins, that the Institute was not designed to be the handmaiden of German politics: 'the Institute was not an auxiliary instrument of the *Reich*-government, but an Institute committed to basic research', tasked first of all with collecting the necessary materials.[66] However, the sources cited above cast a shadow of doubt on the purity of the scholarly interests. They provoke the question whether the idea of a 'legal order' was merely camouflage to make the struggle for German interests more effective.

And did the objective 'to promote' 'scientifically' the 'German ideals of law and justice'[67] on the international plane demand a conceptualisation of international law as a legal order? One might consider that international law could well be employed strategically by Germany and German scholars without being 'orderly'. However, to some degree, the mantle of scienticism and logic, conveyed by the focus on order, can sharpen the weapon that is law, exactly because it shrouds to some extent the strategic considerations undergirding interpretations and legal arguments.[68] It is probably fair to conclude that Bruns' quest for order was not only 'organised scholarly propaganda' (to use his own words[69]), but had both scholarly and political motives. Be it as it may, the German perspective and instrumentalism is painfully obvious in the foreword of the newly founded journal. Here, Bruns identified as the 'main contemporary problems' the reparations issue, the

65 Philipp Glahé, 'Marie Bruns, A "Completely Unexpected Joy". Impressions from the Time of the Institute's Founding 1924-1926', MPIL#100, 25 October 2024 (transl. by Philipp Glahé; emphasis added). <https://mpil100.de/2024/10/eine-ganz-unverhoffte-freude-ein druecke-aus-der-gruendungszeit-des-instituts-1924-1926/>.

66 Mosler (n. 42), 14.

67 Bruns, Report on the Fiscal Year 1928/1929 (n. 61).

68 See also below section V. 4. on fake depoliticisation through ordering.

69 Bruns, Memorandum 1925 (n. 60) (on the 'neighbours to the west and east').

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interpretation of peace treaties, [and] the problem of [German] minorities'.[70] Globally, these were not necessarily the most important problems of the international law of the time, but they were in fact the most pressing questions Germany was faced with.

Bruns' manuscript of a lecture entitled 'International Law as a Legal Order' ('*Völkerrecht als Rechtsordnung*'), on which Bruns' article was based, reveals his militant posture plainly.[71] The manuscript concludes with the words: 'I think us Germans have everything to hope for from a victory of law, and nothing to fear.' Bruns sought to use international law as a weapon – lawfare for Germany.

V. Problems and Potential of Ordering the Law

Moving beyond Bruns and his time, the scholarly attempt of identifying and creating order in international law is confronted with epistemic, practical, political, and moral critique. This section discusses the most salient problems and the potential of the pursuit for legal order, especially in our times.

1. Legal Order as an Outdated Modernist and Western Concept?

A key objection against any ordering programme concerns the potentially flawed epistemics. Moving forward in a systematic fashion, 'being systematic' has been the quintessential modernist marker of science.[72] Along this line, Immanuel Kant wrote: 'Any doctrine, if it is to be a *system*, i. e., a whole of knowledge organised according to principles, is called science.'[73] Such focus on 'order' and 'system' as the hallmark of a 'scientific' approach was also present in the legal field: 'Legal scholarship must be systematic, or it is none', wrote Hans J. Wolff.[74] '[L]'élaboration de toute théorie scientifique présuppose une exigence de systématicité', according to Michel van de Kerchove

70 Bruns (n. 2), 'Foreword'.

71 Viktor Bruns, 'Völkerrecht als Rechtsordnung', unpublished manuscript (MPIL Archive 1927).

72 See only Alois von der Stein, 'System als Wissenschaftskriterium', in: Alwin Diemer (ed.), *Der Wissenschaftsbegriff: Historische und systematische Untersuchungen* (Verlag Anton Hain 1970), 99-107.

73 Immanuel Kant, *Metaphysische Anfangsgründe der Naturwissenschaft*, Werkausgabe Vol. 9 (Suhrkamp 1968), 11: 'Eine jede Lehre, wenn sie ein System, d. i. ein nach Prinzipien geordnetes Ganzes der Erkenntnis sein soll, heißt Wissenschaft' (emphasis added).

74 Hans J. Wolff, *Typen im Recht und in der Rechtswissenschaft*, Studium Generale 5 (1952), 195-205 (205): 'Rechtswissenschaft zumindest ist systematisch oder sie ist nicht!'.

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and François Ost.[75] In these statements, the two pursuits of applying an ordered, systematic approach and of creating order in the object of one's study (the law) are blurred. A recent overview of styles of international legal scholarship aptly sums up: 'Traditional approaches tend to describe the objective reality of international law as a given, and arguably perennial, form of order.'[76]

However, this modernist infatuation with being 'systematic' has been discredited in post-modern times. The search for system and order is said to be an illusion of enlightenment and a thinking-style that is woefully outdated. In their Dialectics of the Enlightenment, Theodor Adorno and Max Horkheimer castigated that approach severely: 'The Enlightenment only recognises as being and happening that which can be grasped through unity; *its ideal is the system* from which everything and anything follows. There is no difference between its rationalist and empiricist versions in this respect. Although the individual schools may have interpreted the axioms differently, the structure of unified science was always the same.'[77]

Critical theory not only discredits the 'modernist' forms of doing science but also the cultural relativity of all 'ordering'. A famous example of disparaging 'Western' order can be found in Michael Foucault's *Order of Things*. Here Foucault cites a taxonomy from 'a certain Chinese encyclopaedia', reported by Jorge Louis Borges.[78] In it, animals are regrouped as follows: a) animals belonging to the emperor, b) embalmed ones, c) tamed ones, d) sucking pigs, e) sirens, f) mythical ones, g) stray dogs, h) those included in this classification, i) those acting as if mad, j) innumerable ones, k) those drawn with a very fine brush of camel hair, l) and so on, m) those having just broken the flower vase, n) those looking like flies from far. This strange and irritating order has, through Foucault, become a prime example of non-western order, by which Foucault apparently wants to remind us of the relativity and cultural embeddedness of our (western) modes of ordering things, laws, institutions.[79] However, the Chinese order is purely fictional, an invention of Louis Borges himself, hence a 'western'

75 Michel van de Kerchove and François Ost, *Le système juridique entre ordre et désordre* (PUF 1988), 128.

76 Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford University Press 2016), 38.

77 Theodor Adorno and Max Horkheimer, 'Begriff der Aufklärung' in: Theodor Adorno and Max Horkheimer, *Dialektik der Aufklärung* (18th edn, S. Fischer 2009; original New York 1944; Fischer 1969), 9-49 (13) (my translation and emphasis).

78 Jorge Luis Borges, 'El idioma analítico de John Wilkins', in: Jorge Luis Borges, Otras inquisiciones (Sur 1985), 102-106 (104-105), quoting 'el doctor Franz Kuhn'.

79 Michel Foucault, *Les mots et les choses: Une archéologie des sciences humaines* (Gallimard 1966), 3.

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idea.[80] Some may consider this literary construction as yet another manifestation of preconceived notions of ostensibly 'Asian' logic, which we share when we adopt Borges' artefact as historically correct. Others may, on the contrary, take Borges' ingenious invention as a proof that Borges was able to transgress his (western) confines. In any case, being a fiction, the 'emperor's order' cannot authentically illustrate the cultural relativity of order.[81]

Moving beyond Foucault, in times that require a de-westernisation of international law and scholarship, the question might no longer be *which* order of international law but rather *whether* order at all. Drawing on the whole gamut of critical philosophies ranging from Jacques Derrida to Judith Butler, Jean d'Aspremont deplored a 'crude modernism in international legal thought'.[82] In contrast, his post-modernist approach insists that 'coherence – and the idea of unity on which it is built – is always bound to collapse under the weight of the normative presuppositions it is derived from.'[83] Therefore, 'any pursuit of coherence is bound to remain a fantasy', wrote d'Aspremont.[84]

In a similar vein, Michelle Staggs Kelsall found the focus on 'order' to be inherently problematic because she deems it a Western obsession that is, so she claims, not compatible with non-western cosmo-visions. Instead, Staggs Kelsall called for '*dis-ordering* international law'.[85] International law, disordered, would be 'an attempt to integrate non-liberal and largely non-Western norms, conventions and principles – determined with reference to a multiplicity of spatial orders existing over time – into international law'.[86] I agree with Staggs Kelsall that the international legal order needs to become more responsive to non-Western values and interests. It is also likely that determinants of order are culturally saturated. It is however implausible that 'order' as such is a Western construct. Especially Foucault's famous passage on the supposedly Chinese taxonomy that defies any 'order' is a hoax, as explained above.

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80 See Umberto Eco, *La ricerca della lingua perfetta nella cultura europea* (4th edn, editore Laterza 1993), 222.

81 Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Postmodernism', in: Armin von Bogdandy and Eberhard Schmidt-Aßmann (eds), *Theorising Comparative Public Law* (Nomos 2024), 89-129, 119-120 (reprint from ICLQ 49 (2000), 800-834).

82 Jean d'Aspremont, 'The Chivalric Pursuit of Coherence in International Law', LJIL 37 (2023), 191-198 (192).

83 d'Aspremont (n. 82). See on the meaning of 'coherence' below text with notes 133-135.

84 d'Aspremont (n. 82).

85 Michelle Staggs Kelsall, 'Disordering International Law', EJIL 33 (2022), 729-759.

86 Staggs Kelsall (n. 85), 732.

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With due cultural sensibility, scholarly attempts to order international law might help to grasp and understand international law better, and therefore may make an intellectual contribution to ongoing debates. To conclude, the scholarly programme of international law as a legal order is not doomed to fail for epistemic and cultural reasons alone – however interesting or uninteresting one might find this programme.

2. Legal Order and the Doctrinal Approach: A Germanicism?

Further objections against the scholarly programme of ordering international law relate to the technical limits of the doctrinal approach (with 'ordering' the law as its quintessential aspect), and expand the observation of cultural contingency made above. Ordering the law is part of the discipline of legal doctrine which can be defined as the 'discipline that seeks to penetrate and organise [*ordnen*] positive law in order to guide legal work and answer questions raised by legal practice. It endeavours to examine and secure ideas and insights about law by forming concepts, introducing distinctions, developing figures or principles, and by *ordering* the material.'[87]

Such a systematic, ordering, doctrinal, approach to the law is an outgrowth of German legal positivism around the turn of the 19th and 20th century. In his '*Foundations of a System of German Constitutional Law*', Carl Friedrich von Gerber, eminent legal scholar and holder of several ministerial posts in the German Land of Saxony, transferred the systematic approach which he had developed in the field of private law to public law. He identified 'the need for a sharper and more accurate definition of fundamental doctrinal concepts' and called for the 'establishment of a scientific system […] in which the individual structures are presented as the development of a uniform basic idea. Only through the establishment of such a system […] would German constitutional law, in my opinion, achieve scientific independence and provide the basis for reliable legal deduction.'[88] His book, a leading work of legal positivism, was first published in 1865, before the German *Reich* was established. A major purpose of Gerber's scholarly organisation of the law found in the various German *Länder* was to identify underlying common principles which eventually led to the emergence of *one* legal constitutional order on which the subsequent constitution of the German *Reich* could build.

87 Christian Bumke, *Rechtsdogmatik: Eine Disziplin und ihre Arbeitsweise: Zugleich eine Studie über das rechtsdogmatische Arbeiten Friedrich Carl von Savignys* (Mohr Siebeck 2017), 48 (emphasis added).

88 Carl Friedrich von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Tauchnitz 1865), Vorrede, VIII.

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Writing 60 years after Gerber, Viktor Bruns was not the first German scholar to apply doctrinal thinking and legal positivism to international law. Especially August von Bulmerincq had already some years before Gerber attempted to establish a 'System [*Systematik*] of international law which insisted on the character of international law as a positive law, purified from all philosophical and political contaminaton, and strictly separate from domestic constitutional law [*Staatsrecht*].[89] Both in Blumerincq and in Bruns, the 'system' or 'order' of the scholarly exposition and of the law that the scholar expounds are blurred; one wonders where the 'order' exactly resides.

One might observe critically that the 'systematic' approach to international law comes naturally for German scholars, and that it is a 'transplant' which is not well suited for dealing with international law. According to Eyal Benvenisti, '[p]erhaps the most distinctive aspect of the German approach to public law in general and to public international law in particular is the systemic vision […]. This systemic approach has contributed significantly to the emergent conception of international law as a legal system.'[90] Martti Koskenniemi, who went so far as to characterise international law as a 'German Discipline', drew attention to the '*System-denken*' as a constant theme in German international legal scholarship.[91] 'There is no dearth of German international lawyers lamenting the lack of systematicity of international law, nor of German projects trying to remedy that lack.'[92] He asserted that the systematising work is indeed 'what German lawyers nowadays do best. They have interpreted and systematised and thereby supported the law of the UN, the European Human rights system as well as European law as robust structures of international government.'[93] This characterisation not only draws out the parochialism of the undertaking, but also its conformist character (more on this below in section V. 4.).

One might ask the question whether (besides being culturally contingent (Germanic)), the scholarly pursuit of ordering the law fits well to the peculiar architecture of international law. Although, as mentioned, the idea of a legal system was promoted by people like Carl Friedrich von Gerber in order to promote the legal harmonisation of a plurality of legal orders, the main

89 August von Bulmerincq, *Die Systematik des Völkerrechts: von Hugo Grotius bis auf die Gegenwart. Erster Theil: Kritik der Ausführungen und Forschungen zu Gunsten der Systematisierung des positiven Völkerrechts* (E. J. Karow 1858). See esp. at 5, 7, and 12.

90 Benvenisti (n. 12), 393.

91 Martti Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline', Redescriptions 15 (2011), 45-70 (63).

92 Koskenniemi (n. 91), 63.

93 Koskenniemi (n. 91), 60.

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training ground for *Dogmatik* has always been the densely codified law of a nation state. This law is produced by a central body (in democratic states by the parliament). It is supplemented and thus refined by a thick layer of judicial interpretation and extrapolation, created by courts which are hierarchically organised and therefore bound to produce a coherent body of case-law.

All this is different in the realm of international law (at least by degree), and the specific features of international law make the doctrinal analysis difficult. First, international law is much less centralised than domestic law. International rules grow in a decentralised fashion, are dispersed in millions of treaties concluded by different actors. Also customary rules emerge out of dispersed practice. The judicial elaboration of all rules is extremely scarce and only punctuated, given the absence of compulsory jurisdiction.

Second, the stuff of international law is less dense than in the main field of application for doctrinal research: domestic contracts, tort, and property law. There are, in total, fewer rules and judicial decisions. So, a logical-semantic analysis of this 'thin' legal subject matter yields less. Third, a considerable amount of international law is still uncodified. The exact content of customary international law must first be investigated with non-logical-semantic methods. This is a different task from determining the meaning or sense of a written rule (treaty interpretation). Fourth, international law is to a higher degree than domestic law the result of political compromise, and for that reason less systematic and less clear than other legal materials. Because of these special features of international law, and in such disarray, the attempt to organise the law is a rather artificial undertaking, which leaves (too) much room for scholarly creativity, one might say. Other scholarly approaches to the law (theoretical, historical, empirical) are therefore even more needed than in the domestic realm to gain a full understanding of the law.[94] But even with these limitations, the doctrinal work of ordering the law might help clarifying (and thus operationalising) a body of law that is as thin and incomplete as international law, as we will see in the next section (section V. 3.). Ultimately, neither its inherent doctrinalism nor its German heritage seem to be a death-blow for the programme of international law as a legal order.

94 Anne Peters, 'International Legal Scholarship Under Challenge', in: Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (Cambridge University Press 2017), 117-159 (151-152).

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3. (Small-Scale) Practical Benefits of Ordering the Law

The major, pragmatic, objection against the scholarly pursuit of ordering is that it is *l'art pour l'art* without any practical consequence, while an important objective of international law has always been to promote social order in the real world of international relations in international life.[95]

The expectation of Bruns and scholars writing in the same vein was not only that international law generally contributes to ordering the world, but that especially the orderly feature of the law, its quality as an international legal *order,* makes a difference here. However, sceptics do not buy into the claim that ordering the law will help international law in ordering the world.[96] As already Hedley Bull masterfully explained, international law is neither necessary nor sufficient for bringing about order in real life of international relations.[97] International law can deploy its ordering function only when its prescriptions find 'some basis in the actual dealings of states with one another'.[98] If factors (outside the law) which are conducive to order (for example an equilibrium of power) are present, then international law can 'mobilise' these. Bull rightly pointed out that international law can also hinder order, and gave as an example the imposition of sanctions after an aggressive war.[99]

In a similar spirit, international order has been qualified as nothing 'but an abstraction, a figment of internationalist hopes that have never been able to triumph over the realities of world politics'.[100] According to Steven Krasner, 'realists of all types agree […] [i]t is naïve to expect that a stable international order can be erected on normative principles embodied in international law.'[101] Younger realists such as Carlo Masala prefer to speak of current world disorder ('*Weltunordnung*') – the opposite of order.[102]

However, the opposing, 'idealist', intellectual camp has similar pedigree as the realist one. At the end of the 19th century, the 'Peace Through Law'

95 See on the conflation of the legal and the political/social order in the writings on 'world order' aboce section III. 1.

96 See e. g. Jack Goldsmith and Eric A. Posner, 'The Limits of International Law Fifteen Years Later', Chi. J. Int'l L. 22 (2021), 112-127.

97 Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd edn, Macmillan 1995), 136-137.

98 Bull (n. 97), 137.

99 Bull (n. 97), 138.

100 Maull (n. 29), 4. (Maull puts a question mark here).

101 Steven D. Krasner, 'Realist Views of International Law', ASIL Proc. 96 (2002), 265-268 (268).

102 Carlo Masala, *Weltunordnung* (3rd edn, Beck 2022). His book's main claim is that 'the world of the 21st century is in disorder', 159.

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Movement emerged and motivated the Hague Peace Conferences and the founding of the Hague Academy of International Law.[103] This idea is also the principal purpose of the League of Nations which was officially established '[i]n order to […] achieve international peace […] by the firm establishment of the understandings of international law as the actual rule of conduct among Governments […]', as the preamble of the Covenant of the League of Nation puts it.[104] Social order provided through legal order has been, as Stefan Kadelbach and co-authors put it, the all-times 'utopia international legal thought explores in its writings'.[105] In the interbellum period, Hersch Lauterpacht in his seminal work on the functions of international law dealt with 'law conceived of as *a means of ordering* human life'.[106] In this tradition, contemporary legal and political scholars observe that '[s]ocial orders increasingly are legalized transnationally', and they write of 'social ordering *through* […] legal norms that are transnational in scope'.[107] International law is assumed to contribute to world order mainly by discharging actors from the burden of re-negotiating every move, by providing a language for communication, by aligning the normative expectations of all those actors who are subjected to the law, thereby allowing for their coordination and also for collective action, and by slowing down and providing for the procedures for change.[108]

An underlying assumption is that an 'orderly' international law can fulfil this task of ordering international society better than an untidy international law. Although we do not have empirical proof of this assumption, it seems highly plausible. When those subjected to international law are confronted with erratic or even contradictory norms, they have more difficulties in adjusting their behaviour and to coordinate. However, all 'order' is a matter

103 Marcus M. Payk, *Frieden durch Recht? Der Aufstieg des modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg* (De Gruyter 2018); Sarah Jäger and Wolfgang S. Heinz (eds), *Frieden durch Recht: Rechtstraditionen und Verortungen* (Springer 2020).

104 Covenant of the League of Nations of 19 June 1922 (108 LNTS 188).

105 Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit, 'Introduction' in: Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017), 1-16 (9-10). These authors use the term 'legal system' for the legal sphere, not 'legal order'.

106 Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon 1933, re-issued by Oxford University Press 2011), 73 (emphasis added).

107 Terence C. Halliday and Gregory Shaffer, 'Transnational Legal Orders', in: Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015), 3-72 (3; emphasis added).

108 Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit? Zur Ordnungsfunktion des Völkerrechts in einer Welt im Umbruch', Der Staat 62 (2023), 579-612; Burchardt (n. 8), 414.

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of degree. There is no 'natural' or objectively proper modicum of ordering and system building.

And even if, in the grand scheme of things, the practical effects of ordering the world through an orderly law are unclear, the small-scale practical utility of ordering the law is obvious. Actually, the doctrinal approach (with its main activity being 'ordering' the law) was invented out of the desire to connect theory to practice, and intends to serve practice.[109] The practice-orientation is so strong that doctrinal scholarship has been dubbed as 'law application science'[110] or 'decision-preparation science'.[111] Of course, the actual practical utility of doctrinalism is a question of degree. If the scholarly ordering gets too complicated it can degenerate into an ivory tower exercise that will not resonate with the requirements of the legal profession.

One benefit for practice is that a well-ordered legal order channels the path for orderly legal change. According to Eyal Benvenisti, 'the systemic vision has provided a potent tool for the development of international law'.[112] This is especially welcome because a clearly codified procedure for the amendment or revision of international law is lacking. Rather, the various types of law (treaty law, customary rules, secondary law of international organisations, judge-made law) follow quite different procedures for change.[113] However, a full-fledged system is not needed to bring more clarity and legal security into the development of the law. Rules of change would suffice to fulfil the job.

A probably more important practical consequence of the vision and construction of international law as a legal order is that it tends to empower or even embolden courts and tribunals. Already Bruns envisaged his work programme to serve the newly created and flourishing arbitral bodies.[114] One reason is that the 'order' is to a large extent built by identifying overarching principles which serve as brackets or bridges to link together the isolated rules.[115] Examples are necessity and proportionality, the no-harm principle,

109 Bumke (n. 87), 1. See on the doctrinal approach above section V. 2.

110 'Rechtsanwendungswissenschaft': Anne van Aaken, 'Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft', in: Matthias Jestaedt and Oliver Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008), 79-104 (79).

111 'Entscheidungsvorbereitungswissenschaft': Andreas von Arnauld, 'Die Wissenschaft vom öffentlichen Recht nach einer Öffnung für die sozialwissenschaftliche Theorie', in: Andreas Funke and Jörn Lüdemann (eds), *Öffentliches Recht und Wissenschaftstheorie* (Mohr Siebeck 2009), 65-118 (87).

112 Benvenisti (n. 12), 393.

113 Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in: Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023), 3-32.

114 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 29.

115 See below section V. 5. on general principles as ordering mechanisms.

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or non-discrimination. These principles need to be fleshed out, and this is typically done by courts.

Through the 'completing mechanism'[116] in form of general principles, with the gap-filling done by the courts and tribunals, the entire idea of international law as a legal order works to support those bodies.[117] This is not in itself a bad consequence, but tends to be viewed with suspicion by those who wish to secure the governments' control over international law or fear judicial overreach that threatens democracy and sovereignty. In contrast, weaker participants in the international legal process such as small states and non-state actors ranging from indigenous groups to civil society groups, often welcome the judicialisation, being the effect of the 'ordering vision' of international law. The judicialisation works in favour of feebler actors who can use the judicial system. Procedures before courts and tribunals operate on the basis of an equality of arms of the parties which neutralises power imbalances. A recent example is the ICJ proceeding Nicaragua against Germany in which Nicaragua can attack German arms' export to Israel with much more leverage than outside the courtroom.[118]

In conclusion, any academic ordering of the law has repercussions in the realm of legal practice even if, on a macro level, its power to order the world remains doubtful. The reproach that the scholarly programme of international law as a legal order is '*law pour law*' is not warranted.

4. (Fake) Depoliticisation and Conformism by Ordering the Law

The next important objection against scholarly attempts to find and create legal order is that any 'ordering' of international law in the service of coherence does not guarantee the fairness of this order. The International Law Commission (ILC) study on fragmentation rightly noted that order (coherence) is only 'a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so.'[119] This critique has a point. For instance, parts of the law of the Nazi regimes or colonial laws were orderly, but they were nevertheless patently unjust.

116 Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), 257.

117 Benvenisti (n. 12), 396.

118 ICJ, Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany) (pending).

119 Study Group of the IILC, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 491.

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A related aspect is that any lawyerly pursuit of order and the scholarly endeavours to 'create' a legal system is inherently conservative (in a descriptive sense). It serves to *maintain* the social system which undergirds the law.[120] The standard critique of the liberal legal tradition brings this to the fore: 'Order' can stand in the way of justice or fairness, because the orderly laws and procedures are simply legitimating mechanisms that re-ify power relationships and perpetuate the (unfair) status quo. As Anne Orford put it: 'The strongest current advocates of a vision of an *international order constituted by law* are the cosmopolitan formalists of continental Europe, […] defending a projection of power imagined in their own terms – […] a *form of power* that depends upon the operation of international institutions envisaged as having moral authority'.[121]

In a trenchant critique of doctrinal scholarship building an international legal order or system, Sué González Hauck noted that these endeavours are only masked as being unpolitical, while they pursue patently political objectives: 'The notions of system, order, and coherence significantly contributed to relegating the Third World's attempts to reshape international law to the political realm, and allowed to counter those attempts with ostensibly neutral and legal arguments, that just so happened to preserve Western dominance.'[122]

This critique is well taken. Of course, law is inherently counterfactual and thus conservative (in a descriptive sense), and thereby fulfils its stabilising function. The systemic and orderly character of international law contributes to this stability, because every attempt to change the rules must fit into the system and must satisfy expectations of coherence.[123] Along the same line, it can be said that 'coherence serves as a shield against value change'.[124]

This would be a problem if both the legal order and the accompanying scholarship were so rigid that self-reflection and renewal are in fact out of

120 This was the point Martti Koskenniemi made on the collusive role of the German lawyers. See above text with note 93.

121 Anne Orford, 'Constituting Order', in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), 271-289 (272, my emphasis).

122 Sué González Hauck, 'Systemerhaltung durch Systematisierung: Lehrbücher, Allgemeine Kurse und Kodifikation im Völkerrecht als politische Projekte', AVR 62 (2024), 3-29 (26). I agree with these observations on the point that international legal scholarship should make no claim to being 'neutral' or 'apolitical', because the political implications of legal arguments can hardly be avoided.

123 See Krieger, 'Ordnungsfunktion' (n. 108), 610.

124 Heike Krieger and Andrea Liese, 'Conclusion: Turbulence, Robustness, and Value Change', in: Heike Krieger and Andrea Liese (eds), *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (Oxford University Press 2023), 319-342 (338).

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reach – which is an empirical question. Additionally, 'conservation' is not per se bad, and is currently intensely and benevolently debated under the heading of the 'resilience' of international law and its protection against erosion. The assessment of this resilience depends on the observer's view whether international law is *worth* conserving as it is.

Returning to the example given above, the National Socialist legal order (and actually also the 'national socialist international law') was surely not worth conserving. It illustrates that a legal order can be orderly but still unjust. However, the inverse statement is not true: If there is no order at all, then – as I will explain in more detail in the next section (V. 5.) – the law cannot be just, because a formal feature of justice is missing. So, while order is no sufficient condition for justice, it is still a necessary one. This brings us to the deep question of the legitimacy of international law.

5. The Thin Legitimacy of International Law *as* Order

I submit that, despite the above-mentioned serious problems, despite the uncertainty of practical effects, parochialism, and inherent conservatism, the scholarly pursuit of ordering international law has some merit. For Viktor Bruns, writing in 1929, an important goal was to furnish the ontological proof that international law *is* law, despite its special features that distinguish it from the domestic law of nation states. In his time, the 'deniers' of international law, building on the philosophies of Georg F. W. Hegel and John Austin, were probably mainstream voices.

Until quite recently, such an ontological proof seemed no longer warranted. International law has been firmly established as a factor in international politics and in law school curricula. Writing in the golden age of international law (the 1990s), Tom Franck found international law to be in the 'post-ontological era'.[125] He and many scholars no longer felt the need to explain that international law is law.[126]

But this was perhaps too superficial. Unlike what Franck thought, the existential question never completely went away.[127] Arguably, the aspect of normative coherence and the ensuing formal or rationalist legitimacy was

125 Thomas M. Franck, *Fairness in International Law and International Institutions* (Clarendon 1998), 6.

126 For an excellent analysis: Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press 2014) 18.

127 E. g. Anthony D'Amato, 'Is International Law Really Law?', Nw. U. L. Rev. 79 (1985), 1293-1314; John R. Bolton, 'Is There Really Law in International Affairs', Transnat. L. & Contemp. Probs. 10 (2000), 1-48.

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even a main concern driving the fragmentation debate of the early millennium, although it was rarely openly articulated.[128] Precisely because international law is 'weak' and its legitimacy precarious, it seems to need such normative coherence more than any other body of law. If international law could, e. g. due to its 'fragmentation' 'no longer be a singular endeavor, […] but merely an empty rhetorical device that loosely describes the ambit of the various discourses'[129] – then its very reality *as law* would be imperiled.

This peril has now materialised, especially after the three shocks of Ukraine (2022), Gaza (2023), and Trump (2025). New qualms and doubts about international law abound. The question has popped up with a bang whether the mess we see deserves the name 'law' at all, or whether it is not simply 'power politics in disguise',[130] as the realists had suspected all along. We therefore need a new 'law-ness' test. Applied to the situation of today, the empirical tests whether there is compliance (in deeds) or whether – at least – international law is invoked as a benchmark to assess behaviour in the international arena (by words) yield rather negative results. Blatant violations of international law and its core principles (use of force, basic rules of International Humanitarian Law, self-determination of peoples, territorial integrity) are breached on a massive scale, hardly without sanction.[131] Key actors such as US President Trump avoid mentioning international law at all, and other players such as the Russian President Putin transmogrify international law by forwarding ridiculous legal 'arguments'.

In this constellation, I do not think that the argument of 'order' does the trick. The scholarly demonstration that the rules on paper are orderly will not prove that international law still exists. However, the orderliness of the legal order bestows a modicum of legitimacy to international law, and this is also needed nowadays. The order of the law (supposedly) follows some rationality, and this (supposedly) makes the law both worthy of recognition and furthers compliant behaviour of states and other actors.

128 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', I.CON 15 (2017), 671-704.

129 Matthew Craven, 'Unity, Diversity, and the Fragmentation of International Law', FYBIL 14 (2005), 3-34 (5) (emphasis added).

130 Georg Schwarzenberger, *Power Politics: A Study of World Society* (3rd edn, Stevens & Sons Ltd. 1964), 203.

131 To mention only the most blatant violations: The annexation of Crimea (2014) and full-fledged aggression against Ukraine by Russia (since 2022); war crimes, crimes against humanity and possible genocide by Israel against Palestinians, following the Hamas massacre of 2023; threat to annex Greenland by US President Trump in 2026; abduction of the Venezuelan President and his trial before US courts in 2026, war against Iran by the US and allies in 2026.

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Tom Franck, building on Ronald Dworkin, has well elaborated this value of 'coherence' for international law.[132] Also building on Dworkin and on the theoretical works of Norberto Bobbio and Neil MacCormick, Raphaël van Steenberghe explained that 'a legal system is characterized by both consistency (or formal coherence) and coherency (or material coherence)'.[133] In that terminology, 'consistency' (formal coherence) means that 'no apparent or genuine contradiction exists within the concerned system or, at least, that the system contains within itself the necessary tools, such as the lex specialis principle, to solve any apparent or real conflict of norms'.[134] However, to be a 'genuine legal system', the law needs to be not only logically consistent but also materially coherent.[135] Material coherence means the compatibility of all norms (rules and principles) in their substance, which requires that there are legal mechanisms to resolve normative (not logical) conflicts among them. A normative conflict is present when an addressee, by obeying or applying one norm, necessarily or potentially violates another norm.[136] For example, a state may be entitled to exercise the right to self-defense, but this risks to violate its obligations flowing from international environmental treaties. The resolution of such a norm conflict is not purely a logical operation but requires choices of a substantial nature, for example, by allowing for a suspension of environmental obligations. These choices must be guided by a 'hermeneutical constraint'.[137]

At this point, general principles of law come into play. General principles of law 'are seen as the best candidates to serve as such a hermeneutical constraint, as they express the fundamental values of a system'.[138] And because general principles are not clear-cut rules but optimisation norms, the test of compatibility (unlike the question of logical consistency) is one of degree. Through their ponderable quality, the principles provide some constraint while giving at the same time a sufficient margin of flexibility.[139]

The general principles' function of creating coherence has been recognised in the realm of legal practice. In the ILC's work on the General Principles of

132 Franck (n. 125). Ronald Dworkin used the term 'integrity' of the law as a source of its legitimacy (Ronald Dworkin, *Law's Empire* (Belknap 1986), esp. Chapter 6.

133 van Steenberghe (n. 10), 1368. See on Tom Franck's (diverging) notion of coherence below text with note 147.

134 van Steenberghe (n. 10).

135 van Steenberghe (n. 10), 1368.

136 Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', EJIL 17 (2006), 395-418 (418). Importantly, norm conflicts can arise between obligations, permissions, and prohibitions, not only when there are two conflicting obligations.

137 van Steenberghe (n. 10), 1368.

138 van Steenberghe (n. 10), 1369.

139 van Steenberghe (n. 10), 1369.

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law in the technical sense of Art. 38(1) lit c) of the ICJ statute, Conclusion 10 sec. 2 is: 'General principles of law contribute to the coherence of the international legal system'.[140] ILC Special Rapporteur Marcelo Vázquez-Bermúdez called this the '*systemic function* of general principles', and 'a natural consequence of the fact that this source of international law is essentially aimed at filling gaps in the international legal system'.[141]

It is this dimension of coherence that is implied in the concept of 'legal order' or 'system'. According to Franck, 'evidently unprincipled' rules which 'lack coherence' 'fail to connect with the skein of general legal principles which make up the body of the law'.[142] 'A rule is coherent […] when the rule relates in a principled fashion to other rules of the same system.'[143] And Franck sees this 'aspect of coherence, the connectedness of rules as a factor in their legitimacy'.[144] Put differently, '[l]egitimacy must be manifested by the relationship between any given rule and the rule system of the international community'.[145] This coherence will, according to Franck, generate a 'pull to compliance' which at the same time evidences the rule's perceived legitimacy.[146] Franck sums up: 'Coherence is that quality of a rule which permits it to be seen holistically: that is, as part of a context in which the separate rules acquire "compliance-pull" *from the purpose and meaning of a larger whole*. A rule which can plausibly claim to be *part of such a system* exercises a greater compliance-pull than one which cannot.'[147] In this model, compliance with international law is augmented through the fact that the rules are coherent and connected – that they form an order or system. The more orderly and principled international law is, the more it will be complied with.

So far, there is no empirical evidence for this hypothesis. From a practical standpoint, a discernible order (in form and substance) aids avoiding or eliminating norm conflicts. This is helpful for those who are supposed to observe the law. Even short of outright normative conflicts, any observable order enhances foreseeability and legal certainty of the rules applicable to a

140 ILC, 'General Principles of Law: Draft Conclusions', ILC 74th Session (Report on the work of the seventy-fourth session, UN Doc. A/78/10, 12 May 2023), paras 30-41.

141 *Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, ILC 73rd Session (UN Doc. A/CN.4/753 of 18 April 2022), para. 139, also para. 145. In line with this idea, Draft conclusion 13 of the ILC text on General Principles of law is: 'The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.'

142 Franck (n. 125), 38, referring to Dworkin (n. 132), 190-192.

143 Franck (n. 125), 38.

144 Franck (n. 125), 41.

145 Franck (n. 125), 41.

146 Franck (n. 125), 121.

147 Franck (n. 125), 121 (emphasis added).

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situation, and this allows those subjected to the law to plan their actions better. Based on these considerations, the hypothesis of the orderly order's legitimacy-pull is plausible – on the premise that the actors in the legal process are in good faith and guided by a conscious or unconscious sense of fairness, and that this sense is shared and not culturally contingent.

Consistency and coherency of the law, its orderliness, is also implicitly or explicitly acknowledged as one element of the rule of law. The Venice Commission's rule of law checklist contains the bullet point 'consistency of law'.[148] The conceptual underpinning of this view is often seen in Lon Fuller's theory of law which considers the absence of normative incompatibilities to be a marker of law properly speaking, a criterion of lawliness.[149] Fuller's condition of normative compatibility has been widely received and is accepted as a key element of a 'formal' conception of the rule of law, a conception that looks at the form through which legal norms should be expressed, rather than at the substantive content of those norms.[150]

Revisiting these US-American legal philosophies of the 20th century forces us to ask the question of cultural, regional, and temporal contingency. Especially Dworkin's and Franck's thinking exemplifies the legal liberalism of the 1980s and 1990s. Also the rule of law has this liberal colouring, especially its formal conception. Further investigation into non-Western legal theory can show to what extent the ideas orderly order and the attempt of avoiding formal and material incoherence have pluri-cultural roots and a cross-cultural appeal.[151]

It is submitted that the contemporary surge of the accusation of 'double standards', which relates more to orderly *application* of the law (rather than to the orderliness on paper), actually proves the cross-cultural appeal of an orderly order. Deploring an incoherent (discriminatory) application of international law,[152] the reproach of double standards is regularly brought forward by certain states of the Global South and by Russia and by China,

148 European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist (Strasbourg 2016), paras 60-61. The Venice Commission does not seem to distinguish 'consistency' (formal coherence) and 'coherency' (material coherence), see text with note 133.

149 Lon L. Fuller, *The Morality of Law* (Yale University Press 1964), 70.

150 See only Kristen Rundle, 'The Morality of the Rule of Law: Lon L. Fuller', in: Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021), 186-201 (189) with reference to Fuller.

151 See e. g. Edwin Etieybo, 'Logic', in: Dilip M. Menon (ed.), *Changing Theory: Concepts from the Global South* (Routledge 2022), 67-79.

152 Especially in Tom Franck's account, coherence also refers to the non-discriminatory (general or coherent) application and implementation of the law. See Franck (n. 125), 39.

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mainly against western states.[153] One motive of this reproach is to undermine the moral standing of the West and throw the western states from their pedestal, after the deep humiliation of non-western states by the West, a humiliation performed to a large extent *through* international law (for example through the early 20th century unequal treaties and international legal doctrines such as terra nullius, standard of civilisation, and so on) that facilitated imperialism and colonisation.

Importantly for our topic, this subversion of the moral credibility of the West functions well because the appeal to consistency and coherence, also in the application of the law, has force.[154] Anyone who complains of double standards is thereby signalling that they regard consistency and coherence of international law in its application as valuable goods. The speaker implicitly calls for a general principle of equal treatment that is, in current international law, present only *in nuce*. The spread of the accusation of double standards can therefore be read as a sign that normative expectations towards international law – with respect to equality and fairness – are rising. Consistent and coherent application and enforcement of the law prove themselves here as a universal, not merely 'Western', regulative idea. Western states, accused of double standards, should orient themselves towards this idea – and they can also hold their critics to it. In the end, the invocation of (real or alleged) double standards thus carries a latent message that is welcome: that legitimacy flows from an *orderly* international legal order.

VI. Ordering International Law as a Contribution to Its Legitimacy and Effectiveness: The Example of the ICJ Climate Advisory Opinion of 2025

The ICJ's recent Advisory Opinion on *Obligations of States in Respect of Climate Change* demonstrates the relevance of ordering (systematising) international law and the contribution of coherence to the effectiveness and legitimacy of this body of law – especially in the context of the advisory

153 See last SCO, 'Tianjin Declaration' 2025 (n. 31), sec. I. See also the Sino-Russian Joint Statement 2021 (n. 31) and written statements by Cuba and Kuwait in the ICJ proceeding on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Cuba 24 July 2023, at p. 29; Kuwait of 25 July 2023, para. 27).

154 Anne Peters, 'The Double Effect of Double Standards: Both Erosion and Strengthening of International Law', Verfassungsblog, 12 September 2025, <https://verfassungsblog.de/the-double-effect-of-double-standards/>.

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function.[155] Being an Advisory Opinion, and not a judgement in a contentious case between two or more litigant parties, the Court considered 'that it has been requested to address legal consequences in a general manner, and that it is not called upon to identify the legal responsibility of any particular State or group of States.'[156] Concomittantly, the Court only sought to 'outline in general terms the legal consequences' flowing from breaches of state obligations to protect the climate system,[157] and in doing so, did 'not prejudge the merits of any future claims'.[158] The Court also emphasised that it was 'not called upon to identify particular States that may have breached their relevant obligations'.[159] This abstract approach has attracted critique, with Judge Yusuf finding the majority to dodge the question asked by the General Assembly.[160] However, the Court's analysis seems to be in keeping with the format of an Advisory Opinion as opposed to a judgement in an adversarial proceeding. Here, the ICJ's explicit and strong systematisation *could* make a contribution which was appropriate to the type of proceeding and nevertheless was able to further develop and strengthen the states' obligations regarding climate change.[161]

Because the high emitter states such as the US and China had attempted to kick customary law out of the scope of the Opinion by arguing (unsucessfully) that the Paris Agreement was a lex specialis, a key issue was the 'relationship between the climate change treaties and other rules of international law'.[162] The Court summarised the view of 'most participants' that the climate change treaties '*form part of a broader set of rules*'.[163] Moreover, various participants in the proceedings 'invoked the principles of harmonious interpretation and systemic integration'.[164] The ICJ stated 'that it is a generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations', and cited the ILC study on fragmentation.[165] The Court also searched (and denied) 'any actual inconsistency between the

155 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025.

156 ICJ, *Climate Change* (n. 155), para. 106.

157 ICJ, *Climate Change* (n. 155), para. 106.

158 ICJ, *Climate Change* (n. 155), para. 106.

159 ICJ, *Climate Change* (n. 155), para. 109.

160 ICJ, *Obligations of States in Respect of Climate Change, Advisory Opinion* (Separate Opinion of Judge Yusuf), 23 July 2025, General List No. 187, para. 6.

161 Elia Alexiou, 'The Revival of the ICJ's Advisory Function: Enhanced or Contested Legitimacy', International Community Law Review (2025), 1-26.

162 ICJ, *Climate Change* (n. 155), see para. 162.

163 ICJ, *Climate Change* (n. 155), para. 163 (emphasis added).

164 ICJ, *Climate Change* (n. 155), para. 164.

165 ICJ, *Climate Change* (n. 155), para. 165; for the ILC study see n. 119.

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provisions of the climate change treaties and other rules and principles of international law'.[166] It also applied a classic 'ordering' strategy by using certain principles of international law as 'guiding principles for the interpretation' of the more specific rules, and here the Court mentioned 'sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, and the precautionary approach or principle'.[167] Based on these considerations, the ICJ found that it was mandated to give its Opinion on obligations flowing both from the climate change treaties *and* from other rules of international law.

Importantly, the ICJ explained that these two types of sources (treaty law and customary law) mutually guide and inform each other: Treaties must be interpreted in the light of relevant customary law,[168] while concomittantly, the exact content of a customary law-based rule (e. g. due diligence) must be determined in the light of treaty law.[169] Also, the practice of state parties in application of a treaty may form the objective element required for the emergence of a customary rule that, once established, then binds also non-parties.[170]

It may be no coincidence that the German judge, Georg Nolte, deepened the systemic approach of the Court by insisting that the parallelism of treaty law and customary law 'does not prevent the climate change treaties and the general customary obligations from informing and influencing each other'.[171] Nolte explained that 'the full and bona fide compliance by a State with its obligations under the climate change treaties "suggests" that this State substantially complies with, i. e. is presumed to fulfil, the customary duty to prevent significant harm to the environment […]. This approach is not lex specialis by another name. Rather, it is a way of achieving a harmonious interpretation of, and maintaining a proper relationship between, the climate change treaties and customary international law.'[172]

The Court not only intertwined treaty law and customary law, but also linked primary (treaty) law and secondary Conference of the Parties (COP) law. It to some extent 'upgraded' decisions of the COPs by specifically mentioning the possibility of their binding legal force, their possible function as subsequent agreements in terms of Art. 31(1) lit a) Vienna Convention on

166 ICJ, *Climate Change* (n. 155), para. 168.
167 ICJ, *Climate Change* (n. 155), para. 172.
168 ICJ, *Climate Change* (n. 155), para. 311, referring to Art. 31(3) lit c) VCLT.
169 ICJ, *Climate Change* (n. 155), paras 311-313.
170 ICJ, *Climate Change* (n. 155), para. 315.
171 ICJ, *Climate Change* (n. 155), Declaration of Judge Nolte, para. 9.
172 ICJ, *Climate Change* (n. 155), Declaration of Judge Nolte, para. 13.

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the Law of Treaties (VCLT),[173] and the COP pronouncements' relevance for the identification of customary law.[174]

The Court's method of 'treating these sources as interlocking parts of a living legal system' has been described as 'action-forcing, because it ties the work of implementation […] to good-faith co-operation, due diligence and rights-based constraints, and because it makes clear that breaches sound in responsibility with the full suite of consequences.'[175] It seems fair to say that – although the pronouncments in the Advisory Opinion are abstract and general – they 'deepen […] the legal texture' of the mentioned obligations in the climate field.[176] The ICJ Advisory Opinion (in its alignment and cross-referencing of the prior International Tribunal for the Law of the Sea (ITLOS) Advisory Opinion on a similar topic) should be hailed as a deliberate contribution 'to the consolidation of a *coherent* legal framework', with a 'convergent legal grammar for addressing the cross-sectoral challenges posed by climate change'.[177]

To conclude, the Climate Advisory Opinion manifests the ICJ's systemic vision of international law, employing several well-known ordering techniques, in an attempt to strengthen both the legitimacy and notably the effectiveness of the relevant law. At the same time, the recent Opinion illustrates how the idea of international law as a legal order empowers courts and tribunals as a matter of principle.

VII. Conclusions: The Orderly Order as an Evergreen of International Legal Thought and Practice

Is the quest for an orderly international legal order – an outgrowth of doctrinalism, Germanicism, idealism, and liberalism – outdated today, when the dawn of the so-called liberal international order is being diagnosed by many?[178] I would say: not completely. Despite the ongoing global power shift towards illiberal states, the concomitant evolution of international law

173 ICJ, *Climate Change* (n. 155), para. 184.

174 ICJ, *Climate Change* (n. 155), para. 288.

175 Margaretha Wewerinke-Singh, 'Harmonizing Sources, Hardening Duties: Inside the ICJ's Advisory Opinion on Climate Change', Verfassungsblog, 11 August 2025, <https://dx.doi.org/10.59704/ca99ffd63031501e>.

176 Wewerinke-Singh (n. 175).

177 Khaled El Mahmoud, 'One Climate, Many Courts: The ICJ Advisory Opinion on Climate Change, Systemic Integration, Cross-Judicial Law-Making and Interjudicialism', Völkerrechtsblog, 13 August 2025, <https://doi.org/10.17176/20250814-122339-0>, (emphasis added).

178 See n. 29.

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and current egregious but unsanctioned breaches, the idea of *order* has not lost its appeal. This is notably manifest in non-western states' opposition against double standards.

Comparing Viktor Bruns' official proclamation of international legal order with his confidential notes reveals that the programme was launched in the service of national interest politics and to some extent sought to sanitise its political impetus. This motivation does not exclude the agenda's scholarly drive and merit. The practical utility of ordering international law has been recently confirmed by the ICJ Climate Advisory Opinion in which several ordering mechanisms were applied, which likely strengthens the operationality of international climate law, e. g. in domestic judicial proceedings.

The thin legitimacy flowing from the markers of order, logical consistency and normative coherency, is not enough, but it is still a necessary quality to make international law a potentially good law for life on our planet. To conclude, the quest for an 'orderly order' seems to live on (and rightly so) in the struggle not only for the legitimacy of international law but for its very existence.

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Abhandlungen

70 Years of EU Law: Continuity and Discontinuity

Foreword

This Special Issue results from the conference, '70 Years of EU Law: Continuity and Discontinuity', held at the Max Planck Institute for Comparative Law and International Law (MPIL) in Heidelberg from 1st to 3rd February 2024.

Spanning over two days and a half, the conference was truly remarkable. It provided a unique opportunity for reflection on the state of EU law – both as a technique of social ordering and as an academic discipline about that technique. Its starting point was a book published by the Legal Service of the European Commission in 2022: *70 Years of EU Law – A Union for Its Citizens*. Collectively produced by the Legal Service's practicing lawyers, the book offers a *tour d'horizon* on the historical trajectory of the EU legal system. Its declared objective is to illustrate the significance of EU law in bringing about 'a Union for its citizens'. With a view to this, the book offers the authors' view on the manifold developments occurred in EU law since the 1950s. The book hence surveys the broadening remit of EU law beyond its historical emphasis on the common market. The emergence of values under Art. 2 of the Treaty on European Union (TEU) takes pride of place in the narrative, but many other developments are illustrated: from EU environmental law to the Common Agricultural Policy (CAP), via EU taxation law and the still pivotal internal market. In all these cases, the book emphasises the concrete implications of EU law for EU citizens' lives.

As part of its dissemination and outreach, the Legal Service queried whether the Max Planck Institute for Comparative Public Law and International Law (MPIL) would host an international conference devoted to discussing the book. The MPIL accepted. The occasion promised to create a space for high-level engagement between scholars and practitioners of EU law. The conference's format was closely tailored to this purpose. We published a call for papers, which asked scholars, upon submitting their abstract, to indicate what aspect(s) of the book they wished to comment on. Two categories of proposals were specifically solicited: engagements with the book's overall approach, and reflections on specific chapters or topics. The ensuing, 'tar-

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geted' nature of the submissions allowed the conference to take place in a unique setting. In fact, a vast majority of the presentations were held in dialogical format. Authors from the Legal Service first introduced the ideas conveyed by the chapters they had penned. Participating scholars subsequently presented their own views on the matters thereby addressed. An open conversation then followed, under the confidence-fostering Chatham House Rule.

This formula turned out to be most instructive. Indeed, as a result of the above, the conference's audience consisted of two professionally demarcated groups: practicing lawyers from the European institutions and academics. The chosen format institutionalised discursive conditions where these groups could closely engage with each other. This is not the place for reviewing the decade-long controversy on the relationship between academic and institutional lawyers in EU law.[1] It seems however fair to say that the epistemic commitments of those two categories are no longer as intertwined as they used to be. Views may and do diverge as to whether this is a satisfactory state of affairs. However, it is perhaps easier to agree on the fact that this creates a discursive space. As the respective sociological profiles and background assumptions divaricate; and as the two groups come to work with different materials in pursuance of different projects, it becomes possible to gauge the commensurability of the resulting intellectual universes. The conference aimed at occupying and fostering that discursive space. The exchange showed commonalities, as well as perhaps surprising differences in the epistemology of each of those two groups. It gave voice to sharp disagreement no less than to heartfelt concordance – sometimes, against all odds. The benefits in terms of reflexivity and mutual learning have been tangible.

This Issue presents the outcome of this engaging process, publishing most of the papers which were presented at the conference. In one sense, it can be seen as a companion to the Legal Service's book. Each of the papers engages closely with *70 Years of EU Law*, and readers already familiar with the book will enjoy the scrutiny to which it was subject. However, seeing this Issue as a rejoinder publication would be only half the story. Indeed, its ambition lies at a higher level of generality. Each of its contributions advances rigorous

1 See Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', ELJ 3 (1997), 165-188; Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015), particularly Chapter 2; Rebekka Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe', GLJ 18 (2017), 1531-1556; Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?', European Law Open 1 (2022), 231-256; Bruno de Witte, 'Editorial Note: How Much Critical Distance in the Academic Study of European Law?', Croatian Yearbook of European Law & Policy 18 (2022), VII-XII.

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scholarly arguments, the import of which reaches far beyond an analysis of the Legal Service's book. The book thus provides an entry point for a more systemic reflection on the nature of the EU legal order, its epistemology, and its political-economic context. The analysis proceeds from the particular to the general. It sheds light on the book's assumptions, dialectically generating new insights which will benefit the broader scholarly discourse on EU law. Therefore, both prior readers of the Legal Service's book and those 'simply' intrigued by the papers will find food for thought in the next pages.

The following papers also provide a glimpse into the sheer variety of the ideas presented at the conference. Some of this Issue's contributions adopt the same approach as the book. They thus carry out a primarily doctrinal analysis of the law, while offering a take on its track-record differing from that of the Legal Service. Others take a more theoretical stance. Legal materials are thereby placed in a broader context, and enriched through interdisciplinary analysis. The conclusions reached also sharply differ. Some Articles formulate uncompromising critiques of the Legal Service's narrative. Some suspend their judgement, rather striving to foreground the book's conceptual horizon. Yet others generally concur with its analysis: if anything, they reproach the Legal Service for downplaying EU law's 'real' achievements. Also in this respect, this Issue will thus resonate with many a reader in the composite panorama of EU legal discourse.

All in all, this Issue is a testament to the intellectual depth of the 2024 conference. It is a pleasure to provide the EU legal community with the opportunity to tap into its proceedings.

Paolo Mazzotti
Cambridge, January 2026

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'70 Years of EU Law' – The Politics of a Professional Language

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Abstract

This article is an updated version of the keynote presented at the Max Planck Institute in Heidelberg in January 2024 to discuss and celebrate '70 Years of EU Law' based on a book written by lawyers working in the Commission Legal Service. The book invites us to look backwards at the great achievements of the past. It treats law as an essential, indeed quite indispensable, tool of the integration project. The article argues that examining more carefully European Union (EU) law as a professional language might enable us to see how policy goals turn into rules that we consider binding or authoritative and that make us believe in the beneficiality of whatever is being proposed as representative of 'integration'. In addition to celebrating the role of lawyers in solving problems, we need to remain mindful of their contribution to creating problems; or defining what should be treated as a problem. Legal work is about making choices; and those choices privilege some values or interests over other values or interests. In the absence of Treaty change, it is the ingenuity of EU lawyers that has kept the integration going. And while this ingenuity has enabled the EU to respond to some very real challenges, it has also led to the capture of Treaty interpreta-

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tion by a professional elite whose biases are hidden behind an impenetrable idiomatic language. This paper makes the argument for a broader grammar of EU law that would translate the choices between priorities into political terms and stop seeing democracy as a threat to the European Union, but instead, allow subjecting its legal and policy choices to critical debate.

Keywords

EU – Legal Expertise – Commission – Transparency – Accountability – Legal Service

I. EU Law as a Professional Language

This special issue discusses and celebrates '70 Years of EU Law'. The title has the scent of a historical enterprise, and primarily invites us to look backwards at the great achievements of the past. Much historical work already exists on both law and lawyers in the Commission, demonstrating the centrality of both of them for the European project.[1] Over the 70 years, these supranational legal professionals have seen themselves as the 'institutionalized carriers of the European idea' in the face of political resistance or reluctance.[2] Their central role in EU development has not only enabled the EU to respond to some very real challenges, it has also led to the capture of Treaty interpretation by a professional elite whose biases are hidden behind

1 See e. g. Morten Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65', Contemporary European History 21 (2012), 375-397 (384); Jean Paul Jacqué, 'The Role of Legal Services in the Elaboration of European Legislation' in: Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013), 43-54; Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)', International Political Sociology 2 (2008), 128-144 (138); Antoine Vauchez, 'How to Become a Transnational Elite: Lawyers' Politics at the Genesis of the European Communities (1950-1970)' in: Hanne Petersen, Anne Lisa Kjær, Helle Krunke and Mikael Rask Madsen (eds), *Paradoxes of European Legal Integration* (Ashgate 2008), 129-145; Stephanie Lee Mudge and Antoine Vauchez, 'Building Europe on a Weak Field: Law, Economics, and Scholarly Avatars in Transnational Politics', American Journal of Sociology 118 (2012), 449-492; Karen J. Alter, 'Jurist Social Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)', European Union Studies Association Review (Fall 2007), 6-12.

2 Antoine Vauchez, '"Integration-Through-Law": Contribution to a Socio-History of EU Political Commonsense', EUI Working Papers RSCAS 2008/10 (2008), 16, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260166.

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an impenetrable idiomatic language. Against such a background, this article examines EU law as a professional language. It studies its in-built preference for Europe, determined by the genetic code of an 'ever closer union among the peoples of Europe',[3] to make visible that which the ruling grammar hides and thus expose the 'politics' of legal professionalism. This is to render the contestability of its conclusions amenable to democratic scrutiny.

Carrying on the European idea and integration more generally is of course a political undertaking. In order to succeed, it has built on the institutionalisation of 'une certaine idée de l'Europe', carried forth by this group of lawyers 'doing' European law who, as Joerges and Weimer remind us,

> 'were assured not only of the centrality of law for integration, but also of the self-sufficiency of their methods and techniques. […] The fictions upon which the project was based fostered its cause: integration is a good in itself which deserves to be promoted. Its promotion "through law" and legal institutions […] is a reliable assurance of non-partisanship and practical wisdom.'[4]

Their permanence, according to Vauchez, depends on the group's 'collective ability to maintain the general view that they have no specific interests or stakes in the European integration process (invisibility)'.[5]

The key message of '70 Years of EU Law' remains loyal to this tradition. It treats law as an essential, indeed quite indispensable tool of the integration project. In this contribution, I argue that this vision is created and upheld by the careful use of the 'syntax' and 'grammar' of EU law by competent professionals in the field.[6] I use 'syntax' to refer to the stylistic structure that distinguishes a native language speaker of EU law in the most orthodox sense, who are very well represented among the Commission lawyers authoring this book. In linguistics, 'syntax' deals with the way that words are used to form phrases, clauses, and sentences. In a professional idiolect such as EU law it consists of professional terms, idioms, set phrases, truisms, and a variety of other types of linguistic units that immediately signal the speaker's competence in that professional speech. The texts collected in '70 Years of EU Law' make elegant use of a rich collection of such units, including

3 G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice', M. L. R. 57 (1994), 175-190 (186).

4 Christian Joerges and Maria Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?' in: Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Hart Publishing 2014), 295-322 (297).

5 Vauchez, 'How to Become a Transnational Elite' (n. 1), 130.

6 Here my approach relies on what Martti Koskenniemi used in: Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press 2009), 10-11.

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quotations of case law as well as frequent references to locutions such as 'EU values that are common to the Member States', 'rights of EU citizens', 'guardian of the Treaties', 'upholding the rule of law', and 'universality and indivisibility of human rights', and of course bits and pieces taken from EU legislation.

As in linguistics, syntax is a subdivision of grammar. In EU professional legal speech grammar refers to the direction of argumentation, the objective or point that the speaker wants to come across to her audience. That point is usually an invitation to think of law as the servant of integration in the best tradition of neofunctionalism. The dominant grammar of EU law enables us to combine concepts that form a part of the syntax in a way that promotes integration, while simultaneously hiding from sight political choices between different interests. This language is not only meant to impress and persuade the reader. It also makes possible the translation of contested political objectives into the apparently neutral language of law while making institutional ambitions and objectives seem credible, necessary or even legally 'true'. Examining more carefully EU law as a professional language might enable us to see how policy goals turn into rules that we consider binding or authoritative and that make us believe in the beneficiality of whatever is being proposed as representative of 'integration'.

'70 Years of EU Law' relies on the classic justification for EU integration: privileging of functional demand – or perhaps better, the insiders' understanding of those functions – as the primary driver of legal or institutional change.[7] It describes how EU law and EU lawyers have served us well. It conveys the message that they have fought tirelessly for rights for the EU citizens and vulnerable groups that the Commission has secured against difficult and hesitant governments that are driven by false political ambitions. Commission lawyers have – as the subtitles of the book helpfully suggest – 'promoted and protected EU values', 'provided rights to EU citizens' and 'improved their lives' and 'ensured fair competition in the internal market'.

I hope to focus now on issues that the Book does *not* discuss, and while doing so, also look ahead, as I believe that the future should be different from the past. Joschka Fischer was already describing the process of European integration in 2000 as 'a bureaucratic affair run by a faceless, soulless Euro-

7 For a thorough explanation of the 'law of integration', see Julio Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018). For a historical contextualisation of this line of thinking, see Peter L. Lindseth, 'The Critical Promise of the New History of European Law', Contemporary European History 21 (2012), 457-475 (462-465).

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cracy in Brussels – at best boring, at worst dangerous'.[8] Nearly twenty-five years later, the EU's political integration remains low, decision-making largely confidential, and political control weak. The empowerment of the technocrat has come at the expense of the disempowerment of somebody else.

The book, in its presentation of the 'reflections on the principles and foundations of EU law' of the Commission Legal Service officials,[9] makes this disempowerment visible. The political citizen is entirely absent from the book. The Section entitled 'The Treaty of Lisbon: the citizen at the heart of the democratic life of the European Union' is exactly half a page long and merely quotes a number of Treaty articles.[10] While the book for example mentions the word 'democracy' some 45 times, these mostly refer to democracy as a general value or in the context of action against the Member States breaching the rule of law. More specifically, there is nothing in the book about the rights that EU citizens hold *against* the EU Institutions. While such rights have clearly developed at the level of Treaties, in particular after the Treaty of Maastricht, they have often remained a dead letter.[11] In the syntax and grammar of EU law, which settle what can be professionally said in EU law, it seems that the rights that the citizens hold against the EU find no articulation.

In recent years, we have seen an increase in the volume of research on how technical or scientific expertise fits into the governance process of a democratic society. The question has been raised whether expert-driven policy-making with its scientific vocabularies is squeezing the life out of the democratic process.[12] In the EU context, these concerns are equally relevant also for the role of law and lawyers. The dominant ideas of legal neofunctionalism have enabled the translation of essentially political questions into legal ones. As a result, they can then be resolved in the relative autonomy by legal

8 Speech by Joschka Fischer at the Humboldt University: 'From Confederacy to Federation – Thoughts on the Finality of European Integration', (Berlin, 12 May 2000), 2 available at <https://www.cvce.eu/en/obj/speech_by_joschka_fischer_on_the_ultimate_objective_of_european_integration_berlin_12_may_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html>, last access 18 February 2026.

9 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 7.

10 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 377-388 (377-378).

11 On this, see also Päivi Leino-Sandberg, 'Disruptive Democracy: Keeping EU Citizens in a Box' in: Sascha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019), 295-316.

12 Emilia Korkea-aho and Päivi Leino-Sandberg, 'Law, Legal Expertise and EU Policy-Making: Introduction' in: Emilia Korkea-aho and Päivi Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022), 1-16.

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professionals according to their own professional 'language and logic'.[13] With a bit of imagination and skill, lawyers can reframe what started out as a political issue as a legal one,[14] thus effectively shortcutting the political process around it.

All this has consequences. In addition to celebrating the role of lawyers in solving problems, we need to remain mindful of their contribution to the creation of problems; or in defining what should be treated as a problem. It is important to consider how particular normative biases and preferences come to be embedded within a regime in its historical trajectory and to explore the processes by which these normative biases are sustained or changed over time.[15] In this respect, during the '70 Years of EU Law' fairly little seems to have changed.

II. Learning to Speak the Language of EU Law

I plan to use my own experience in learning how to speak, write and think like a professional in EU law, how to use its idioms and references in a way that constitutes, for EU professionals, persuasive legal speech. What does it enable to say, and what not?

I started my law studies the same year as Finland joined the EU (1995). The year before Fischer wrote about the soulless bureaucrats in Brussels, I joined the Finnish Ministry of Foreign Affairs (MFA) human rights unit. I stayed there during the first Finnish EU Presidency, which naturally involved a great deal of EU coordination; not only in Brussels, but also in Geneva, Vienna and New York. The Commission legal service people I came across at the time were in particular from the external relations team, most specifically a certain Allan Rosas.

After eighteen months I returned to academia to do my PhD – but I also began to feel a growing frustration with the academic bubble that seemed to believe that 'real world problems' could be resolved by sitting in libraries reading stuff written by other people sitting in libraries; producing one article after another that very few people would ever read and that would be likely to remain irrelevant for any action that was actually taking place. After my

13 Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', IO 47 (1993), 41-76.

14 See also David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* Princeton University Press 2016), 110-116.

15 See Andrew T.F. Lang, 'Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition' in: Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012), 113-135 (113).

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PhD I left to work for the Finnish government for another nine years to deal with 'real world problems', working primarily on EU constitutional and institutional questions, including the negotiations on the Lisbon Treaty, Fundamental Rights Agency, Passenger Name Record (PNR) Agreements and the setting up of the Banking Union. This is the time when I came across many institutional lawyers in the European Council, different Council formations, Euro group, trilogues, the Secretariat of the European Parliament, during the second Finnish Council Presidency in 2006, in the various working parties I attended, and in the context of Court litigation. These were my 'formative years' that shaped my understanding of EU law and EU lawyers, but also introduced me to the syntax and grammar of EU law.

If you ever had faith in the law providing objective, technical, or clear-cut solutions to the tricky aspects on the negotiation agenda, that faith starts to crumble quickly when watching EU lawyers in action. Legal interpretations turn out to be just that, interpretations. Some readings may be more solid than others – but among competing interpretations the one usually is chosen that enjoys the widest agreement among professionals, that accords with the structural bias of the institution. In these circles, a reading not in conformity with the expected outcome may be judged as weak for being 'too political', or for being 'too academic'.[16]

Yet, politicians often look in the direction of lawyers to ease their pain in trying to deal with intractable political conflicts. Sometimes this means translating distributive choices into the syntax and grammar of legal speech; this may enable finding support for initiatives that are politically problematic. At other times, such translation helps, as it creates a sense of legal obligation for measures that are deemed necessary but for which no one is eager to take the political responsibility. The political context is seldom irrelevant, and the law provides opportunities to serve it.

When inside the institutions, you may get to enjoy the entertainment of Council and Commission lawyers beating each other – something which is regrettably rare, but highly enjoyable when it does happen. More often, however, their lawyers seem to be on a rather consensus-driven joint mission of assigning new tasks to the EU institutions.[17] There seem to be very few problems that could not be solved by inventing a new EU agency or a new procedure led by the European Commission reigning over a new governance

16 Päivi Leino-Sandberg, *Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021), 43.

17 On this, see Päivi Leino-Sandberg and Panu Minkkinen, 'From Separated Powers to Consensual Executive Government in the EU' in: Christina Eckes, Päivi Leino-Sandberg and Anna W. Ghavanini (eds), *The Dynamics of Powers in the European Union* (Hart Publishing 2024), 19-36.

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exercise explained as purely technical in nature, irrespective of the depth of the political struggles it is meant to solve. Faith in European solutions knows few limits – the Commission can always come up with better solutions than Member State authorities, and its belief in those solutions is unwavering.[18]

If you work for a Member State, like I did, it will not take long before you get your government's pet political project killed by Council lawyers, sometimes with a reading you find unjustified, or even biased. You see how often a politically problematic solution may be passed owing to its translation into a legal idiom. It also makes possible the translation of contested political objectives into the apparently neutral language of law while making institutional ambitions and objectives seem credible, necessary, or even legally 'true'. One recent example of this would be the institutional call for the 'principle of solidarity' as a new general principle of EU law; thus justifying a new form of national-supranational and executive-technocratic governance taking over national legislatures' traditional reserve over budgets and each Member State's responsibility for their own finances.[19]

Political power wins, especially when it can be dressed up in credible legal argumentation. Law is flexible, and EU law perhaps particularly so. Its interpretation is not tied to any tightly-woven societal or constitutional structure. Indeed, its very point is to eliminate politics. By the use of the appropriate syntactic and grammatical moves, a persuasive conclusion can be produced that seems no longer 'political' at all. And this takes place in a bureaucratic process that outsiders know little about. When working inside these procedures, you also see how often the legal readings are produced by techniques and arguments that seem contestable and even contradictory. The use of case law is selective nearly by definition, as arguments are built on specific cases or even individual paragraphs that are carefully selected so as to support the desired conclusion, while any case law contravening can be conveniently ignored.[20]

All the situations I just mentioned are situations where professional EU legal speech and the syntax of EU law flourish. A key aspect of the latter is – in what my friend Jan Klabbers would call the 'pissing contest' – the intimate knowledge of the Court's case law (just look at any random page of '70 Years

18 This is what Majone has referred to as 'the EU political culture of total optimism' of EU elites. See Giandomenico Majone, 'The Deeper Euro-Crisis *or*: The Collapse of the EU Political Culture of Total Optimism', EUI Working Papers LAW 2015 (2015).

19 I have discussed this at length in 'Constitutional Imaginaries of Solidarity. Framing Fiscal Integration Post-NGEU' in: Ruth Weber (ed.), *The Financial Constitution of European Integration: Follow the Money?*, 161-188.

20 On this, see Peter Lindseth and Päivi Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power', Hague Journal on the Rule of Law 16 (2024), 587-610.

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of EU Law'). The ability to throw around a mind-blowing number of Court references will quickly silence any aspiring young Member State diplomat with a fresh PhD sitting around the negotiation table, and make generalist officials feel uncomfortably that it is indeed high time to stretch one's legs. After experiencing such a pissing contest, it is easy to conclude that it is best to leave it to the EU institutional lawyers in the room to deal with such highly technical and boring issues. Moreover, EU institutional lawyers are – due to their double function as legal advisers and institutional agents before the Court – also deemed to have the competence to anticipate how the Court might be expected to react to the possible solutions on the table. Institutional lawyers know the secret arts of institutional Rules of Procedure and thus can often put their finger on the scale when it is settled who gets to decide matters, where and when. They excel in legal drafting, and generally keep the EU machinery running. This part of the 'syntax' is unknown, invisible, underappreciated, and vital for the European project.

The expertise of institutional lawyers is collective and cumulating knowledge, which is recorded in legal opinions and approved collegially. These opinions develop and refine a doctrine, to be reflected and referenced in future opinions.[21] Conceptual distinctions are stabilised in path-dependent ways. This doctrine is largely invisible outside the EU institutions. It is different from 'law in books'. Like all experts, legal experts tend to believe that their expertise is a 'special' something that cannot be acquired outside the institutional setting,[22] and they are in many ways right in arguing this. This professional legal speech involves much more than just legal skills. It also includes bureaucratic expertise of knowing the EU's inner workings. It is produced by people who are EU officials, and thus paid to look at things from the institutional perspective[23] – a perspective that they either prepossess or assume efficiently. A part of becoming a legal professional in this field is also learning those values and objectives that the leading professionals in the field represent. As Schepel argues:

> '[T]his is hardly a conspiracy theory just an assumption about people taking their professions seriously and having their worldviews determined in part by the way their professional lives are shaped and structured.'[24]

21 Jacqué (n. 1), 48.

22 Leino-Sandberg, 'Politics' (n. 16), 44.

23 For a more detailed explanation of the duties of EU officials, see Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?', European Law Open 1 (2022), 231-256.

24 Harm Schepel, 'Law and European Integration: Socio-Legal Perspectives', European Union Studies Association Review 17 (2004), 1-3 (1-2).

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A part of this expertise is acquiring a linguistic competence specific to their craft: 'the possession of a specific lexicon and a set of idioms plus a grammar that allows for the making of distinctions that frame the world in a specific way'.[25] Most fundamentally, this perspective frames their vision and tends to make considerations such as democratic scrutiny or national debates appear at best a nuisance or, worse, a threat to efficient decision-making in their own institutions. I should add that this is where my own attempts to learn the language of EU law have failed. While I gained insight into the workings of the language, I never quite managed to internalise its worldview, which seemed to be in too fundamental a contrast with my own identity and (openly political) vision of what the European Union should aim to be.

What I learned, however, is that unlike suggested by Fischer, EU lawyers are not soulless zombies but fundamentally nice and committed human beings, many of whom I consider my friends and whose skills never cease to impress me. However, when I meet my friends who work in the Commission for coffee at EXKI just outside Berlaymont they will sigh deep and resignedly at my arguments, and kindly let me know they are 'too political' and 'too biased' to be considered seriously in a grown-up world. Still, I believe that it is the job of the academic to point to the blind spots and biases that are part of being an expert in a field such as 'EU law'.

III. Researching EU Law as a Professional Language

I returned to the University some ten years ago to write a book about my experiences from working with the EU Institutions. This felt like the right thing to do to preserve my own critical voice, but also to protect the values and principles that figure high among my priorities for what the EU should become. In addition to EU law in the classic sense, my book on *The Politics of Legal Expertise in EU Policy Making* (2021) builds on 'new sources of law': interviews, access to documents and information requests and court pleadings that show how court cases have been argued by the institutions – and of course, who won and who lost and with which argument.[26] I also try to describe who these legal experts are, what they do, where they come from, what motivates them, and how they see their own role in the democratic processes and the construction of Europe.

25 See Martti Koskenniemi, 'Performing Legal Expertise: Reflections on the Construction of Transnational Authority' in: Emilia Korkea-aho and Päivi Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022), 19-42.

26 Leino-Sandberg, 'Politics' (n. 16).

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The specific focus of this special issue is on the Commission and its lawyers. They are not an easy topic for research. When making interviews, they are professional, competent, kind and even reasonably approachable, but they are also the only institutional lawyers who I have come across who will not allow you to record what they say.[27] So you go home from an interview with a bunch of random notes, wondering if they actually told you anything that you can use – which is of course exactly as they planned it.

'70 Years of EU Law' explains how the Legal Service is everywhere.[28] It

> 'provides independent legal advice to the Commission as a whole, in order to assist it to achieve its policy objectives. Taking the time to consider carefully all relevant elements of law and fact, and to listen to all points of view, the Legal Service strives to guide the institution as to the limits of, and opportunities provided by, the law, based on our best assessment of how the law is to be interpreted and applied.'[29]

The 'best assessment of the law' is in itself a policy objective. Any appearance of autonomy is the result of structural bias that is hidden by the appropriate syntactic moves that make the position seem legally 'true'. This was reflected in the many interviews I have conducted. Commission lawyers themselves like to emphasise the separation of the technical from the political, and the non-political nature of their own expertise, stressing their own integrity and professionalism. This is the classic way in which 'lawyers and judges will always and automatically do the most possible good through complacent inattention to the society in which they live'.[30] This reflects the

> 'liberal idea of law as the neutral arbiter of social conflict: It tells the managers of the legal system that their basic instructions are specified by a social process outside of the legal system and that they have no responsibility for that process except to solve the technical problems of devising functional responses that will help rather than hinder it. Hence, the inevitable ambiguities of legislative command, prior case law, custom, or constitutional text need never force a legal system

27 See Emilia Korkea-aho and Päivi Leino-Sandberg, 'Interviewing Lawyers: A Critical Self- Reflection on Expert Interviews as a Method of EU Legal Research', European Journal of Legal Studies 12 (2019), 17-47.

28 According to the Commission website, just during 2021 the Legal Service replied to 17.318 consultations of which 10.536 were on legislative drafts. Annual activity report 2021 – Legal Service, published in May 2022, 3, <https://commission.europa.eu/document/download/487a7f66-e435-4906-a01f-06e98f06a480_en?filename=annual-activity-report-2021-legal-service_en.pdf>, last access 18 February 2026.

29 Daniel Calleja and Tim M. Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 11-28 (19).

30 Robert W. Gordon, 'Critical Legal Histories', Stanford L. Rev. 36 (1984), 57-125 (69).

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to the pain of political choice because its managers can always claim to be serving the logic of a historical process or immanent social consensus that exists beyond and prior to politics.'[31]

However, Commission lawyers are also human beings and EU officials. Both of these qualities affect their work. They are 'people with projects, projects of affiliation and disaffiliation, commitment and aversion, and with wills to power and to submission'.[32] Still, these lawyers, like their peers in the other EU institutions, seem genuinely convinced that their legal expertise is – like most expertise is believed to be – technical and 'apolitical' and 'neutral', and they defend it as 'objective' and 'unquestionable'; and justify this with reference to legal professional rules.[33] Moreover, they would very much like to keep the professional circle where the potential scrutiny of their work takes place, small.

In defending their position, they use their own distancing vocabularies.[34] They rely on carefully selected paragraphs from the Court's case law, and emphasise how 'public interest requires that the EU institutions should be able to benefit from the advice of its legal service, given in full independence';[35] how their legal advice is to be understood as 'purely internal exchanges' that should 'be as a rule protected as part of the institution's "space to think"', and justify this conclusion with reference to 'the specific dual nature of the Legal Service, as both the sword and the shield of the legality of Union acts'.[36] Their 'advice should always be 'frank, objective and comprehensive'[37] – language also repeated in '70 Years of EU Law'[38] – which is also why their legal analyses could not possibly be disclosed. This is because the Legal Service of the Commission 'has no self-standing role

31 Gordon (n. 30), 68.

32 Kennedy (n. 14), 111.

33 Leino-Sandberg, 'Politics' (n. 16), 9-13.

34 Martti Koskenniemi, 'Hegemonic Regimes' in: Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012), 305-324.

35 This was argued 'with reference to Standing case-law, see most recently, ECJ, *Hungary v. Parliament and Council*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, para. 53, with further references; and ECJ, *Poland v. Parliament and Council*, case no. C-157/21, ECLI:EU:C:2022:98, para. 50, with further references'. What the Commission chooses not to mention is that in both of these cases, the Court established that the legal opinion in question was covered by legislative transparency and the claim for its confidentiality was 'refused unfounded'.

36 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 2001/1049/EC, Brussels, 9 June 2024 C(2024) 3961 final, 16.

37 For this argument made by the Council, supported by the Commission, see e. g. ECJ, *Sweden and Turco v. Council*, judgement of 1 July 2008, case no. C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, para. 62. The Court rejects the argument in paras 62-67.

38 Calleja and Rusche (n. 29), 21.

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during the ordinary legislative procedure. […] This principle is important, because each institution has its own Legal Service, and each Legal Service has the exclusive prerogative of advising its own institution, but not the others.'[39] In any case, 'It's the College that decides', as the Commission lawyers will tell you. But of course, if anything is more confidential in the EU than Commission legal advice, it is Commission College decision-making.[40] Whatever is recorded in its public minutes is a carefully curated PR exercise. If the Commission ever decides against the advice of its lawyers, as is known to happen from time to time, we certainly will not know about it.

According to the established jurisprudence of the Court of Justice, legal advice given especially in the context of legislative procedures should, as the main rule, be publicly disclosed. Even when the institution itself feels that

> 'disclosure of a document would undermine the protection of legal advice, it is incumbent on that institution to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined. In that respect, it is for that institution to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.'[41]

These considerations are 'clearly of particular relevance where the institution is acting in its legislative capacity' as

> 'Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise **all the information which has formed the basis for a legislative act**. The possibility for citizens to find out the considerations under-

39 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 2001/1049/EC, Brussels, 9 June 2024 C(2024) 3961 final, 16.

40 As the Commission helpfully explained in response to my recent public access request 'As for the oral procedure, the Director-General of the Legal Service serves as *jurisconsulte* of the College of Commissioners, attends the meetings of the Commission, and provides legal advice in the meetings of the Commission, when requested to do so. The detailed deliberations of the College of Commissioners, including the positions taken by the Legal Service, are not public, and the members of the College and the officials attending the meetings of the College are bound by the secret of the deliberations, in line with Article 9 of the Rules of Procedure of the Commission, which stipulates '*Meetings of the Commission shall not be public. Discussions shall be confidential*'. Decision of the European Commission pursuant to Article 4 of the implementing rules to Regulation 1049/2001/EC, Brussels, 9 June 2024 C(2024) 3961 final, 6.

41 ECJ, *Sweden and Turco* (n. 37), paras 44-45.

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pinning legislative action is a precondition for the effective exercise of their democratic rights.'[42]

'All the information' sets the threshold high. According to the Court, the Commission is to weigh its own interest against the interest of individual citizens. Given the grammar of EU law, it is not difficult to guess who wins when Commission lawyers engage in this balancing exercise. In its case law, the Court has specifically included the Commission as 'a key player in the legislative process' and established that documents produced 'upstream of the legislative procedure *sensu stricto*, which does not formally begin until a legislative proposal is submitted by the Commission' are in view of their purpose covered by the broad obligations of disclosure.[43] In these cases, Commission lawyers have raised persistent worries for 'room for manoeuvre', 'ability to reach a compromise' and 'external pressures which could hinder those delicate processes, during which an atmosphere of trust ought to prevail'. Consequently, for the Commission, the 'public interest would be better served by the possibility of completing those processes without any external pressure'.[44] The claim about external pressure created by Non-Governmental Organisations (NGOs), academics and the perils of public debate is something that I have personally challenged before the Court in respect of disclosure of institutional legal advice specifically – and won.[45] In that case, the Court reiterated that

> 'mere statements relying, in a general and abstract way, on the risk of "external pressure" do not suffice to establish that the protection of legal advice will be undermined […] mere unsupported statements regarding the possibility of "external pressure' on its legal service do not make it possible to consider that disclosure of the requested document would give rise to a real risk that is reasonably foreseeable and not purely hypothetical that the independence of that service would be undermined.'[46]

With this in mind, I would find it difficult to argue that 'all the information which has formed the basis for a legislative act' would not include various legal questions that occupy the Legal Service, such as legal analyses of what specific Treaty articles are understood to enable the institutions to do and what action they should refrain from engaging in. In my view, all of these are

42 ECJ, *Sweden and Turco* (n. 37), para. 46 [emphasis added].

43 ECJ, *ClientEarth v. Commission*, judgement of 4 September 2018, case no. C-57/16 P, ECLI:EU:C:2018:660, paras 86 and 88.

44 ECJ, *ClientEarth* (n. 43), paras 13 and 18.

45 General Court, *ClientEarth and Päivi Leino-Sandberg v. the Council*, judgement of 13 March 2024, joined cases T-682/21 and T-683/21, ECLI:EU:T:2024:165.

46 General Court, *ClientEarth* (n. 45), paras 64-65.

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fundamentally important constitutional questions that should not be regarded as confidential in a structure that claims democratic credentials. Yet, the idioms and references of EU law make such denial of disclosure persuasive for the professionals in the field, however undemocratic or hard to explain it might otherwise be.

A topical example is my request for access to legal advice to three legislative proposals[47] that later continued their life as the EU's massive COVID-19 response, the Recovery and Resilience Facility (RRF). These proposals pioneered an innovative use of cohesion policy that, as a member of the Commission Legal Service describes in an academic article, offered an indirect way to address the infamous asymmetry of the Economic and Monetary Union (EMU), which is why the process of preparing the legal groundwork for these proposals constituted a fierce area of activity for Commission lawyers for several years.[48] Yet, when requesting access to this massively important legal background work, the Legal Service consistently downplayed its own role. In fact, it insisted that its only contribution to this major constitutional transformation had consisted of correcting typing errors at the stage of interservice consultation.[49] To my insistence that there was a 'public interest in the disclosure and publicity of these matters is concerned' demonstrated by the huge increase in cohesion allocations in the EU 2021-2027 budget and the 'magnificent change in how EU citizens' money is being spent' the Commission agreed that 'the public should be informed about how public money is spent. Such information made available to citizens reinforces public control of the use to which that money is put and contributes to the best use of public funds'. However, the Commission found that 'this objective is already achieved by publishing comprehensive information on the EU budget' and the new cohesion policy, which already 'contributes to transparency in the use of public funds. No such link can be established regarding the full disclosure of the legal advice to which you are

47 I requested 'any legal advice in the possession of the European Commission relating to the "Proposal for a Regulation on the establishment of the Reform Support Programme" COM (2018) 391 final'; Reference number EASE 2023/1806; the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function (EISF Proposal)" COM(2018) 387 final', Reference number EASE 2023/1807, and the Proposal for a governance framework for the budgetary instrument for convergence and competitiveness for the euro area, COM(2019) 354 final', Reference number EASE 2023/1808.

48 Leo Flynn, 'Greater Convergence, More Resilience? – Cohesion Policy and the Deepening of the Economic and Monetary Union' in: Diane Fromage and Bruno de Witte (eds), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection*, Maastricht Law Faculty of Law Working Paper series 2019 (3), 48-60.

49 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 1049/2001/EC, Brussels, 22 August 2023 C(2023) 5806 final.

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seeking access'.[50] In other words, as far as the legal questions are concerned, there is nothing to see; the real action is always elsewhere, and communicated at the institution's own discretion. What the Commission Legal Service advises is a matter for the Commission only, and no one else. The Emperor has spoken, the subjects be pleased.

After several appeals to the European Ombudsman, the Commission's final decision to my requests for legal advice arrived in June 2024.[51] In the end, it had suddenly discovered 13 documents containing legal advice consisting of e-mail messages and other informal correspondence within the Legal Service and between the Legal Service and the Directorates-General that were in charge of preparing the proposals. But again, distancing vocabularies were at play. All the actual legal advice could, in its view, be redacted, because it 'concern[ed] purely internal exchanges related not even to any draft versions of future proposals (and therefore not part of [any] legislative file) and thus should be as a rule protected as part of the institution's "space to think".' These arguments are factually inaccurate, given the timeline of the relevant legislative negotiations and other publicly available information.[52] The timing of the documents shows their relevance for drafting the proposals or addressing concrete legal issues that emerged in the negotiations. When downplaying the importance of its own legal work, the Commission actually contradicts itself, as it simultaneously emphasises the high relevance of these

50 Decision of the European Commission pursuant to Article 4 of the implementing rules to Regulation 1049/2001/EC, Brussels, 9 June 2024 C(2024) 3961 final, 3.

51 Decision of the European Commission pursuant to article 4 of the implementing rules to Regulation 1049/2001/EC, Brussels, 9 June C(2024) 3961 final.

52 Deepening the EMU and modernising EU public finances are key strands in the debate on the future of Europe initiated by the Commission's White Paper of 1 March 2017, <https://commission.europa.eu/document/download/b2e60d06-37c6-4943-820f-d82ec197d966_en?filename=white_paper_on_the_future_of_europe_en.pdf>, last access 18 February 2026 which specifically refers to the objective that 'a euro area fiscal stabilisation function is operational' by 2025. Two of the legislative proposals I was interested in are included in the Reflection Paper on the future of EU Finances of 28 June 2017, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0358>, last access 18 February 2026; the letter of intent available at <https://wayback.archive-it.org/12090/20231103120538/https:/commission.europa.eu/system/files/2017-09/letter-of-intent-2017_en.pdf>, last access 18 February 2026; accompanying President Juncker's State of the Union Address 2017, available at <https://commission.europa.eu/strategy-and-policy/state-union/state-union-addresses-jean-claude-juncker_en>, last access 18 February 2026; and the Commission work programme for 2018, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0650>, last access 18 February 2026. The two first proposals were approved by the Commission on 31 May 2018. The third one builds on the first two, as mandated by the December 2018 Euro Summit, available at <https://www.consilium.europa.eu/media/37563/20181214-euro-summit-statement.pdf>, last access 18 February 2026. There is little doubt that by the end of 2017 the Commission was working on concrete legislative proposals.

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opinions not only for the RRF, but also for many pending and future proposals, particularly in the context of the future [Multiannual financial framework] preparations, and 'for future programmes, and in particular for on-going discussions on defence financing'.[53] I fully agree, and would argue that this is precisely what creates such a crucial democratic interest for transparency on the matter and constitutes a strong reason to disclose the documents.[54] These are issues, which should be debated more widely before a legal fiat is allowed to settle the outcome. The European Ombudsman agreed, and found maladministration in how the Commission had handled my request.[55]

When Commission lawyers enable the EU to 'make Union economies more resilient and better prepared for the future', and 'invest in green and digital technologies', 'boost energy efficiency', 'create jobs and sustainable growth and allow the Union to make the most of the first-mover advantage in the global race to recovery',[56] they are intimately involved in high politics. What the Commission lawyers do, and how they do their determinations, has consequences for the lives of us all. This calls for a clearly higher standard of democratic scrutiny. However, the Commission is heading in the opposite direction. In December 2024 the Commission updated its Rules of Procedure to establish 'a presumption that access to opinions of the Legal Service 'undermines interests protected by Article 4(1) to (3) of Regulation (EC) No 1049/2001'. As a result, '[n]o access to those documents shall therefore be granted, unless the applicant demonstrates an overriding public interest […].'[57] My experience serves to demonstrate that the Commission is unlikely to ever find its new, inverted presumption overridden, given that it does not see any public interest in public scrutiny of its legal background work. This is among the reason why I have joined a legal challenge to the Commission

53 Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation 1049/2001/EC, Brussels, 22 August 2023 C(2023) 5806 final (emphasis added).

54 The Court has already established that 'the assertion that the requested document is relevant to a 'wide range of current and future dossiers' does not constitute a detailed statement of reasons' ECJ, *Samuli Miettinen v. Council*, judgement of 18 September 2015, case no. T-395/13, para. 37.

55 European Ombudsman, Decision on how the European Commission handled a request for public access to documents concerning legal advice issued during the preparatory stages of three legislative proposals of 2 April 2025, case no. 2498/2023/SF.

56 This is language from the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility of 28 May 2020, COM(2020) 408 final, 1.

57 European Commission Decision 2024/3080/EU establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 of 5 December 2024, OJ L 2024/3080, Art. 4 para. 2(c).

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decision adopting the new rules.[58] The basic principles of democracy also apply to the Commission's own work.

IV. The Biases of a Professional Language

Even if legal opinions are difficult to access, in my previous work and research I have read many of them. More of those are by the Council Legal Service, as they are easier to get hold of, but also many by the Commission. These opinions are a useful material for examining the actual grammar of EU law; it demonstrates the rules on which kinds of arguments succeed and which fail; or how rules are interpreted and applied in certain ways instead of other prima facie plausible ways.

What my research suggests is that, contra the implication of the '70 Years' Book, the winning arguments do not simply arise out of a functionalist dynamic, or some unavoidable process that can be called 'integration', which creates specific demands and preconditions that are then translated into legal language by EU lawyers. These outcomes do not emerge from the law automatically or out of their own intrinsic force. In other words, law has not just evolved as a function of the problems it seeks to solve, with institutional lawyers simply advancing that functionalist dynamic in some kind of neutral way. This thinking is a reflection of the

> 'general functionalist method [which] is to construct (or, as is rather more common, to assume without much discussion) a typology of stages of social development and then to show how legal forms and institutions have satisfied, or failed to satisfy, the functional requirements of each stage.'[59]

In this process of 'becoming', Commission lawyers have played a deeply political role, picking, for a purpose, the winning arguments, subject to a later scrutiny by lawyers in the Council. My research on the EU's Covid-19 transformation exemplifies how institutional lawyers have promoted a contested integration agenda by carefully cherry-picking supportive legal arguments while remaining silent on other, possibly more persuasive arguments that go into the opposite direction. The legal background work and the interpretative choices backstage have had massive distributive consequences, a fundamental impact on the functioning of democracy in the EU and its future direction.[60] In this process, EU law has offered lawyers within the

58 See ECJ, *De Capitani and Others v. Commission*, case no. T-146/25.

59 Gordon (n. 30), 64.

60 In more detail, see Päivi Leino-Sandberg, 'The Secret Life of the EU Treaties: NGEU and the EU's "Living Constitution"', European Law Open 1 (2026), 1-23.

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Institution a vocabulary to make choices between values and interests. In such processes, some arguments win, some of them lose, which is the essence of politics. Together these lawyers have enjoyed, in conjunction with the Court, something close to a monopoly in establishing the 'true' meaning of a norm, which in turn has given them a key role in solving disputes and providing compromises.

As I wrote above, the grammar of EU law is strongly geared in a functional direction: everything should go 'forward', and the job of the legal experts is to write their views in such a way that this impression is strengthened.[61] Many analyses of the legal services are persuasive, others less so. The EU's many open Treaty rules and principles are often less relevant than institutional preferences and ways of operation. In the syntax of the language, expressions such as 'allocated powers', 'subsidiarity', 'proportionality' and the likes are secondary to 'efficiency' and 'an ever closer Union'. Such expressions can be bent this way or that way.[62] But though the syntactic arrangement of rules and other locutions remains indeterminate, the outcomes are still easy to predict, if one is familiar with the institutional way of solving questions. 'Solidarity' beats 'no-bailout', as solidarity speaks for more integration while no-bailout speaks for less. There will nearly always be a legal basis that can be identified for any proposal – the only question is where to find it, and how to frame that choice in a manner that is professionally persuasive. When such flexible, pro-integrationist language-use becomes business as usual, any defence of established readings starts to be perceived as political and biased, or indeed 'a reactionary attempt to oppose the trajectory of history'.[63] There is a 'hermeneutic of suspicion', a need to 'uncover hidden ideological motives behind the "wrong" legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology'.[64]

Words such as 'democracy' and 'citizen' have their formal place in the syntax of EU law. But the background conditions of EU debates and the grammar of EU law turn them into second-order issues. Just look at how applying for documents from the Commission is made so difficult that any

61 In other words, it follows the classic neofunctionalist logic as described in Burley and Mattli (n. 13), 43-44.

62 One topical example is the future use of mixed agreements, where the future involvement of national parliaments and their democratic engagement with the broad spectrum of international obligations that the EU assumes on behalf of Member States is balanced against the interest of institutional efficiency.

63 See Maria Antonia Panascì, 'Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution', CML Rev. 61 (2024), 13-54 (54).

64 See Duncan Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought', Law and Critique 25 (2014), 91-140 (91).

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person in their right mind – or with a life – would conclude there is no point to try to appeal and keep track of missed deadlines when all the Commission does is, to do its best to ignore you. For the European Ombudsman, these systemic and significant delays amount to maladministration and she has urged the Commission to correct this situation as a matter of priority.[65] This speaks volumes about the rights of the 'political citizen' in the syntax of Commission legal advisers, who are largely in charge of drafting Commission responses and defending its position in Court.

Priority is on the functionalist demand to deliver results. Overall, institutional legal experts tend to have little patience for democratic concerns, and I have seldom seen one of them defend national competence.[66] The role of national parliaments is rarely highlighted in professional talk, and national constitutional courts are just the worst. All these factors are at play when lawyers select which interpretation should be seen to conquer in this or that particular instance.[67] But 'for a lawyer with a project, no existential crisis need emerge from what inevitably appears as a strategic accommodation'.[68] The background conditions explain why some of these choices, in terms of legal interpretation, seem 'good' and others 'bad'; some policies appear plausible while others seem implausible. EU law does not generate those choices – but it provides a menu of argumentation to justify whichever choice best serves a particular purpose. The choices reflect background conditions that institutions and their lawyers have come to accept in more or less unthinking terms. These choices are not random but actually predictable, if you understand the background conditions.

So it behoves us, as researchers, to bring these choices to the surface and try to subject them to critical assessment. Transparency demands it, but so too does democracy and the rule of law in the EU.[69] As legal scholars, it should be a matter of professional pride to go beyond just examining and echoing what the EU institutions and their lawyers say. Too often, EU legal scholarship includes a strong element of apology, a willingness to understand

65 European Ombudsman, Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents of 18 September 2023, OI/2/2022/OAM.

66 The Council Legal Service used to be more firm in monitoring the limits of EU competence, but has, in recent years, let go.

67 One example I have written about earlier is the EU-UK TCA and how silent the procedure remained on the democratic rights of national parliaments in the approval process. See Christina Eckes and Päivi Leino-Sandberg, 'The "EU-UK Trade and Cooperation Agreement" – Exceptional Circumstances or a New Paradigm for EU External Relations?', M. L. R. 85 (2022), 164-197.

68 Koskenniemi, 'Performing Legal Expertise' (n. 25), 36.

69 Again, see Lindseth and Leino-Sandberg (n. 20).

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and justify, stemming from a strong attachment to the same integrationist worldview that the institutional lawyers share.[70]

In EU law, the standard of professional competence is often set by practitioners and members in EU institutions. Their views about what the real 'problems' are, and what are the proper ways to resolve them, become professional standard-setters. To be a professional EU lawyer is to share the grammar of functionalism, and to employ the syntactic rules set by the lawyers in the EU institutions. Moreover, due to the high confidentiality of legal work within the EU institutions and difficulties in gaining access to it, knowledge is often mediated by the insiders, which further strengthens their dominant position in the hierarchies of knowledge in the field.[71] '70 Years of EU Law' is also representative of much of the 'academic' work produced by Commission lawyers. There are no contributions that would be critical of Commission action, or raise concern about its legality; it is a story about 70-year march from one virtuous battle to another in the service of a higher goal. To be clear, I am not saying that anyone's acting in bad faith. I am merely pointing out that this is where things will inevitably land, both in terms of the general cultural ethos in the Commission Legal Service and in terms of the incentives of its individual members. The job for us researchers is to uncover what makes Commission lawyers promote certain readings at the expense of other, equally plausible readings. It is difficult to think of a situation without alternative interpretations, and a choice between them. For critical research, it is also important to demonstrate that institutional practice entails more than just the official rules and policies that the institution claims to follow.

The Commission has a job, which is to promote integration. This determines the grammar of EU law. Yet, what 'integration' means is not always obvious. Law is not only an important tool in making that definition, but from the perspective of institutional lawyers, law itself *is* integration. It creates a sense of what 'integration' really is about and what it is not. Yet, there are alternative and equally legitimate ways to think about 'integration'; in each of them choices are made between different values and interests, involving different kinds of distributional consequences. However, these choices and consequences become invisible behind a professional language with syntactic choices that make a certain way of thinking about integration as the only 'right' way to think, 'required by the Treaties' or in other ways

70 For a similar argument see Duncan Kennedy, 'The Structure of Blackstone's Commentaries', Buff. L. Rev. 28 (1979), 209-382 (217). For a critique of such structural bias in EU legal scholarship, see Leino-Sandberg, 'Enchantment and Critical Distance' (n. 23).

71 Leino-Sandberg, 'Enchantment and Critical Distance' (n. 23), 256.

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legally 'true'. This is a result of '70 Years of EU Law', which has provided us the sense of what the right or the realistic way of understanding what 'integration' is.

And let me be clear: I am not arguing that EU legal experts should or even could be 'neutral'. That would be obviously naïve. All readings of law are political, including my own. It is also normal that the meanings of legal language develop with society and its needs. I am not insisting that EU development should be frozen to some inert interpretation that somebody thinks that the Treaty-makers may have had in mind seventy years ago when they threw away their guns, stopped shooting each other and signed the first Treaty. But the world has changed, and the wishes of the European electorate should matter as well. Currently, they have little chance to affect the institutional agenda. A part of this is the extreme reluctance to open legal debates to critical and democratic scrutiny. The EU remains a sausage factory with production lines that are not attractive to observe. In this process, the job for us academics is to make sure that the integration agenda and the sausage factory that keeps reproducing it both remain subject to debate. In this discussion, this special issue makes a significant contribution in providing a critical engagement by the EU legal academia with the official narratives produced by EU institutional lawyers, highlighting the convenient omissions in the Legal Service's recollection.

V. Towards a New Professional Language

In conclusion, I would like to come back to where I started: my worry about the flip-side of the remarkable success of EU lawyers in taking forward the European idea. This is of particular importance now that it has become clear how difficult it is to advance the integration process through formal Treaty amendments. In the absence of Treaty change, it is the ingenuity of EU lawyers that has kept integration going. And while this ingenuity has enabled the EU to respond to some very real challenges, it has also led to the capture of Treaty interpretation by a professional elite whose biases are hidden behind an impenetrable idiomatic language. This theme is also touched upon by the final section of the '70 Years of EU Law', which talks about the EU Treaties as 'living instruments', and makes tribute to the 'political will of the institutions working together in order to respond to the urgent nature of [the EU's recent] challenges' and the 'evolution of the EU's institutional system through "constitutional practice"'.[72]

72 Calleja and Ladenburger (n. 10), 384.

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This is one way of looking at these developments, but there certainly are even others. With the Treaty anchor loosened, what used to be great constitutional moments have been downgraded to mere questions of reinterpretation. We see how 'bargaining takes place far away from political constituencies' as 'law relegates the world-creating and distributive aspects of institutional power to men and women whose experiences and normative expectations are geared in a particular way' but who still maintain the idea that their legal expertise is neutral.[73] I am thinking of big questions such as EU borrowing, the push for structural reforms in the Member States by using money to buy leverage into their national policies, and the rapidly widening use of conditionality and modes of EU-level planning as a means to give the Union leverage in areas where it does not have formal competence. In recent years, legal interpretations in the institutions on core choices made in the Treaties have tended to fluctuate in response to functional demands. The extent to which the EU remains a Union based on the principle of conferral, and what implications this has, should be subject of an open, constitutional debate. In these contexts, the distancing techniques of the language of EU law seem particularly out of place.[74] The institutions are moving us in the direction of a new professional language where previously held understandings about the limits of the Treaty are quickly being replaced by new 'constitutional practice' that is largely developed backstage, in the Commission and the Council.[75] It is striking that those most eagerly speaking for flexible readings of the Treaty are those who most eagerly wish to isolate the processes where such readings take place from democratic scrutiny and public participation. Exposing these underlying assumptions and key arguments is vital for a critical scrutiny of EU's future direction.

Alternative languages would exist, building on a more expansive legal grammar that would recast choices of priorities in political terms. It requires input from all of us in EU legal academia to make the insufficiency of the language of EU law spoken in the institutions to meet the democratic demands of today. Joseph Weiler once wrote, '"[d]emocracy" was not part of the original DNA of European integration. It still feels like a foreign implant'.[76] For the EU to survive for another seventy years, and also for it to

73 On the setting in relation to transnational law more broadly, see Koskenniemi, 'Performing Legal Expertise' (n. 25).

74 See Lindseth and Leino-Sandberg (n. 20).

75 Leino-Sandberg, 'The Secret Life' (n. 60), 10.

76 Joseph H. H. Weiler, '"Europe in Crisis – on Political Messianism", "Legitimacy" and the "Rule of Law"', SJLS12 (2012), 248-268 (268).

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become a less obvious choice as the punching bag for political extremists, old practices will need to change. It will need a new DNA – one which depends less on lawyers and technocrats taking a leading role in the background. We need to foreground the hard work of democracy, particularly now as the EU seeks new powers to raise and spend money. We need to stop viewing democratic processes, particularly at the national level, as mere nuisance in an otherwise expert-driven process.

Legal work is about making choices; and those choices privilege some values or interests over other values or interests. For this reason, 'the contours of responsibility of each are more complex than some general theories of moral responsibility and the pleas of some public officials would have us believe'.[77] As Duncan Kennedy writes,

> 'lawyers are often – maybe usually – more than just legal technicians. They shape deals and they make law. They invent new forms of social life, they fill gaps, resolve conflicts and ambiguities. They mold the law, through the process of legal argument, in court, in briefs, in negotiations. It won't do to say, look, I molded the law this way, and this way, and this way. I've made a lot of law. But don't hold me responsible for the actual content of the law I made. […] The trouble with this is that your activity is not neutral, and the better your legal skills, the less neutral you become. Lawyers think up new rules, ideas, arrangements and arguments. Which ones win, which ones judges and juries and legislatures adopt, is a function of who has the legal talent on their side, as well as a function of the justice of the position.'[78]

I believe it is imperative to make the pattern of legal choices visible, as well the justifications on which they are based. If legal advice is not publicly available, it is difficult to have a public debate on its quality or to contest its conclusions by putting forward alternative readings.

As researchers, we are placed between the dialectics of being either inside or outside the EU legal professional community. We also need to position ourselves in relation to continuity and change of this professional language. Commitment to the language of EU law is required to maintain influence, prestige and professionalism. At the same time, it is important to maintain one's identity and critical power as an external observer.[79] My contribution is

77 Dennis Thompson, 'Ascribing Responsibility to Advisers in Government', Ethics 93 (1983), 546-560 (560).

78 Duncan Kennedy, 'The Responsibility of Lawyers for the Justice of Their Causes', Tech L. Rev. 18 (1987), 1157-1164 (1160).

79 On this, see also Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power', Humanity: An International Journal of Human Rights, Humanitarianism, and Development 1 (2010), 47-58 (55).

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aimed as an attempt to change the language 'from within' while making some of its arguments and background assumptions visible. With this, I hope to create conditions for a broader grammar of EU law that would translate the choices between priorities into political terms and stop seeing democracy as a threat to the European Union, but instead, allow subjecting its legal and policy choices to critical debate.

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An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity

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Abstract

This Article uses *70 Years of EU Law – A Union for Its Citizens* to illustrate how different positionalities in the present lead to divergent (re-) constructions of the past of European Union (EU) law. This, in turn, configures different imaginations of EU law's future. In order to show this, the paper puts the Legal Service's book in conversation with the academic literature. It shows a disconnect between the book's imagination of the future of EU law and the corresponding scholarly debates: while the former is focused on procedural reforms, the latter predominantly problematise matters of substance. The paper relates this mismatch to the respective, divergent postures towards EU law's past. In order to do so, it proposes an analytical

* This paper benefitted greatly from engagement with many persons who generously devoted their time to discussing the ideas expressed therein. I am thus indebted to the participants in the conference '70 Years of EU Law: Continuity and Discontinuity'; to my colleagues in Team von Bogdandy at the MPIL (and particularly to Armin von Bogdandy and Michael Ioannidis); to Marco Dani, Floris de Witte, and Alexander Somek; as well as to Robert Stendel and two anonymous reviewers. All websites were last accessed on 10th October 2025; all translations are mine. The usual disclaimer applies.

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framework which, building on Gerschenkron, understands 'continuity' and 'discontinuity' as possible modalities of (constructive) diachronic 'change'. The paper subsequently deploys Foucault's 'archaeological' analytical framework to further flesh out the conceptual contours of 'continuity' and 'discontinuity'. In this framework, 'continuity' describes change which takes place in harmony with 'foundations' assumed to remain stable. 'Discontinuity', on its part, denotes change which introduces new 'foundations' altogether. Against this background, the Legal Service's book interprets the history of EU law as one of continuity with European integration's mythical origins. On the other hand, the scholarly literature is much readier to understand EU law's path as discontinuous with the vision of the 'founders'. The paper understands such different attitudes towards EU law's past as (co-) responsible for configuring those different imaginations of its future. In turn, both such postures can be traced back to different claims to present-day authority. The paper thus calls for reflection on how EU law's temporality is constructed to legitimise different legal-political projects.

> '[F]or Europe, the memory of our past has always framed our future. And that is all the more important at a time when the unthinkable has returned to our continent. Russia's flagrant attempts to redraw maps and to rewrite even the most tragic parts of our history have reminded us of the dangers of losing our grip on both our past and our future. Of living in a perpetual present and thinking that things can never be different. […] But this Conference has shown us that Europeans are determined not to make this mistake. You have told us that you want to build a better future by living up to the most enduring promises of the past. Promises of peace and prosperity, fairness and progress; of a Europe that is social and sustainable, that is caring and daring.'
>
> Ursula von der Leyen, 'Speech by President von der Leyen at the Closing Event of the Conference on the Future of Europe' (Strasbourg, 9th May 2022)[1]

Keywords

70 Years of EU Law – EU Law – Archeology – Narratives – Discourse

[1] Available at: <https://ec.europa.eu/commission/presscorner/detail/sl/speech_22_2944>, last access 10 October 2025.

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I. Introduction: the Past, Present, and Future of EU Law

In European modernity, the categories of 'past', 'present', and 'future' are placed in a dialectical relationship.[2] For one, as most lucidly theorised by Max Weber, claims to authority in the present can be legitimised as the propagation of a mythical, 'traditional' past.[3] However, legitimising the present by reference to the past can also come in a confrontational shape. In fact, a defining feature of European modernity has been its claim to overcome a past of obscurity and oppression.[4] In this case, authority is legitimised not so much to the extent that it reproduces past arrangements, but rather insofar as it breaks away with them. Beyond the apparent juxtaposition of these two postures, however, lies a structural commonality. In fact, in both instances, past events are invoked as instrumental to present action. Present-day claims to authority are thus formulated by way of a dialectical relationship to the past – whether this dialectic takes the form of an appropriation or of a rejection. Furthermore, a key feature of European modernity has also been a projection into the future. Concurrently with the relationship to the past, claims to authority in the here-and-now have thus been grounded on the promise of realising a state of affairs different from that prevailing at the time when the claim was advanced. This promised future generally exhibited the features of progress, and individual as well as collective emancipation.[5] In modern temporality, the present thus emerges as the interlocking juncture between past and future.[6] In other words, the past and the future are mobilised to serve the purposes of the present, which constitutes itself in a dialectical relationship with both.

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2 The present Article admittedly reproduces the linear temporality which is characteristic of European modernity. I do so for analytical purposes, deeming EU law to be firmly embedded in European modernity's categories. However, I am mindful of the cultural contingency and problematic implications of this construction of temporality. For recent critiques with an overview of the relevant literature, see Eliana Cusato, 'Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity', HJIL 84 (2024), 865-893 (866-876); Moritz Vinken, A Geology of International Law 2.0 – Time, Structures and Struggle (May 29, 2025). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2025-09, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5274030 (1-5).

3 Max Weber, *Wirtschaft und Gesellschaft – Teilband 4: Herrschaft* (Edith Hanke and Thomas Kroll eds, Mohr Siebeck 2005), 729-734.

4 Jürgen Habermas, *Der philosophische Diskurs der Moderne: Zwölf Vorlesungen* (Suhrkamp 1983), 13 f.

5 Habermas (n. 4), 14-16.

6 See, although with different accents, Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (The Viking Press 1961), 6-15.

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So much being said, the relationship between past, present, and future in European modernity is more appropriately understood as *co*-constitutive. That is to say, the 'past' and the 'future' are a far cry from being a mechanical succession of 'facts', aseptically reconstructed or foreseen by the observer in the 'present'. Rather, they are the contingent construct of situated material conditions. To start with, past events are not epistemologically separable from their indirect reconstruction by the historian.[7] In turn, this constructive nature makes them indissociable from the situated perspective of the subject undertaking the reconstructive enterprise. The positionality of that subject and the motives underlying their undertaking shape which events are to be recollected, which events are ignored, and the way in which the overall narrative is constructed.[8] At the same time, one's projected future cannot but reflect the cleavages and aspirations arising out of present-day circumstances.[9] Precisely because the future promised by modernity is juxtaposed with a dissatisfactory present, its concrete shape is inherently relational: the world to come defines itself in opposition to the world it promises to change. In other words, as eminently intellectual constructs, both the past and the future are influenced and shaped by the situated conditions which lead the subject to construct them. Past, present, and future are thus mutually co-constitutive. While appeals to the past and to the future ground (or undermine) claims to authority in the present, they also are a projection of the situated conditions of that present.

This dialectical interplay of the three temporal planes ubiquitously pervades the discourse on the EU and its law. Weiler thus famously described the political ethos of the EU as 'political messianism': European integration derived its *present* legitimacy from its promised *future* of peace and prosperity, juxtaposed to a *past* of violence and domination epitomised by WWII.[10]

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7 See only Marc Bloch, *Apologie pour l'histoire ou métier d'historien* [1949] (Dunod 2024), 99-107.

8 See Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021), particularly 253-257 and 285-287. For seminal elaboration on the way in which this plays out for Weber's traditional mode of legitimisation, see Eric Hobsbawm, 'Introduction: Inventing Traditions' in: Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983).

9 Niklas Luhmann, 'The Future Cannot Begin: Temporal Structures in Modern Society', Social Research 43 (1976), 130-152 (139-145).

10 See, for the argument's several iterations, Joseph H. H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', I.CON 9 (2011), 678-694 (682-686); Joseph H. H. Weiler, 'Europe in Crisis: On "Political Messianism", "Legitimacy", and the "Rule of Law"', SJLS (2012), 248-268 (256-260); Joseph H. H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration', Journal of European Integration 34 (2012), 825-841 (832-837); Joseph H. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay' in: Julie

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Against this background, the interlocking of past, present, and future can be observed in what has by now become established practice: the (re-)narration of EU law's diachronic development on the occasion of symbolical anniversaries.[11] These periodic reconstructions are not just aseptic updates, covering the most recent nitty-gritty of EU legislation and case law. Rather, they ostensibly bear the mark of the shifting intellectual climates, cultural cleavages, and political struggles of the period which produced them. A quick perusal of this memorial practice vividly illustrates the point. In 1983, the European Commission promoted the publication of a book on *30 Years of Community Law*.[12] Over twenty-one Chapters, the book identified general principles and lines of development in both the EU's constitutional structure and its substantive policies. The underlying effort was one, first and foremost, at doctrinal systematisation. This insistence on law and its ordering potential strongly resonates with the contemporaneous 'integration through law' project[13] – which, uncoincidentally, was strongly backed by the Commission itself.[14] Between 2009 and 2010, two high-profile edited volumes then commemorated '50 years' of the integration process. The books engaged in a more reflexive and critical exercise.[15] Once again, it is tempting to see this

Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012), 137-158 (144-158). For a recent endorsement and further development, see Toni Marzal, 'Between Integration and the Rule of Law: EU Law's Culture of Lawful Messianism', GLJ 24 (2023), 718-734 (723-729). For critique, see Alexander Somek and Jakob Rendl, 'Messianism, Exodus, and the Empty Signifier of European Integration' in: Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 147-159.

11 More broadly on anniversaries in EU law, see Antoine Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence', European Political Science Review 4 (2012), 51-71.

12 European Commission, *Thirty Years of Community Law* (Publications Office of the European Union 1983).

13 As conceptualised in Mauro Cappelletti, Monica Seccombe, and Joseph H. H. Weiler, 'Integration Through Law: Europe and the American Federal Experience – A General Introduction' in: Mauro Cappelletti, Monica Seccombe, and Joseph H. H. Weiler (eds), *Integration Through Law: Europe and the American Federal Experience – Volume 1: Methods, Tools and Institutions – Book 1: A Political, Legal and Economic Overview* (de Gruyter 1986), 3-68. For an insightful retrospective, see Loïc Azoulai, '"Integration Through Law" and Us'. I.CON 14 (2016), 449-463.

14 Rebekka Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe', GLJ 18 (2017), 1531-1556 (1545-1555).

15 Incidentally, it is interesting to notice that these works also explicitly drew a connection between EU law's 'past' and its 'future', in the vein of the remarks formulated above. See Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009); Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

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approach as aligned with the sober optimism, coupled with a latent sense of *malaise*, which accompanied the 'rescue' of the Constitutional Treaty by the Lisbon Treaty.[16] The pattern is completed by another publication which, in 2019, celebrated '60 years' of the Rome Treaty. This time, the book adopted an interdisciplinary perspective on the 'challenges' faced by the EU at the end of the 2010s.[17] This framing is strongly aligned with the narrative of 'crisis' which dominated the EU's political and scholarly debates over the 2010s.[18] Further, the move away from a strictly legal analysis seems to reflect the 'contest' between law and other disciplines in providing the epistemic frame of reference for EU integration.[19]

70 Years of EU Law, the book to which this Special Issue is devoted (hereinafter: 'the book'), can be understood as the latest iteration of this tradition.[20] Throughout sixteen Chapters, the Legal Service of the Commission tells a story of EU law's development over time. This diachronic perspective is applied to several areas of EU substantive and institutional law. The book presents the developments occurred over the '70 years of EU law' spanning from the entry into force of the Treaty of Paris in 1952 to today.[21]

16 Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010), 20-25.

17 Luisa Antoniolli, Luigi Bonatti, and Carlo Ruzza (eds), *Highs and Lows of European Integration: Sixty Years after the Treaty of Rome* (Springer 2019).

18 From a rich literature, see Agustín José Menéndez, 'The Existential Crisis of the European Union', GLJ 14 (2013), 453-526; Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-Between" Democracy and Authoritarianism', I.CON 13 (2015), 219-245; Kelly M. Greenhill, 'Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis', ELJ 22 (2016), 317-332. Over the 2010s 'crises' were often presented as a threat to the integration process. More recently, however, a different framing has taken hold. The manifold crises faced by the EU are now often portrayed as having rather provided opportunities for resilient progress: see John van Oudenaren, *Crisis and Renewal: An Introduction to the European Union* (Rowman & Littlefield 2022), 8-27 (in political science); Armin von Bogdandy and Jürgen Bast, 'Die Systematik des Verfassungsrechts der europäischen Gesellschaft' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht: Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2025), 39-65 (39-40) (from legal scholarship).

19 Antoine Vauchez, 'Introduction. Euro-Lawyering, Transnational Social Fields and European Polity-Building' in: Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013), 1-17 (15-17); Christian Joerges, 'Introduction: The Contest of Disciplines in the Study of European Integration' in: Christian Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart 2022), 11 f. Also see Jacob van de Beeten, 'Festschrift or Fiction' Ommissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

20 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023).

21 See Roberta Metsola, 'Guest Contribution' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 8-10 (8).

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Its declared intent is to reconstruct 'the journey leading from the original essentially economic-based Communities to a union for its citizens, which now spreads its action to a vast number of fields increasingly relevant to all Europeans'.[22] In other words, the book essentially undertakes to illustrate how, in the most varied areas of socio-economic life, the EU has delivered beneficial outcomes 'for its citizens' by means of its law. Its overall purpose is hence to advance a renewed claim of 'output legitimacy' for European integration, understanding EU law as its key driver.[23] The other contributions in this Special Issue address in detail several of the book's Chapters. The present article rather focuses on the book's overarching intellectual framework. In order to do so, it takes as a starting point the book's concluding Chapter, devoted to 'The Future of European Union Law' (hereinafter: 'the Chapter').[24] My main contention is that the Chapter's vision for 'the future of EU law' is impervious to several prominent lines of debate to be found in the scholarly discourse on the same issue. I thus interrogate the reasons for this divarication, building on the intertwinement between 'past', 'present', and 'future' highlighted above. I thus try to uncover the extent to which the reconstructions of EU law's 'past' and the imaginations of its 'future', respectively undertaken by the book and the broader scholarly discourse, are instrumental to different projects pursued in the 'present'.

With a view to this, the Article proceeds as follows. Section II identifies the main lines of the Chapter's proposals concerning the future of EU law, understanding them as mostly devoted to questions of procedure. It then contrasts them with some key topics discussed in the recent scholarly literature, which primarily concern questions of substance. The Section resorts to the concept of 'legal imagination' to conceptualise the hiatus so identified.

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22 Daniel Calleja and Tim M. Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (28).

23 For influential theorisation, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999), particularly Chapter 1. For a similar reading of the book's overall motive, see Päivi Leino-Sandberg, '"70 Years of EU Law" – The Politics of a Professional Language', HJIL 86 (2026), 59-83; Aitor Navarro, 'The EU as a Catalyst for Tax Harmonisation – Triumphs and Challenges in an Asymmetric Cooperation Model', HJIL 86 (2026), 357-378, and van de Beeten (n. 19); implicitly also Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297, as well as Christian Thönnes, 'Invisible Infringements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330. For a different take, see however Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408.

24 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-392.

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This lays the foundations for the enterprise subsequently undertaken: investigating the extent to which the respective approaches to EU law's past concur in configuring those different imaginations. With a view to this, Section III introduces the analytical lens used to decipher such approaches. Drawing on Gerschenkron and Foucault, the Section thus introduces the concepts of 'continuity' and 'discontinuity' as possible modalities of diachronic 'change'. Section IV shows that the book generally exhibits a tendency towards interpreting EU law's past as a story of continuity. Legal scholarship, on the other hand, is much more comfortable in reconstructing that past as marked by discontinuity. The article thus interprets the mismatch between different legal imaginations highlighted in Section II as the manifestation of deeper divergences on how to interpret the current state of EU law, as well as its relation to its past. In a nutshell, I thus contend that the Chapter's emphasis on procedure is the forward-looking projection of the overall paradigm of continuity which animates the book's reconstruction of EU law's past. By contrast, the literature's emphasis on substance can be understood as a call to replicate the discontinuities which the scholarly discourse more readily finds in EU law's past. These postures are in turn instrumental to the present-day projects respectively undertaken: legitimising EU law based on the outputs to which it is conducive (for the book) and critically reflecting on EU law (in the literature's case).[25] Section V concludes, offering preliminary reflections on the impact of narratives of legal change over one's legal imagination.

II. Imagining the Future of EU Law: Procedure or Substance?

In order to identify trends in the debate on 'the future of EU law', I adopt the well-established conceptual dichotomy between 'procedure' and 'sub-

25 To be sure, this framing contains a gross oversimplification. 'The literature' is far from being a monolithic discursive camp, and the projects pursued therein are extremely varied in turn. Furthermore, contentions directly opposite to mine also exist. Leino-Sandberg thus recently submitted that, on balance, EU legal academia is highly complacent *vis-à-vis* 'official' narratives: see Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?', European Law Open 1 (2022), 231-256. Still, I share de Witte's assessment that the overall attitude in the field (and especially in the segments of it which are intellectually hegemonic in the English-speaking literature) has actually grown increasingly critical: see Bruno de Witte, 'Editorial Note: How Much Critical Distance in the Academic Study of European Law?', Croatian Yearbook of European Law and Policy 18 (2022), VII-XIII (XI-XIII). Against this background, I make the latter simplifying assumption to illustrate my broader theoretical point.

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stance'.[26] For this purpose, I understand 'procedure' as law which mandates that certain activities be performed in a specific manner or sequence – chiefly, with a view to taking a decision on the course of action to be taken under given circumstances. Such prescription structures decision-making processes independently of, and antecedently to, the actual content of the decision. Importantly, I understand this to encompass not only the decision-making process *stricto sensu*, but also questions concerning the institutional design of the actors participating in the decision (e. g. in respect of both the composition of institutions and their organs, as well as their respective competences). On the other hand, by 'substance' I denote norms which take courses of action as the object of legal regulation in and of themselves. Here, law lays down a detailed rule of conduct (e. g. in the form of a right or obligation), or embodies a principle which structures the axiological horizon within which decisions are to be taken. In the context of EU law, therefore, I understand questions of procedure as pertaining to the vertical (between the EU and its Member States) and horizontal (between different EU institutions, bodies, offices, and/or agencies) allocation of competences in law- and (executive) decision-making procedures. I also include therein the regulation by EU law of the implications for institutional design attendant to those procedures. Conversely, I understand matters of substance to concern the distribution of material and ideational values and social goods by and through EU law.[27]

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26 For an overview of the meaning and uses of this dichotomy, see Jutta Brunnée, 'Procedure and Substance in International Environmental Law', RdC 405 (2019), 75-240 (92-114). By emphasising the juxtaposition of 'procedure' and 'substance', I distance myself from another familiar dichotomy: that between 'form' and 'substance'. On the one hand, both dyads have ostensible commonalities. In this sense, 'procedure' and 'form' are both differentiated from substance because of their principled indifference to the concrete objects to which they apply – that is, 'substance' itself. On the other hand, in (EU) legal discourse, the concept of 'form' has tended to take on tones which mostly address the structural features of (EU) legal norms (e. g. their generality or 'pedigree') and their relationship to other forms of normativity (primarily focusing, in the case of EU law, on the relationship between EU and national law). For uses of the form/substance dichotomy along these lines, see Duncan Kennedy, 'Form and Substance in Private Law Adjudication', Harv. L. Rev. 89 (1976), 1685-1778 (1687-1694, 1710-1713, and 1737-1766); Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', P. L. (1997), 467-487; Mark Dawson, 'The Changing Substance of European Law', Eu Const. L. Rev. 20 (2024), 451-481 (454-459).

27 This definition presupposes a supranational perspective: the distinction between procedure and substance, being eminently relational, pertains to different norms to be found *within the EU legal order itself*. Bringing norms from other legal systems into the picture potentially alters the relationship. In fact, I hereby characterise the norms pertaining to EU constraints on the rule of law and democracy at the national level as substantive for purposes of the EU legal system. However, they obviously have implications of an eminently procedural nature as far as the institutional systems of the EU Member States are concerned: see n. 72-78 below and accompanying text.

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There is no denying that this dichotomy is elusive.[28] In many instances, the procedural or substantive character of a norm will lie in the eye of the beholder. Further, even where a distinction can neatly be drawn, the two planes are intimately intertwined. This is so, first and foremost, at a descriptive level. For one, the regulation of procedures contributes to skewing decision-making procedures towards particular substantive outcomes.[29] On the other hand, substantive norms also concur in structuring decision-making procedures.[30] Both phenomena give expression to the deeper normative intertwinement between the two poles of the dyad. The regulation of procedures often reflects substantive preferences. Consequently, procedure's influence on substance is ultimately a reproduction of those underlying preferences. Conversely, some substantive outcomes are legitimised exclusively by virtue of the procedural arrangements of which they are the product.[31] However, for all such intertwinements, the dichotomy retains heuristic value.[32] Against this background, I aim at showing the disconnect between the Chapter and scholarly discourse on the future of EU law. Whereas the Chapter is predominantly focused on questions of procedure (Section II. 1.), prominent lines of debate in the academic literature rather deal with questions of substance (Section II. 2.). A helpful way to conceptualise this misalignment is then to understand the Chapter and the scholarly debate as embodiments of diverging 'legal imaginations' (Section II. 3.).

1. The Chapter's Vision for EU Law's Future: a Procedural Question

The Chapter disambiguates its overall horizon at the very outset, by setting out three key notions. First, the Chapter subscribes to the interlocking between (constructed) past and (projected) future by '[l]ooking back at 70 years

28 See generally, with ample references to the debate in legal theory, David Dyzenhaus, 'Process and Substance as Aspects of the Public Law Form', C. L. J. 74 (2015), 284-306.

29 E. g. because the procedure attributes priority to the decision of an actor which institutionally bears a specific interest, leading the final decision to primarily reflect that interest. See Brunnée (n. 26), 226-230.

30 E. g. because they introduce a rule-exception scheme, forcing decision-makers to address the rule before tackling the exception. This argument was forcefully made by the 'New Haven School' of international law: see e. g. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994), 1-11.

31 See Ofer Malcai and Ronit Levine-Schnur, 'Which Came First, the Procedure or the Substance? Justificational Priority and the Substance-Procedure Distinction', Oxford J. Legal Stud. 34 (2014), 1-19 (5-10).

32 Malcai and Levine-Schnur (n. 31), 2-3 and 5.

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of EU law' to offer 'some reflections on how [its] future could look like'.[33] Second, such retrospective shows that 'the "community method"' has allowed the EU to develop 'from a purely economic organisation towards a "Union for its citizens"'.[34] This emphasis on the 'community method' is complemented by pointing out the progressive democratisation of the method itself.[35] Third, the Chapter reviews the 'Conference on the Future of Europe' as an exercise in such democratisation, and takes note of the proposals formulated therein.[36] The Chapter then submits that several of the Conference's proposals can be implemented *à droit constant*, mobilising the Treaties' 'untapped potential'.[37] It is thus the coordinates of such 'untapped potential' that express the Chapter's key vision on 'the future of EU law'. And it is here that the emphasis on procedure emerges most forcefully. The Chapter sets out seven proposals for the future of EU law. Of these, three are clearly devoted to questions of procedure, while four are (potentially) devoted to substantive matters. However, the argumentative imbalance in developing the two clusters of proposals makes readily apparent that the Chapter is overwhelmingly focused on the procedural ones. It should also be noted that, when concretising its analysis, the Chapter abandons the Conference's outcome as the reference point. This makes it impossible to argue that the Chapter's focus on procedure flows from a need to follow the Conference's pre-determination of key areas of reform. In fact, many of the procedural reforms envisaged by the Chapter do indeed follow in the footsteps of the Conference's proposals. However, the latter also include several ideas of a substantive nature, to which the Chapter is conspicuously unreceptive.[38] The Chapter's vision thus seems to be an intellectual construct peculiar to the Chapter itself.

33 Calleja and Ladenburger (n. 24), 381.

34 Calleja and Ladenburger (n. 24), 381.

35 Calleja and Ladenburger (n. 24), 381-382.

36 Calleja and Ladenburger (n. 24), 382-383. The 'Report on the Final Outcome of the Conference on the Future of Europe' is available at: <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf>, last access 10 October 2025. For background on the Conference and analysis of the proposals emerging therefrom, see Federico Fabbrini, Legal and Constitutional Reflections on the Conference on the Future of Europe (December 2024). REGROUP Focus Paper No. 1-2024, available at: <https://www.cidob.org/sites/default/files/2025-01/D.7.2.%20REGROUP%20focus%20paper%20no.%201.pdf>, last access 10 October 2025.

37 Calleja and Ladenburger (n. 24), 383 f. This reiterates the Commission's previous political stance on the Conference's follow-up: see European Commission, 'Conference on the Future of Europe: Putting Vision into Concrete Action', 17 June 2022 (COM(2022) 404 final), 4-5. For broader analysis of the EU institutions' response to the Conference, see Editorial Comments, 'From Conference to Convention? Ideas and Prospects for Reform of the EU Treaties', CML Rev. 59 (2022), 1583-1596.

38 See the overview of the Conference's proposals provided in Fabbrini (n. 36), 6-9.

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The common thread running through the Chapter's procedural proposals is a project of deepened supranationalisation and democratisation of EU decision-making. For one, the Chapter provides a detailed overview of the various 'passerelle clauses' currently envisaged by the Treaties. As is well-known, passerelle clauses allow for decision-making in the Council by qualified majority voting (QMV) where the Treaties otherwise envisage unanimity, and/or resort to the ordinary legislative procedure where a special legislative procedure is generally prescribed. The authors propose extensive use of those clauses, with a view to overcoming national veto powers and/or enhancing the European Parliament's involvement in EU law-making.[39] Second, the Chapter proposes to 'strengthen external action'. According to the authors, this would entail bringing 'optional mixity' to an end, and thickening the EU's unitary representation in multilateral organisations.[40] Optional mixity arises where the political institutions opt for mixed ratification of an international agreement by both the EU and its Member States (MS), in a context where the Treaty framework would allow for EU-only ratification.[41] This effectively allows individual MS to veto Europe-wide ratification of international agreements, in cases where the Treaties do not constitutionally guarantee such veto. On its part, EU representation in multilateral organisations is regulated by a complex framework which reflects the internal distribution of competences in the relevant subject matter.[42] This framework often leads to both the EU and the MS representing European interests in multilateral fora, potentially resulting in decision paralysis when disagreement arises. In both cases, therefore, the Chapter's proposals aim at reducing the capacity of the MS to stall international negotiations of interest to the whole of the Union. Finally, the Chapter articulates several proposals to further supranationalise the EU's political system by means of 'constitutional practice'. The most

39 Calleja and Ladenburger (n. 24), 384-387. The Treaties currently envisage five sectoral passerelle clauses: Art. 81(3) TFEU (on family law with cross-border implications), Art. 153(2) TFEU (in the field of social policy), Art. 192(2) TFEU (regarding environmental policy), Art. 312(2) TFEU (on the multiannual financial framework), and Art. 31(3) TEU (for the CFSP). Further, they also contain two cross-cutting passerelles: Art. 48(7) TEU (generally allowing for the switch to both QMV and the ordinary legislative procedure) and Art. 333 TFEU (allowing again for both options in the context of enhanced cooperations). For an overview, see Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010), 107-109.

40 Calleja and Ladenburger (n. 24), 388-389.

41 See Allan Rosas, 'Mixity Past, Present and Future: Some Observations' in: Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill 2020), 8-18 (14).

42 For an overview, see Christine Kaddous, 'The European Union in International Organisations: Principles and Rules for Good Governance' in: Christine Kaddous and Frank Hoffmeister (eds), *EU Diplomacy in Multilateral Fora* (Hart 2025), 1-26.

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prominent are the strengthening of the *Spitzenkandidaten* system, the introduction of transnational lists for the European Parliament's elections, and the bolstering of the right of legislative initiative of the European Parliament and the Council.[43] These ideas have indeed long formed part of the playbook of European federalists and transnational democrats.[44] By putting forward these proposals, the Chapter thus takes one further step in the direction of supranationalising and democratising the EU's decision-making.

While these proposals are quite well-articulated, the ideas possibly going to points of substance are remarkably underdeveloped. This underdevelopment also makes categorisation of some of these ideas quite uncertain. In fact, although I understand them to be directed to substantive matters, their generic formulation would actually also be compatible with a characterisation thereof as procedural. In this vein, the first idea is to 'amend certain protocols', highlighting that '[p]olitically, the most significant example is the possibility of amending Protocol 12 on the excessive deficit procedure'.[45] The Chapter then simply mentions that '[o]ther protocols amendable […] are those establishing the statutes of the Court of Justice, the European Central Bank and the European Investment Bank'.[46] However, the Chapter is not clear as to the changes it envisions, nor on the underlying motives. Consequently, the only unambiguously substantive proposal is the one concerning Protocol 12, which sets out the reference values for the excessive deficit procedure. In the other cases, the emphasis on Protocols concerning institutional design indeed seems to allude to more procedural reforms. A partially more detailed proposal is, second, that to bring about 'changes to internal policies' by activating simplified Treaty amendment procedures. In the Chap-

43 Calleja and Ladenburger (n. 24), 391 f. The Chapter further proposes to unify the posts of the President of the Eurogroup and of the Vice President of the European Commission, and to allow 'citizens' panels' to 'formulate recommendations before key legislative initiatives are proposed'.

44 See e. g. Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU Into a Transnational Democracy Is Necessary and How It Is Possible', ELJ 21 (2015), 546-557; Carlino Antpöhler, 'Enhancing European Democracy in Times of Crisis? The Proposal to Politicise the Election of the European Commission's President' in: Federico Fabbrini, Ernst Hirsch Ballin, and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015), 217-232. For a soberer appraisal, see however Marco Goldoni, 'Politicising EU Lawmaking? The *Spitzenkandidaten* Experiment as a Cautionary Tale', ELJ 22 (2016), 279-295.

45 Calleja and Ladenburger (n. 24), 387. On the excessive deficit procedure as the 'corrective arm' of EU budgetary discipline, see Jean-Paul Keppenne, 'EU Fiscal Governance on the Member States: The Stability and Growth Pact and Beyond' in: Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), 813-849 (827-836).

46 Calleja and Ladenburger (n. 24), 387.

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ter's account, this can be done either by means of 'the general clause in Article 48(6) TEU' or through 'some specific provisions in the TFEU'.[47] The Chapter offers some elaboration on the changes envisaged through the 'specific provisions in the TFEU', which admittedly go to points of substance. However, these largely amount to a mere repetition of the amendments which the legal bases themselves expressly (and exclusively) authorise.[48] On the other hand, the Chapter fails altogether to specify possible changes under Art. 48(6) TEU. Consequently, once again, it cannot be unambiguously assumed that the Chapter envisions use of that provision to revise the substance of EU primary law. Third, at the lowest level of specification is the proposal of 'creating a common defence for the Union' under Art. 42(2) TEU. In fact, the Chapter simply mentions the availability of that possibility.[49] To be sure, this would entail several institutional and procedural changes. However, these are but a consequence of an underlying fundamental reorientation of the substantive purposes and principles of European integration.[50] While this proposal would then clearly entail substantive changes, it is thus disappointing (if understandable, precisely in light of the question's politically heated character) that the Chapter fails to take a stance on the hard choices inherent in developing a common European defence. Finally, the Chapter mentions the availability of Art. 352 TFEU's 'flexibility clause'.[51] However, the only concrete proposal is to use it to incorporate the European Stability Mechanism (ESM) into EU law.[52] On the one hand, the very open-endedness of Art. 352 TFEU certainly suggests that the authors may conceive of it as a tool for reorienting the substance of EU law. However, as also underlined by the authors, substantive operationalisation thereof is in large

47 Calleja and Ladenburger (n. 24), 387 f.

48 Calleja and Ladenburger (n. 24), 388. The proposed changes are: broadening the rights attached to EU citizenship under Art. 25(2) TFEU; adding new serious crimes with a cross-border element amenable to EU legislation under Art. 83(1) TFEU; and increasing the powers and mandate of the European Public Prosecutor's Office under Art. 86(4) TFEU.

49 Calleja and Ladenburger (n. 24), 390.

50 See only Carolyn Moser, 'The Impact of the War in Ukraine on the EU's Common Security and Defence Policy' in: Stefan Kadelbach and Rainer Hofmann (eds), *The Common Security and Defence Policy of the EU* (Nomos 2024), 23-54.

51 Art. 352 TFEU notoriously allows the adoption of measures at the EU level where 'action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers'. See Manuel Kellerbauer and Marcus Klamert, 'Article 352 TFEU' in: Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edn, Oxford University Press 2024), 2072-2079.

52 Calleja and Ladenburger (n. 24), 390. On the ESM as an *extra ordinem* revision of EMU law, see Francesco Martucci, 'Non-EU Legal Instruments (EFSF, ESM, and Fiscal Compact)' in: Amtenbrink and Herrmann (eds) *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), 293-325 (301-317).

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part redundant because of the wide competences bestowed upon the EU by the current Treaty framework.[53] Coupled with the ESM-focused concretisation of the proposal, this might suggest that this proposal is also ultimately oriented towards institutional design.[54]

The Chapter thus emerges as overwhelmingly preoccupied with questions of procedure. The red thread running through these detailed reform proposals is the authors' preference for suprationalisation and democratisation of EU decision-making. By contrast, the scant proposals concerning substance fail to articulate any coherent vision for the future of EU law. Avenues for substantive change are sometimes indicated, but no thick principles are offered as to the direction such change should take. At least in part, this move implicitly proceduralises even the Chapter's substantive proposals. Looked at from the angle of the relationship with scholarly discourse, the emphasis on procedure is reminiscent of the debate held throughout the 1990s.[55] This is strikingly out

53 Calleja and Ladenburger (n. 24), 390. See, however, the post-Lisbon practice surveyed in Kellerbauer and Klamert (n. 51), 2728-2731.

54 Although the controversy surrounding the ESM's location outside EU law largely derives from the ensuing insulation of its operation from several of EU law's substantive constitutional guarantees: see Martucci (n. 52), 310-317.

55 The discussion in this period revolved around four main bones of contention. First, the overall democratic legitimacy of the EU's institutional structure was questioned. In particular, the broadening of EU competences brought about by the SEA and the Maastricht Treaty revamped long-lasting criticism of the limited involvement of the European Parliament in EU law-making. This was all the more acute because of the broadening of QMV, held to have also weakened the Council's indirect democratic legitimisation through control by national parliaments. Reinforcing this predicament was, second, the concern that the political dynamics of QMV itself had been altered over time. Many quarters submitted that small countries had come to be over-represented under the weighting of votes which had emerged from the successive enlargement rounds. Third, these issues were compounded by the planned enlargement of the EU to the Central and Eastern European (CEE) countries. Here, the key concern was with the increased socio-economic heterogeneity this would bring about within the EU. In this connection, commentators feared that enlargement could result into either the unilateral imposition of the preferences of one group of countries over another, or EU decision-making being unworkable altogether. Finally, the institutional fragmentation chiefly (but not exclusively) resulting from the 'pillars' structure was also criticised. This fragmentation, so the argument went, was conducive to institutional confusion and piecemeal applicability of key constitutional principles. For diagnosis of these problems, see Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483 (2453-2483); Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', CML Rev. 30 (1993), 17-69 (22-30, 38-39, and 44-66); Anthony L. Teasdale, 'The Politics of Majority Voting in Europe', Pol. Q. 67 (1996), 101-115 (106-109 and 114-115). On the debate addressing these issues see, from a rich literature, Jo Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy', ELJ 4 (1998), 63-86 (79-86); Gráinne de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (1st edn, Oxford University Press 1999), 55-81 (64-79); Armin von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization Within a Single Legal System', CML Rev. 36 (1999), 887-910 (909 f.).

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of sync with the general trends in the EU legal scholarship produced since the Lisbon Treaty's entry into force. Here, discussions on the future of EU law have, by and large, rather focused on questions of substance.

2. Scholarly Debates on the Future of EU Law: Cleavages on Substance

In fact, a brief overview of the scholarly debate on the future of EU law held in the last fifteen years reveals a picture which is quite different from that conjured by the Chapter. What tends to get discussed in the post-Lisbon literature is not so much how to design procedures and institutions attuned towards any particular project (in the Chapter's case: supranational democracy).[56] Rather, several strands of legal scholarship express variegated concerns at the substantive values, principles, and norms contained in EU law. This literature problematises the societal model envisioned by EU law, the concrete behavioural patterns it incentivises or discourages, and the subjectivities it (re)produces or represses.

One prominent theme concerns the question of EU law's 'over-constitutionalisation'. A seminal 2015 paper by Grimm famously posited that '[d]ifferent from national constitutions, the [EU] treaties […] are full of provisions that would be ordinary law in the Member States'.[57] According to Grimm, this insulates from political contestation matters which do not warrant elevation to such fundamental status. Based on this diagnosis, Grimm called for a future development of EU law in the direction of 're-politicisation'. This was to be effected by downgrading the most detailed Treaty provisions to the rank of secondary law, thus allowing for the EU's political organs to decide anew upon them.[58] While Grimm's predicament had general import, it was visibly most influenced by his dissatisfaction, specifically, with EU economic law.[59] An almost contemporaneous paper by Davies made very similar points.[60] Davies pointed out that EU legislation is often constitutionally bound to pursue pre-determined purposes, articulating the EU's legislative powers according to a paradigm of 'purposive compe-

56 Subject to several qualifications: see below, n. 87-90 and n. 192 and surrounding text.

57 Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', ELJ 21 (2015), 460-473 (470). Grimm's thesis is however starting to be subjected to criticism. See Robert Schütze, '"Integration-Through-Law": Grand Theory, Revisionist History', European Law Open 4 (2025), 162-200 (186-188); Luke D. Spieker, 'Was Grimm Wrong? Putting the Over-Constitutionalization of EU Law to the Test', GLJ 26 (2025), 1-33 (11-24).

58 Grimm (n. 57), 473.

59 Grimm (n. 57), 467-469.

60 Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', ELJ 21 (2015), 2-22.

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tence'. Davies' key concern was with internal market legislation under Art. 114 TFEU, purposively tied to the establishment of a Europe-wide market and the streamlining of competition therein.[61] Davies underlined that this pre-determination was detrimental to democratic dialectics: European politics was thereby reduced to deliberating on the means to implement a project already decided upon, and insulated from political contestation. Similar to Grimm, Davies thus called for 'a fundamental rethinking of what exactly it is that we need the EU to do'.[62]

In fact, the (im)possibility to politically contest EU economic law's substantive principles have been a recurring theme. Most variants of this debate revolved, one way or another, around EU law's neoliberal bias. Often, authors explicitly adopted the de-constitutionalisation framework. They hence criticised in this vein both the EU's 'microeconomic constitution' and its 'macroeconomic constitution'.[63] On the microeconomic side, Snell called for it allows to develop an 'agnostic' development of EU law in terms of the varieties of capitalism it is to structure.[64] Building on his work on the asymmetry between negative and positive integration,[65] Scharpf further ad-

61 Davies (n. 60), 7-11. However, Art. 114 TFEU's purposiveness has reportedly been tempered in practice. See Bruno de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation' in: Phil Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012), 25-46. The trend was only deepened in recent years: see Bruno de Witte, 'Editorial: Internal Market Legislation as European Public Policy', Revista de Derecho Comunitario Europeo 80 (2025), 11-17.

62 Davies, 'Democracy and Legitimacy' (n. 60), 22.

63 For this terminology, see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014), particularly Chapter 2. According to Tuori and Tuori's influential framework, the EU's microeconomic constitution primarily consists of free movement law and competition law (16-18). The macroeconomic constitution is enshrined in the law on economic and monetary union (EMU) (26-28). For a further development of this framework, which differentiates competition law as a 'mesoeconomic constitution' from free movement law as the microeconomic constitution proper, see however Guillaume Grégoire, 'The EU's Neoliberal Constitutionalism(s)', European Law Open 3 (2024), 705-745 (719-743).

64 Jukka Snell, 'Varieties of Capitalism and the Limits of European Economic Integration', Cambridge Yearbook of European Legal Studies 13 (2011), 415-434 (430-432). For a similar argument which, however, moves to the microeconomic constitution only after a lengthy discussion of the macroeconomic one, see Alexander Somek, 'What Is Political Union?', GLJ 14 (2013), 561-580 (577-579).

65 Fritz W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', Pub. Adm. 66 (1988), 239-278; Fritz W. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in: Gary Marks et al. (eds), *Governance in the European Union* (Sage 1996), 15-39; Scharpf, *Governing in Europe* (n. 23), particularly Chapters 2-3. As with Grimm's overconstitutionalisation (n. 57), the asymmetry thesis has recently been challenged. See Martijn van den Brink, Mark Dawson, and Jan Zglinski, 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU', Journal of European Public Policy 32 (2025), 209-234; Schütze (n. 57), 191-194.

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vocated a de-constitutionalisation of the economic rights and liberties laid down in EU law.[66] Pulling together the threads of decade-long debates on this matter, Höpner and Schmidt also suggested a whole range of options to achieve de-constitutionalisation in this area.[67] Perhaps even more fiercely, however, the future of EU law was discussed in the context of the macro-economic constitution. This followed the widespread criticism of the EU's response to the financial crisis as an instantiation of 'authoritarian liberalism'.[68] The de-constitutionalisation thesis was thus vocally applied by Dani to plead for freeing EU law from the neoliberal principles enshrined in the constitutional framework of Economic and Monetary Union (EMU).[69] Alongside other prominent scholars, the same author had already argued in favour of 'either […] aligning EMU to democratic and social ends or […] unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level'.[70] However, the centrality of economic governance and political struggle over its shape did not only feature in the openly normative (and mostly left-leaning) camp surveyed so far. For instance, Zilioli and Ioannidis penned a sophisticated analysis of the rules governing the mandate(s) of the European Central Bank (ECB), concluding on the legal acceptability, and general desirability, of incorporating environmental considerations in the ECB's monetary policy.[71]

Another site of sharp contention has been the mobilisation of EU law to confront the backsliding of liberal democracy and the rule of law at the national level.[72] The central question here was the extent to which EU law

66 Fritz W. Scharpf, 'De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe', ELJ 23 (2017), 315-334 (321-322). However, Scharpf was skeptical as to the practical feasibility of such proposal: see n. 90 below.

67 Martin Höpner and Susanne K. Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review', Cambridge Yearbook of European Legal Studies 22 (2020), 182-204 (196-204).

68 Groundbreakingly Michael A. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', GLJ 14 (2013), 527-560 (547-551). For the most recent and comprehensive presentation of the argument, see Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021), particularly Part IV.

69 Marco Dani, 'Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State', GLJ 24 (2023), 1099-1126 (1123-1126).

70 Marco Dani et al., '"It's the Political Economy …!" A Moment of Truth for the Eurozone and the EU', I.CON 19 (2021), 309-327 (324-327).

71 Chiara Zilioli and Michael Ioannidis, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies', CML Rev. 59 (2022), 363-394 (393 f.).

72 For a seminal reconstruction, see Luke D. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023), particularly 19-32.

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can and should impose enforceable constitutional standards on national polities. For one, Scheppele, Kochenov, and Grabowska-Moroz welcomed developments in this direction. In a much-publicised piece, they called upon the EU to become a full-fledged 'militant democracy'.[73] However, several authors cautioned against over-enthusiasm. Many thus pointed out this turn's potential drawbacks in the EU's composite constitutional panorama.[74] Radical critique came from Guazzarotti, who alleged that these developments amounted, essentially, to yet another instance of authoritarian liberalism.[75] In less uncompromising terms (and from the opposite end of the political spectrum), Schorkopf had already criticised EU law's turn to 'value constitutionalism' as devoid of legal and societal legitimacy. Accordingly, he strongly urged the European Court of Justice (ECJ) to exercise self-restraint in inferring detailed constitutional prescriptions from the abstract values contained in Art. 2 TEU.[76] Even sympathetic commentators such as Baraggia, von Bogdandy, Bonelli, and Spieker acknowledged that the turn to values in EU law potentially raises constitutional problems.[77] While favouring it in principle, these authors hence formulated a whole range of suggestions to set limits on EU law's constitutional homogenisation effects.[78]

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73 Kim L. Scheppele, Dimitry V. Kochenov, and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union', YBEL 39 (2020), 3-121 (10-11).

74 On which see Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union', M. L. R. 84 (2021), 477-502.

75 See Andrea Guazzarotti, *Neoliberismo e difesa dello Stato di diritto in Europa: riflessioni critiche sulla costituzione materiale dell'UE* (Franco Angeli 2023), 35-84 and 178-191.

76 Frank Schorkopf, 'Value Constitutionalism in the European Union', GLJ 21 (2020), 956-967 (963-967). Similarly, see the more recent Martin Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', AJIL Unbound 118 (2024), 167-171.

77 A background to much of this line of argument has arguably been provided by Weiler's notion of 'constitutional tolerance'. See Joseph H. H. Weiler, 'Federalism Without Constitutionalism: Europe's *Sonderweg*' in: Kalypso Nicolaïdis and Robert L. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001), 54-70 (65-70).

78 Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States', CML Rev. 57 (2020), 705-740 (713-715 and 732-738); Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', Eu Const. L. Rev. 18 (2022), 30-58 (47-58); Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', GLJ 23 (2022), 131-156 (152-156); Spieker, *EU Values* (n. 72), Chapters 12-13.

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One last prominent area of debate is the broad discourse which Azoulai has termed an 'anti-transcendental perspective on EU law'.[79] This denotes a renewed concern with 'both the forms of people's life that EU law itself tends to support and promote and the ones that it tends to overlook or suppress'.[80] This multifaceted strand of literature combines a fundamental historical-materialist posture with culturalist nuances.[81] This is done in order to analyse and critique the material subjectivities, as well as the ideational representations thereof, which EU law contributes to (re)producing and marginalising. In this vein, de Witte, as well as Davies, called for a re-interpretation of EU free movement law capable of accommodating diverse forms of life and their essentially non-economic logic.[82] Both authors, alongside for instance O'Brien and Barbou des Places, also participated in more traditional debates on the balancing of individual and collective perspectives in EU free movement law. These revolved around the exclusionary effect of economic and cultural factors on the concrete enjoyment of mobility, or the threats allegedly posed by mobility itself to the cohesion of the communities of arrival.[83] Lastly, an exciting line of work engages with the legacy of colonialism and coloniality in EU law.[84] Spearheaded by Bhambra, Silga, Solanke, and Eklund, this literature confronts

79 Loïc Azoulai, 'Reconnecting EU Legal Studies to European Societies', Verfassungsblog, 19 March 2024, doi: 10.59704/506091b2c1b6b18a. With further references to this literature, see Marc Steiert, 'Telling (Social) Europe Differently: Fractures, Discontinuities, and Alternative Trajectories in 70 Years of EU Law', HJIL 86 (2026), 331-356 as well as van de Beeten (n. 19).

80 Loïc Azoulai, 'The Law of European Society', CML Rev. 59 (2022), 203-214 (207).

81 This is how I interpret the texts by key authors of this movement, such as Floris de Witte, 'Here Be Dragons: Legal Geography and EU Law', European Law Open 1 (2022), 113-125; Loïc Azoulai, 'Living with EU Law', European Law Open 1 (2022), 140-143.

82 Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law', CML Rev. 50 (2013), 1545-1578 (1566-1577); Gareth Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests' in: Panos Koutrakos, Niamh Nic Shuibhne, and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016), 218-239 (238 f.); Floris de Witte, 'You Are What You Ate: Food Heritage and the EU's Internal Market', E. L. Rev. 47 (2022), 647-665 (663-665).

83 See, from a rich literature, Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights', CML Rev. 53 (2016), 937-977 (961-966 and 973-977); Ségolène Barbou des Places, 'The Integrated Person in EU Law' in: Loïc Azoulai, Ségolène Barbou des Places, and Étienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016), 179-202 (195-202); Floris de Witte, 'The Liminal European: Subject to the EU Legal Order', YBEL 40 (2021), 56-81 (72-80). Most controversially, Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans', European Papers 4 (2019), 675-694; for the subsequent debate, see Loïc Azoulai, 'On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' *Article*', European Papers 5 (2020), 279-282; Gareth Davies, 'How Citizenship Divides: A Response to Loïc Azoulai', European Papers 5 (2020), 283-286.

84 On the difference between colonialism and coloniality see, with further references, Walter Mignolo, 'Coloniality and Globalization: A Decolonial Take', Globalizations 18 (2021), 720-737 (722-725).

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the EU's colonial roots to reimagine the future of such diverse areas of EU law as anti-discrimination, migration, and free movement law.[85]

Undoubtedly, the overview of EU legal scholarship presented above is dramatically selective. Like all selections, it is clearly shaped by my own interests, preferences, and predispositions. *Inter alia*, it is admittedly centred around the discourse on EU constitutionalism, and leaves much of the work on sectoral EU law out of the picture.[86] However, it still gives a sense of several lines of debate which find no echo in the Chapter. As suggested above, the overarching theme hereby identified is a fundamental hiatus. While academic debates on the future of EU law predominantly focus on questions of substance, the Chapter primarily occupies itself with questions of procedure. To be sure, just as the conceptual dichotomy between procedure and substance itself, this is arguably a heuristic overstatement.[87] Recent scholarly work explicitly concerned with the future of EU law admittedly addresses both substantive and procedural questions.[88] What is

85 Gurminder K. Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism', ELJ 23 (2017), 395-405 (404-405); Janine Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?', UCLA Journal of International Law and Foreign Affairs 24 (2020), 163-200 (199-200); Iyiola Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in: Mikael Rask Madsen, Fernanda Nicola, and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022), 343-353 (346-350); Hanna Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome', EJIL 34 (2023), 831-854 (853-854); Jeffrey Miller and Fernanda G. Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism' in: Jan Komárek (ed.) *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 320-339 (320-322 and 334-339); most extensively now, Hanna Eklund (ed.), *Colonialism and the EU Legal Order* (Cambridge University Press 2025). Important work by other authors has also reconstructed the colonial roots of European integration. However, it did not take the further step of reckoning with this past to re-imagine EU law's future. See Daniela Caruso and Joanna Geneve, '*Melki* in Context: Algeria and European Legal Integration' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017), 506-527 (516-527); Signe Rehling Larsen, 'European Public Law after Empires', European Law Open 1 (2022), 6-25.

86 Thanks to one of the reviewers and to Robert Stendel for alerting me of this implicit limitation in my study.

87 See n. 28-32 above and surrounding text.

88 See Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart 2019), where the Chapters authored by Neyer, Craig, and Butler primarily concern questions of competences and institutional design, whereas other Chapters by, *inter alia*, Groussot and Zemskova, Jonsson Cornell, and Jakab tackle issues of fundamental rights, security, and the rule of law. In a similar vein, see Matej Avbelj (ed.), *The Future of EU Constitutionalism* (Hart 2023). On the one hand, a large majority of the Chapters deal with the questions of substance already highlighted above (see e. g. Avbelj's Chapter on values and Fabbrini's contribution on EMU). However, Garben's Chapter addresses both the balance between economic and social aims in EU substantive law and the persistent democracy deficit of EU governance and institutional design.

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more, both predicaments with procedure and substance ultimately bear on one and the same question: allowing for a maximum of individual and collective self-government within the EU.[89] Several amongst the authors hereby presented as substance-focused admittedly took note of this interrelationship, and also formulated proposals which largely concern questions of procedure.[90] However, the Chapter itself falls substantially short of making any such explicit connection between procedure and substance. The implicit assumption is thus to refrain from radically questioning the substantive principles and ends of EU law. Questions of procedure thus emerge as a mere tinkering exercise, which aims at streamlining the implementation of those principles and the pursuance of those ends.[91] In so doing, the Chapter seems strongly out of sync which the rich academic discourse hereby surveyed. This rather problematises both those principles and those ends.

3. Conclusion: Diverging Legal Imaginations

The analysis above shows that the Chapter and the scholarly literature diverge sharply in constructing proposals for the future of EU law. The divarication is so marked that it can hardly be thought of as a simple matter of preferences. Rather, it signals an altogether different intellectual space within which the respective treatments take place. To this extent, the Chapter and the scholarly debate can be understood to embody contrasting 'legal imagina-

89 This is a familiar theme in contemporary democratic and constitutional theory. See e. g. Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in: Seyla Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996), 95-119 (95-97 and 102-108).

90 See e. g. Floris de Witte, 'EU Law, Politics, and the Social Question', GLJ 14 (2013), 581-611. De Witte outlines at 587-595 how EU law's substantive commitment to neoliberalism undermined individual and collective capacity for self-determination. Based on this analysis, he then proposes at 595-610 'three ways to reappropriate the social question' which incorporate manifold procedural reforms. In a similar vein, Scharpf, 'De-Constitutionalisation' (n. 66), at 325-332 deemed his preferred de-constitutionalisation solution unlikely to work in practice. He thus proposed to bring about deliberative majority voting, coupled with expanded possibilities at opt-outs, as a second-best solution to the problems he diagnosed. Von Bogdandy, 'Principles' (n. 78), at 724-731 also joined his substantive proposals to avoid overreach by the EU's turn to values with several corrections of a procedural nature. These would allow for the substantive contestation on Art. 2 TEU values to be legitimately reflected in the process of reaching a decision upon their application in individual cases. Most extensively, see Mark Dawson and Floris de Witte, 'From Balance to Conflict: A New Constitution for the EU', ELJ 22 (2016), 204-224, advocating at 208-214 and 221-223 substantive conflict over the societal goals of European integration as key, and articulating at 214-221 detailed arrangements to 'institutionalise conflict' in EU decision-making.

91 This is reminiscent of Koskenniemi's notion of 'managerialism'. See Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', M. L. R. 70 (2007), 1-30.

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tions'.[92] The legal imagination is 'the worldview […] in which our ideas about [the law's] purposes and limits [take] shape',[93] or 'the image of common life in which the law is set'.[94] The legal imagination thus expresses the legal component of a 'social imaginary', understood in turn as 'the largely unstructured and inarticulate understanding of our whole situation, within which particular features of our world show up for us in the sense they have'.[95] In this sense, the legal imagination expresses the set of presuppositions under which thinking about the law takes place. It conveys a 'specific way of thinking about [a given legal problem], regardless of […] concrete proposals'.[96] In other words, the legal imagination is the ensemble of notions, principles, and assumptions, of both a legal and non-legal nature, which underlie and nurture legal thinking. This concerns not only and not so much the application of technical-legal conceptual toolkits to concrete circumstances. Much more crucially, it regards the very choice to understand a given problem as 'legal' in nature, and the range of options to legally regulate a problem which are assumed to be possible.[97] In so

92 I first encountered this concept in Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford University Press 2021). In turn, Perrone draws on Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* (Yale University Press 2010). Purdy's concept as articulated below seems largely coincident with the concept of 'constitutional imaginary' recently propounded by Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies, and the Other', in: Komárek (ed.) *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 1-17. In fact, Komárek himself appears to deem the notions of (constitutional) 'imagination' and 'imaginary' largely interchangeable (2).

93 Purdy (n. 92), 4.

94 Purdy (n. 92), 5. However, this is not the only available conceptualisation of 'legal imagination': see n. 97 below.

95 Purdy (n. 92), 11-12. Purdy takes the definition of 'social imaginary' from Charles Taylor, *A Secular Age* (Harvard University Press 2007), 177 (which he quotes verbatim).

96 Perrone (n. 92), 5.

97 So understood, the concept of 'legal imagination' has a key *de iure condendo* orientation. This is apparent, for instance, in the unconceptualised use of the term as it transpires from Alan Watson, *Failures of the Legal Imagination* (Scottish Academic Press 1988): see e. g. 27 and 35-36. However, the first sustained use of the term of which I am aware understands the concept in a much more *de iure condito* fashion: James B. White, *The Legal Imagination* [1973] (45th anniversary edn, Wolters Kluwer 2018). In White's account, the legal imagination mostly captures the imaginative aspect entailed by creatively applying the existing law, rather than the imagination of an altogether different legal world: see e. g. xlii-xliv, 8-9, and 758-760 (although, at 760, White also hints at the legal reform dimension hereby referred to). This understanding also underlies the recent and prominent use of 'legal imagination' by Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (Cambridge University Press 2021), of which see in particular 1-8 and 952-953. For a broader overview of deployments of the concept of 'legal imagination', see Mark Antaki, 'The Turn to Imagination in Legal Theory: The Re-Enchantment of the World?', Law & Critique 23 (2012), 1-20 (8-15). Antaki identifies four ideal-types of the legal imagination: the theoretical, the progressive, the transformative, and the nostalgic. Roughly, the theoretical, progressive, and nostalgic ideal-types are more aligned with White's concept, whereas the transformative is more akin to the meaning used here.

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doing, the legal imagination pre-determines the set of possible directions for legal change, as well as the language within which they can be conveyed.[98]

Against this background, the legal imaginations respectively underlying the Chapter and the literature differ dramatically. The future of EU law imagined by the Chapter is one where the substantive socio-political project pursued by that law is not questioned. Rather, the procedural-institutional machinery of EU law should be streamlined with a view to smoothing the realisation of that project. By contrast, several strands of EU legal scholarship fundamentally question that project in the first place. They imagine a future for EU law which reconfigures its current socio-economic arrangements and their cultural elaboration. Otherwise put, the Chapter and the literature discussed respectively assign an altogether different role to law within European integration. The Chapter understands EU law as a purely functional and apolitical tool to pursue the substantive ends of European integration. In turn, the latter are deferred to determination 'elsewhere'. The literature, on its part, views EU law as the carrier of a politically contestable project on its own right.[99] The difference could thus not be more fundamental. This very fact calls for further reflection on the factors which shape those legal imaginations in such radically different ways.

III. Change, Continuity, Discontinuity: an Archaeological Analytical Framework

How, then, can we make sense of such fundamentally different legal imaginations? As mentioned in the Introduction, I contend that the different imaginations of EU law's future surveyed in the preceding Section are the product of different attitudes towards its very present. I further submit that this different configuration is evident in the approaches which the book at large and the majority of legal scholarship respectively take *vis-à-vis* EU law's past. To substantiate this statement, I now turn to different paradigms available to reconstruct the past of EU law. These are the concepts of 'continuity' and 'discontinuity', which I take from Foucault's 'archaeology'. To set the ground for this exercise, however, I first draw on Gerschenkron. I thus juxtapose the dyad of 'continuity' and 'discontinuity' to the misleading dichotomy of 'continuity' and 'change' often used in legal scholarship. Sec-

98 For further reflection on this matter, although with a different conceptual framing, see Leino-Sandberg, '70 Years of EU Law' (n. 23).

99 Thanks to the reviewers and Floris de Witte for underlining, with different accents, the importance of this point.

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tion IV below will then show how these paradigms can illuminate our understanding of the divarication hereby diagnosed.

As alluded to, several works devoted to diachronic analyses of EU law adopt the dyad of 'continuity and change' as the cognitive frame for their inquiries.[100] This dichotomy is hardly peculiar to EU law. It can be found in the neighbouring disciplines of national public law[101] and public international law.[102] More generally, the conceptual pair also features in the intellectual weaponry of historians,[103] including those especially concerned with legal materials.[104] However, despite pervasive resort thereto, conceptual elaboration on these terms is scarce. Some of the authors who deploy them simply do not offer any explanation as to the meaning they attach to each concept.[105]

100 See e. g. Christoph Demmke and Christian Engel (eds), *Continuity and Change in the European Integration Process: Essays in Honour of Günther F. Schäfer* (European Institute of Public Administration 2003); Anthony Arnull, Piet Eeckhout, and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008); Francis Snyder and Imelda Maher (eds), *The Evolution of the European Courts: Institutional Change and Continuity/L'évolution des juridictions européennes: changements et continuité* (Bruylant 2009); ECB, *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow – ECB Legal Conference 2021* (ECB 2022); Anna Södersten, 'Explaining Continuity and Change: The Case of the Euratom Treaty', I.CON 20 (2022), 788-817.

101 See e. g. Afroditi Marketou, *Local Meanings of Proportionality* (Cambridge University Press 2021), devoting Chapter 3 to 'Proportionality in English Public Law: *Continuity and Change*'. The emphasis is in the original, and intended to acknowledge the author's borrowing from John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007), as well as Matt Qvortrup (ed.), *The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor* (Hart 2013).

102 See e. g. Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011); Tomoaki Nishimura, 'The Paris Agreement: Continuity and Change within the Climate Regime' in: Neil Craik et al. (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press 2018), 42-58; Olivier de Frouville, *From Cosmopolitanism to Human Rights* (Hart 2021), Chapter 9.1 of which is titled 'Change or Continuity: Has the Establishment of the [Human Rights] Council Really Changed Anything in the Universal System of Human Rights Protection?'.

103 To the point of having inspired the name of a prominent journal: 'Continuity and Change: A Journal of Social Structure, Law and Demography in Past Societies', published with Cambridge University Press since 1986.

104 See e. g. Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', BYIL 73 (2002), 103-139; Sarah B. Snyder, 'Continuity and Change in US Human Rights Policy' in: Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights* (Routledge 2019), 316-333.

105 See e. g. Francis Snyder and Imelda Maher, 'Introduction' in: Francis Snyder and Imelda Maher (eds), *The Evolution of the European Courts: Institutional Change and Continuity/L'évolution des juridictions européennes: changements et continuité* (Bruylant 2009), 9-14; Joseph Jaconelli, 'Continuity and Change in Constitutional Conventions' in: Matt Qvortrup (ed.), *The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor* (Hart 2013), 121-140; Snyder (n. 104); Nishimura (n. 102); de Frouville (n. 102).

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Still, by the mere fact of this juxtaposition, these authors appear to characterise them as opposite lenses to diachronically analyse legal materials. Against this background, 'change' seems to rest on its ordinary meaning of qualitative or quantitative modification in the ontology of those materials. At the opposite pole, 'continuity' would then emerge as the absence of such modification over time. In fact, a characterisation along these lines is undertaken in slightly clearer fashion by others, although again without offering much thought about this move's implications.[106] Most explicit along these lines is Södersten, who deploys the framework of historical institutionalism.[107] In fact, within historical institutionalism, the dichotomy is well-established, although a closer reading reveals a subtler understanding than a blunt juxtaposition.[108]

Indeed, the all-or-nothing nature of this dichotomy is misleading. By juxtaposing 'continuity' and 'change', this framing suggests an undifferentiated notion of the latter. All modifications of the *status quo* are regarded as equivalent by the mere fact of amounting to such a modification. In so doing, the dichotomy lacks analytical sharpness. In fact, it misses the crucial point that 'change' can be not only quantitatively (which the continuity/change dichotomy is arguably still in a position to capture), but also qualitatively differentiated. This point was aptly made in 1962 by the economic historian, Alexander Gerschenkron.[109] Finding the concept of 'continuity' to be largely used by historians, Gerschenkron elected to elucidate its meaning. Gerschenkron thus noted that '[t]here is the customary contrast between "change" and "continu-

106 See Christoph Demmke and Christian Engel, 'Foreword' in: Demmke and Engel (eds), *Continuity and Change in the European Integration Process: Essays in Honour of Günther F. Schäfer* (European Institute of Public Administration 2003), ix-xii (x-xii); Allison (n. 101), 1-5; Anthony Arnull, Piet Eeckhout, and Takis Tridimas, 'Preface' in: Anthony Arnull, Piet Eeckhout, and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), vii-x (viii); Christine Lagarde, 'Change and Continuity in Law – Keynote Speech' in: ECB, *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow – ECB Legal Conference 2021* (ECB 2022), 13-19 (14).

107 See Södersten (n. 100), 791-792, 800-802, and 803-804. For a concise introduction to historical institutionalism, see Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, 'Historical Institutionalism in Political Science' in: Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016), 3-28.

108 See, above all, Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in: Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economy* (Oxford University Press 2005), 1-39 (4-9). In fact, Streeck and Thelen *prima facie* juxtapose 'continuity' to 'change' (see 5-6). However, they ultimately make clear that 'change' can result in both 'continuity' and 'discontinuity' (see 8-9). As will be argued just below, the present paper indeed regards a framing along these lines as the most appropriate.

109 Alexander Gerschenkron, 'On the Concept of Continuity in History', Proceedings of the American Philosophical Society 106 (1962), 195-209.

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ity"', whereby 'continuity appears to mean no more than absence of change, i. e., stability'.[110] However, he continued:

> 'It does not require long semantic expeditions through the current usage of *the term continuity* to discover that it *denotes a good deal more than stability*. Confused and inconsistent as that usage is, unmistakably *it refers time and again to the nature of change rather than to its absence*. *Hence the phrase "continuous change" is by no means a contradiction in terms; by the same token, the phrase "discontinuous change" need not be pleonastic at all*. It is precisely because *continuity and discontinuity can relate to a certain kind of change* that the two concepts may be expected to prove useful in historical research'.[111]

In this passage, Gerschenkron alerts us to two crucial points. On the one hand, one can indeed profitably juxtapose 'stability' and 'change'. When reconstructing the diachronic dynamics of human experiences, one can thus analyse the interplay between stable elements and those which undergo some form of modification. On the other hand, however, 'continuity' is more appropriately juxtaposed to 'discontinuity', both concepts amounting to different modalities of 'change'. In other words, once one has satisfied themselves that, in a particular domain, 'change' has taken place while other elements have remained 'stable', the analysis can then move to whether that change can be characterised as 'continuous' or 'discontinuous'. 'Continuity' is thus not the opposite of 'change'. Rather, alongside 'discontinuity', it is a *species* to the *genus* of 'change'.

The next question is thus what 'continuity' and 'discontinuity' amount to. Gerschenkron proposes five conceptualisations of 'continuity', reversing which one can derive the corresponding notions of 'discontinuity':[112]

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110 Gerschenkron (n. 109), 195. The stability/change dichotomy is sometimes also used in legal scholarship, although, again, without much elaboration: see Antonio Cassese and Joseph H. H. Weiler (eds), *Change and Stability in International Law-Making* (de Gruyter 1988). Historical institutionalists also occasionally conflate 'continuity' and 'stability': see Streeck and Thelen (n. 108), 6; Södersten (n. 100), 792 and 801-802. This conflation occurs primarily in passages which use 'continuity' as opposed to 'change'. As argued in n. 108 above, however, this is not the most conceptually refined understanding of 'continuity' available within this scholarly tradition.

111 Gerschenkron (n. 109), 195 (footnote omitted, emphasis added). Admittedly, Gerschenkron aims at deciphering what the 'real' meaning of 'continuity' is, even when juxtaposed to 'change'. I trust Gerschenkron's appraisal that this was indeed the meaning one could infer from the state of professional historiography in the 1960s. However, in legal discourse, the dichotomy is used in a very different sense (see n. 100-108 and surrounding text). This difference warrants the reconceptualisation hereby called for.

112 Gerschenkron also analyses a 'mathematical' concept of '(dis)continuity' which, however, he ultimately dismisses as unhelpful in the historical domain: see Gerschenkron (n. 109), 196-199.

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1) 'Constancy of direction', understood as 'the evolution of a historical phenomenon' which 'start[s] with hardly perceptible origins' and 'pursue[s] the process of growth and expansion to its culmination';[113]
2) 'Periodicity of events', denoting the 'periodic recurrence over time' of historical events as posited by circular conceptions of history;[114]
3) 'Endogenous change', conceptualised as change which is induced by 'a homogeneous set of factors';[115]
4) 'Length of causal regress', understood as a decision to 'single out a certain occurrence as the "beginning" of the causal chain' which leads to a given historical development, where the 'beginning' is identified at a point in time which significantly predates the outcome;[116] and finally,
5) 'Stability of the rate of change', fleshed out more concretely as 'gradualness of change'.[117]

Importantly for present purposes, Gerschenkron also highlights that 'continuity must be regarded as a set of tools forged by the historian rather than as something inherently and invariantly contained in the historical matter'.[118] Gerschenkron thus acknowledges that regarding a process of change as 'continuous' or 'discontinuous' does not entail simply taking note of any inherent feature of the phenomena analysed. Rather, it involves the historian's hermeneutics. In other words, any given change can be interpreted as continuous or discontinuous by different observers.

Admittedly, focused on professional historiography as they are, not all of Gerschenkron's concepts of '(dis)continuity' are equally helpful for present purposes. A most fruitful fertilisation can thus come from pairing Gerschenkron's reflection with that of Michel Foucault. In fact, Foucault's seminal *L'archéologie*

113 Gerschenkron (n. 109), 200. The reverse concept of discontinuity would thus encompass changes which entail a reorientation in direction; that is, the establishment of a different 'origin' to be 'expanded' by subsequent change.

114 Gerschenkron (n. 109), 200-203. Within this framework, discontinuity is thus conceptualised as a pattern of change deviating from the cycle (e. g. a change which has never taken place beforehand).

115 Gerschenkron (n. 109), 203 f. In this context, discontinuity would then be defined as change induced by an 'exogenous' factor, inhomogeneous with the set of factors otherwise inducing change.

116 Gerschenkron (n. 109), 204 f. In this sense, discontinuity thus emerges as change induced by factors irreducible to a long-standing causal chain.

117 Gerschenkron (n. 109), 205-208. Discontinuity would here describe change which occurs abruptly, marking an interruption in the gradualness of the rate of change. While this is not the meaning of '(dis)continuity' I focus upon, also this understanding can have potent implications in shaping one's understanding of EU law's path over time. See, although with the different framing of 'evolution', Giulia La Torre, 'The Formation of the EU Legal System', HJIL 86 (2026), 133-166.

118 Gerschenkron (n. 109), 208.

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du savoir (1969) was essentially preoccupied with the dichotomy between continuity and discontinuity.[119] In this work, Foucault outlined the essential tenets of 'archaeology'. Foucault understands archaeology as an approach to the history of knowledge devoted to 'marginalising the subject' and exposing the discursive structures which underlie human cognition.[120] With a view to such marginalisation, Foucault characterised archaeology as a method of analysis juxtaposed to the traditional history of ideas along several fundamental axes.[121] However, underlying all these axes is the project of analysing systems of knowledge insisting on the discontinuities marking their development over time.Obversely, according to Foucault, both the history of ideas as traditionally practiced and general historiography are premised on the fundamental ideas of reconstructing discourses around the idea of continuity.[122]

In Foucault's archaeology, 'continuity' means 'the prolongation of the foundations', whereas 'discontinuity' describes 'transformations which act as founding moments and renewals of the foundations'.[123] This conceptualisation resonates with Gerschenkron's first meaning of continuity: the idea of 'constancy of direction' in change.[124] In fact, change which takes place continuously prolongs the phenomenon concerned in the same direction set by the foundations. On the other hand, discontinuity introduces new foundations which set a different direction also for future changes. Against this background, the concept of discontinuity in Foucault crucially takes a critical tone. In fact, according to Foucault, adopting continuity as an *a priori* ordering paradigm comes with two interrelated, yet tacit assumptions. First, the notion that 'it is never possible to identify, in the order of discourse, the irruption of a veritable event; that beyond all apparent beginning, there always is a secret origin – so secret and so original that it is never possible to apprehend it in and of itself'.[125] Second, the stance that 'all manifest discourses secretly rest upon an already-said; and that this already-said is not simply a sentence which was already pronounced, a text which was already written, but a "never-said"'.[126] According to Foucault, these assumptions de-historicise human affairs, turning historical analysis into an infinite regress. By always positing an inaccessible foundation for any concept or idea, continuity insulates human action from historical determination.[127] Against this back-

119 Michel Foucault, *L'archéologie du savoir* (Gallimard 1969).

120 For a concise overview, see Gary Gutting, *Foucault: A Very Short Introduction* (2nd edn, Oxford University Press 2019), 31-40.

121 Foucault, *L'archéologie* (n. 119), 183-190.

122 Foucault, *L'archéologie* (n. 119), 9-26.

123 Foucault, *L'archéologie* (n. 119), 12-13.

124 See n. 113 above and surrounding text.

125 Foucault, *L'archéologie* (n. 119), 38.

126 Foucault, *L'archéologie* (n. 119), 38-39.

127 Foucault, *L'archéologie* (n. 119), 39.

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ground, a reconstruction centred on discontinuities brings to the fore the genuinely new foundations introduced, at a given point in time, in a discursive camp. And, as importantly, it understands those foundations in light of their historical situatedness.[128]

Such historicising reconstruction has enormous critical potential.[129] This can be illustrated by a comparison with Foucault's later turn to 'genealogy'.[130] Foucault understands genealogy as an anti-metaphysical mode of analysis, electing to demystify the 'beginnings' of human phenomena. In fact, even more explicitly than archaeology, genealogy understands human experiences as the contingent product of concrete material conditions. The key concern here is not so much with evidencing discontinuities in the diachronic elaboration of discourses. Rather, it is with underlining that the foundations of present-day discourses are essentially shaped by the historical circumstances in which they were developed. Against this background, genealogy focuses on the power constellations which prevailed at the time when a specific discursive utterance was first propounded. Every discourse is thereby understood as both the embodiment of power structures and as key to their sustenance and reproduction. Genealogical analysis thereby uncovers discourses as the ideological product of particular conditions. The overarching aim is to undermine claims to universal alethic validity, showing the contingent situatedness of those claims' discursive structures. Through such demystification, genealogy paves the way for critique of hegemonic discourses as complicit with the power dynamics in connection with which they emerged as dominant.

Through its emphasis on situated 'beginnings', genealogical analysis resonates with a well-established mode of critique developed in critical legal studies (CLS): the notion of 'false necessity'.[131] In fact, a crucial aim of the

128 Foucault, *L'archéologie* (n. 119), 39.

129 For some nuance see, however, n. 196 below and surrounding text.

130 On the concepts of 'genealogy', 'archaeology', and 'critique' in Foucault, as well as on their interrelationships, see Michel Foucault, *Nietzsche, la généalogie, l'histoire* in: Suzanne Bachelard (ed.), Hommage à Jean Hyppolite (Presses Universitaires de France 1971), 145-172 (148-158); Michel Foucault, 'Qu'est-ce que la critique ? Critique et *Aufklärung*' [1978], Bulletin de la Société française de philosophie 84 (1990), 35-63 (36-39, 45-52). For a succinct treatment, see Gutting (n. 120), at 43-50.

131 See, for extensive theorisation, Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (2nd edn, Verso 2001), particularly Chapter 1. Although with different accents, read in this light Foucault, 'Nietzsche, la généalogie, l'histoire' (n. 130), 154-158. Elaborating on the connection between genealogy and false necessity, see Kate Purcell, 'On the Uses and Advantages of Genealogy for International Law', LJIL 33 (2020), 13-35 (13-15). Arguing that the relationship might be more ambiguous, see however Samuel Moyn, 'From Situated Freedoms to Plausible Worlds' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 517-526 (521-522).

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CLS movement was precisely to re-open spaces for the political contestation of legal discourses by showing their contingency. Whatever is not necessitated and therefore contingent is, by this very fact, amenable to change. Applied to legal history, this has led to reconstructions of diachronic legal developments questioning the necessity of the path taken. Importantly, this is not a purely retrospective exercise. CLS authors have highlighted the constraining effect which narratives of the past have on the imagination of alternative legal futures. Critical scholars hence undertook to reconstruct legal history as a radically contingent development, which for this very fact was contestable and reversible in the here-and-now.[132] Crucially, this approach has percolated into EU law, in the context of the 'critical turn in EU legal studies'.[133] Against this background, several authors have questioned the 'false necessities' of conventional narratives of EU law's diachronic evolution.[134] This literature has dovetailed with the blossoming work by EU legal historians and socio-legal scholars of EU law. The latter uncovered abstract changes in the state of EU law as the product of struggles moved by concrete interests, patterns of socialisation, and political activism. In so doing, it exposed those changes as the radically non-necessitated outcome of situated confrontations over the interpretation of indeterminate EU legal norms.[135]

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132 See, seminally, Robert W. Gordon, 'Critical Legal Histories', Stanford L. Rev. 36 (1984), 57-125 (70-71, 81-87, 96-102, and 112-116). Most extensively, see the essays collected in Venzke and Heller (eds) (n. 131), particularly in Part III. For general theoretical elaboration, see Ingo Venzke, 'Situating Contingency in the Path of International Law' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 3-20 (5-15).

133 Editorial Comments, 'The Critical Turn in EU Legal Studies: Loneliness of the European Lawyer', CML Rev. 52 (2015), 881-888; presciently, Anthony Arnull, 'The Americanization of EU Law Scholarship' in: Anthony Arnull, Piet Eeckhout, and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), 415-431. For an overview which, however, also evidences the methodological underdevelopment of much of this literature, see Päivi J. Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?', European Law Open 1 (2022), 60-88.

134 See Mark Gilbert, 'Narrating the Process: Questioning the Progressive Story of European Integration', J. Common Mkt. Stud. 46 (2008), 641-662 (646-659); Marco Dani and Agustín José Menéndez, 'European Constitutional Imagination: A Whig Interpretation of the Process of European Integration?' in: Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 44-74 (54-73). With less critical *élan*, also see Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (2nd edn, Routledge 2023), 63.

135 For the key texts, see Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', Contemporary European History 21 (2012), 305-318; Antoine Vauchez, *Brokering Europe: Euro-Laywers and the Making of a Transnational Polity* (Cambridge University Press 2015); Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022). On this literature, see van de Beeten (n. 19).

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(Quasi-)genealogical projects historicising changes in EU law by highlighting their contingency have thus been underway for a while now. However, archaeological enterprises insisting on discontinuity can bring about a different kind of critical historicisation. This is underlined by Foucault's drawing of a distinction between archaeology and genealogy in the first place. In other words, much untapped critical potential can be realised by complementing a genealogical critique of EU law with archaeological thinking. This is because a change in the state of EU law may well be entirely contingent, in the sense of being only one amongst competing avenues for change which imposed itself as dominant at the outcome of a process of struggle. This might still not tell us whether the change so introduced is aligned with a continuity paradigm (in terms of further developing unquestioned foundations) or a discontinuity one (in terms of introducing new foundations altogether).[136] In this sense, appealing to Foucault's archaeology can complement the anti-necessitarian critique of EU law's diachronic development.[137] This approach would ask the scholar to determine whether a given change in the state of EU law can be predicated to introduce a new foundational logic (discontinuity), or rather to amount to a further actuation of unchanged foundations (continuity). Analysing changes in terms of their impact on the foundational logic of their area of law creates space for critical inquiry. It invites one to question what interests and values the changed panorama promotes. Likewise, it calls for a scrutiny of the democratic credentials of the underlying process of change. More generally, through its historicising pull, archaeology rejects the notion that EU law possesses a self-sustaining and imma-

136 The point can be illustrated by an ever-green in social theory: the alleged determinism of the Marxian theory of revolutions. Revolutions in Marx are clearly discontinuous in the Foucauldian sense. They substitute one mode of production for the previous one, thereby introducing new foundations in the economic base of society. However, at least if one accedes to the determinist interpretation of Marx's writings, this discontinuity is theorised as the product of necessitarian economic forces. For all the critical potential inherent in reading changes in the economic base as discontinuous, this can disempower critical thinking. In fact, contingent political decisions to continuously reproduce the economic base of society risk being thereby insulated from contestation, since no alternative would be available until the moment discontinuous change becomes historically necessitated. For an overview of this debate, see Umut Özsu, 'The Necessity of Contingency: Method and Marxism in International Law' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 60-76.

137 For a similar point on the interplay between discontinuity and contingency in enabling critical histories of international law, see David Kennedy and Martti Koskenniemi, *Of Law and the World: Critical Conversations on Power, History, and Political Economy* (Harvard University Press 2023), 181-183.

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nent logic. In so doing, this approach interrogates whether, and by implication why, when, and how, that logic has undergone fundamental recalibrations. As shown by the anti-necessitarian reading of EU law's history and by the CLS movement, this reaches far beyond a refined understanding of EU law's past. Rather, it has crucial implications for present and future struggles. For one, this approach allows one to critically scrutinise presently unfolding processes of change, along the same lines as those hereby outlined for a reconstruction of the past. Crucially, however, showing that discontinuities already happened in the past creates space for imagining further discontinuities in the future. The presently unfolding project of anti-necessitarian analysis of EU law's history can thus be profitably complemented with a scrutiny informed by a sensitivity for discontinuity.

The present article thus pleads to substitute for the commonplace dichotomy between 'continuity' and 'change' the more fine-grained dichotomy between 'continuity' and 'discontinuity'.[138] This is conceptualised as attendant to an underlying dichotomy between 'change' and 'stability'. To be sure, some contributions in the fields hereby surveyed (EU law, national public law, public international law) already *prima facie* deploy the continuity/discontinuity framing.[139] Unfortunately, conceptual elaboration is lacking also here. It is accordingly mostly unclear whether the dichotomy is understood in the same sense as in the present article, or rather as a paraphrasis of

138 This approach has a seminal precedent in Pier G. Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"', Hastings L. J. 51 (2000), 479-555 (506-513). However, this piece was primarily received in the circles of the theory of comparative law and legal history. Furthermore, Monateri himself sometimes conflates the continuity/discontinuity dichotomy with the continuity/change one; see e. g. 509.

139 See Christian Joerges, 'Continuities and Discontinuities in German Legal Thought', Law & Critique 14 (2003), 297-308; James Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in: Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009), 801-817; Gabriela Drăgan, 'Continuity versus Discontinuity in the 2014-2020 EU Cohesion Policy' in: Gabriela C. Pascariu and Maria A. Pedrosa Da Silva Duarte (eds), *Core-Periphery Patterns Across the European Union: Case Studies and Lessons from Eastern and Southern Europe* (Emerald 2017), 291-335. Another pairing which seems to enjoy some currency is that between 'continuity' and 'rupture'. See e. g. Christian Joerges, Europe a *Großraum*? Rupture, Continuity and Re-Configuration in the Legal Conceptualisation of the Integration Project (2002). EUI Working Paper LAW No. 2002/2, available at: <https://cadmus.eui.eu/entities/publication/30083a2f-58b1-52ef-be3b-1152be36cd55>, last access 10 October 2025; Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures', AJIL Unbound 109 (2016), 266-270.

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the continuity/change dichotomy.[140] I thus submit that, drawing on Gerschenkron and Foucault, much critical benefit can be reaped. Continuity and discontinuity can thus be understood as different lenses through which to critically analyse the changes undergone by EU law over time.

IV. Constructing Change in EU Law: Continuity and Discontinuity

With the help of this analytical framework, I can now better sketch out my hypothesis: that different imaginations of EU law's future reflect different positionalities in the present, which in turn play out in different reconstructions of EU law's past. My contention can thus be reformulated as follows. The Chapter's insistence on procedure, divorced from related questions of substance, is but the forward-looking projection of the book's reconstruction of EU law's past development as a process of change marked by continuity. In fact, throughout the book, one encounters a recurring opinion. This holds that the changes in EU law occurred over its '70 years' have been but a function of the foundations laid down in the 1950s. To be sure, the book thus acknowledges that changes have indeed taken place. However, it downplays the extent to which those changes have marked a discontinuity with the

140 Joerges, 'Continuities and Discontinuities' (n. 139) does not define the concepts, but seems somehow to suggest that 'continuities in German legal thought' amount to a persistence of theoretical and practical questions posed to legal thinking by the Nazi era (see 298 and 300). In so doing, Joerges somehow leans towards conflating, in turn, the pairs of continuity/change and continuity/discontinuity. A similar pattern emerges in Joerges, Europe a *Großraum*? (n. 139), although, as mentioned, 'discontinuities' here are substituted by 'ruptures' (see 7-11 for 'ruptures' and 26-33 for 'continuities'). Drăgan (n. 139) also fails to define the concepts. Interestingly, however, the pairing of 'continuity' and 'discontinuity' in the title gives way to the juxtaposition of 'continuity' and 'innovation' throughout the paper (see 294 and 299). This use also seems to strongly suggest that Drăgan understands 'continuity' as lack of change. Clearly understanding 'discontinuities' as generic 'changes' is, on the other hand, Crawford (n. 139), 809-817. On her part, Lagarde (n. 106) makes an unexpected move at 19. She thus superimposes a new dichotomy between continuity and discontinuity upon the previously-employed dichotomy between continuity and change. This new dyad seems to swing between the Gerschenkron/Foucault conceptualisation and the more traditional one. Ambiguity is also to be found in Lesaffer (n. 104), at 137, where the dichotomy between 'continuity' and 'change' is first suggested in the mainstream sense, but then a partial opening to the idea that continuity might be a modality of change is implied. On the other hand, Tzouvala (n. 139), while referring to 'ruptures' rather than 'discontinuities', implicitly suggests that both 'continuities' and 'ruptures' are actually modalities of 'change' (see 269-270).

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prescient vision of the 'founders' of Europe.[141] This framework then constrains the Chapter's imagination of EU law's future: in fact, addressing matters of substance would introduce the more radical discontinuities advocated by the literature. In other words, it is precisely because the Chapter assumes (past and future) continuity in the substantive ends and principles of European integration that it can portray incremental procedural tinkering as the way forward for EU law. By contrast, the literature's insistence on proposing changes in EU law's substance, and discontinuous ones at that, reflects a general predisposition in the scholarly debate to read the development of EU law as already marked by discontinuity in the past. This reconstruction of EU law's diachronicity configures a legal imagination which is readier to call for substantive changes in EU law's future as well.

Importantly, these different attitudes towards the past and the future ultimately reflect different positionalities in the present. The book is an outspoken attempt at providing output legitimation for the integration project in its current outlook.[142] Understanding EU law's history through a continuity paradigm is instrumental to this enterprise. It reconstructs the benefits of integration currently enjoyed by EU citizens as the tangible results of the founders' forward-looking vision. This appeal to the founders adds a further layer of legitimisation: the Weberian-traditional legitimacy coming from the messianic foundational moment.[143] Further, the book presents the current output of integration as the product of a logic unchanged for 70 years. In so doing, the book entrenches that logic as key to enabling the continued production of that output in the future. If the concrete benefits currently accruing to EU citizens are ultimately attributable to the Treaties' foundational project (complemented by a modicum of input legitimacy emerged over the years), why change those foundations? Should these rather not keep on being incrementally streamlined through procedural supranationalisation? By contrast, the scholarly debate in recent years is marked by an increasingly

141 I use the language of 'founders' in an attempt to analytically acknowledge the entrenched use of the rhetorical figure of the 'founding fathers' of European integration, while seeking to problematise the concept's gendered dimension. At the same time, the very idea of 'founders' should also be questioned as the bearer of a deeper, problematic reconstruction centred on agency which downplays structure. See Agnieszka K. Cianciara, 'Why Have There Been No Founding Mothers of Europe?', Sprawy Między 75 (2022), 61-82.

142 See n. 23 above and surrounding text.

143 See n. 3 and n. 10 above and surrounding text. In fact, Weiler's theorisation of the EU's 'messianism' arose precisely out of a diagnosis that the EU traditionally relied on output legitimacy in the face of weak democratic credentials, but also that the EU's capacity to deliver that output had been compromised by the financial crisis. See Weiler, 'The Political and Legal Culture' (n. 10), 682-683; Weiler, 'Europe in Crisis' (n. 10), 254-255; Weiler, 'In the Face of Crisis' (n. 10), 831-832; Weiler, 'Deciphering the Political and Legal DNA' (n. 10), 144-145.

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critical attitude towards the legal dynamics of European integration.[144] If the aim of the enterprise is to deconstruct and criticise EU law (whether internally or externally), a discontinuity paradigm seems more promising. Here, no idealised *moment constituant* needs to be posited to stabilise the present state of affairs. Rather, highlighting deviations from the arrangements of the 1950s can show that precarious equilibria have been undermined without introducing compensatory measures. A discontinuity paradigm can otherwise underline that dissatisfactory states of affairs have been overcome after hard-fought battles, while still needing full realisation. In other words, the value ascribed to the foundational Treaties may differ sharply, depending on the project pursued by examining their subsequent permutations. It is thus fruitful to read differing imaginations of EU law's future as a function of pre-existing assumptions on EU law's past. More fundamentally still, however, both the appeal to the past and the promise of the future are shaped by one's positionality in the present.

Against this background, the book's adherence to a continuity paradigm surfaces in several Chapters. For instance, Chapter 1 reconstructs the evolutionary path of Art. 2 TEU's values 'from principles to legal obligations'.[145] In so doing, the authors claim that EU law's turn to axiology is not a recent development. Rather, it is just the coherent unfolding of the 'ideals' upon which '[t]he cradle of the supranational law that became modern EU law was based'.[146] In this account, '[t]he integration of markets has notably been the outer form of the EU, whereas ideals have been the inner driver'.[147] The authors then characterise the process of European integration as having 'brought the inner idealistic heart of the EU into the daylight'. They hence reconstruct the emergence of the value agenda in EU law as a '"stone by stone" approach', which led to current Art. 2 TEU by building on the 'textual […] roots in the Treaties of Rome and Paris'.[148] In the authors' submission, therefore, recent developments are visibly configured as the 'already-said' that is at the same time a 'never-said', through which Foucault characterises continuity.[149] A further example is provided in Chapter 6, deal-

144 See n. 25 and n. 133 above and surrounding text.

145 Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 34-57. Critically on this Chapter, see Maciej Krogel, 'Is It Enough to Say "Common Values" When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244.

146 Erlbacher and Herrmann (n. 145), 34.

147 Erlbacher and Herrmann (n. 145), 34.

148 Erlbacher and Herrmann (n. 145), 34-37.

149 See n. 126 above and surrounding text.

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ing with several iterations of the EU's transition 'from an economic community to a Union for its citizens'.[150] To be sure, the authors of this Chapter understand this to have been a journey 'from the unthinkable to tangible rights, and beyond'.[151] However, they subsequently make clear that this 'unthinkable' has 'become a reality because the European Economic Community, and subsequently the EU, has increasingly placed the citizen at the heart of the "process of creating an ever closer union among the peoples of Europe"'.[152] This reference to the open finality set for the integration process since the latter's very outset reveals the continuity paradigm underlying the reconstruction.[153] The significant changes in Europeans' lives surveyed in Chapter 6 are thus presented as the progressive realisation of the forward-looking vision of the founders, updated to cope with 'a changing world' and 'the evolution of European society'.[154] Against this background, a significant part of Chapter 6 is devoted to three interrelated developments. The authors identify one *fil rouge* threading across them: The shift 'from a perspective of treating persons as economic resources to considering them persons with a right to work with dignity'.[155] The authors trace this evolution in the broadening of the free movement of workers to protection against one's home MS after having exercised mobility; the prevalence of the principles of aggregation and export of benefits in social security coordination; and the introduction and progressive 'socialisation' of EU rules concerning collective lay-offs.[156] In all these cases, they underline how the progressive 'humanisation' of the original Treaties' economy-centred provisions merely developed the

150 Isabel Galindo Martín et al., 'From an Economic Community to a Union for Its Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 133-156. Critically on this Chapter, see Steiert (n. 79).

151 Galindo Martín et al. (n. 150), 133.

152 Galindo Martín et al. (n. 150), 134.

153 See the first Recital of the Preamble to the Traité instituant la Communauté Économique Européenne (1957). On its historical and present-day significance see Jürgen Bast and Armin von Bogdandy, 'Geltung, Telos und Hierarchie des Unionsverfassungsrechts' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht: Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2025), 67-121 (87-100).

154 Galindo Martín et al. (n. 150), 155 f.

155 Galindo Martín et al. (n. 150), 155. The shift in perspective is summed up at 134 as having led 'from workforce to European Union citizens'. Despite hinting at it, the authors do not pick up on the issue of citizenship. This is probably because the matter is addressed separately in Chapter 4 of the book: Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 96-114. Critically on Chapter 4, see Meeusen (n. 23).

156 Galindo Martín et al. (n. 150), 134-140.

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latter's in-built principles.[157] In so doing, the authors read the current state of EU law as an uninterrupted lineage which developed foundations always (if latently) present in the Treaties.

Chapter 8 of the book, on its part, addresses the evolution of the Common Agricultural Policy (CAP) and of the Common Fisheries Policy (CFP).[158] The Chapter devotes significant effort to showing that both policies have significantly broadened their objectives. From initial emphasis on food security and support to domestic production, they have incorporated, *inter alia*, aspects of social and environmental sustainability, as well as animal welfare.[159] However, the authors also caution that 'the substance' of the Treaty provisions 'has not changed since 1957'.[160] Rather, the policies' several objectives 'have been developed gradually over the last 60 years'.[161] In other words, 'the fundamental objectives of food security and market stabilisation are still central, and require ongoing rebalancing in the light of the current circumstances'.[162] Far from entailing a radical break with the original Treaty framework, these developments show that 'EU law can move with the times and adapt to changing circumstances and challenges, both of today and of the future'.[163] Chapter 8 thus suggests that this process of adaptation can occur without fundamentally altering EU law's 70-year-old foundations. In a similar vein, Chapter 13 addresses the infringement procedure as 'a key driver of the development of European Union law'.[164] As far as the historical profile is

157 See Galindo Martín et al. (n. 150), 134, underlining that the first development was made possible by the TEEC provisions on the free movement of workers, which 'remained, in essence, unchanged until the [TFEU] enshrined, in Article 45, the principle as it stands today'; 136, highlighting that social security coordination had already been addressed before the start of European integration in 'an international convention that was incorporated into what was only the third regulation to be adopted after the entry into force of the original EEC Treaty', based on Art. 51 TEEC; 138, positing that, despite the lack of a power to adopt legally binding acts, Art. 118 TEEC already made 'labour law and working conditions' a matter of supranational concern. However, for a different reading on the extent to which the Chapter posits such continuity, see Steiert (n. 79).

158 Jacqueline Aquilina et al., 'Of Farms, Fish and Forks: Towards Safe, Sustainable and High-Quality Farming and Fishing in the EU' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 179-206.

159 Aquilina et al. (n. 158), 181-182 (on the CAP) and 190-191 (on the CFP).

160 Aquilina et al. (n. 158), 179.

161 Aquilina et al. (n. 158), 180.

162 Aquilina et al. (n. 158), 206.

163 Aquilina et al. (n. 158), 206.

164 Karen Banks and Gregor von Rintelen, 'The Infringement Procedure: A Key Driver of the Development of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 296-310.

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concerned, Chapter 13 mostly highlights how Treaty amendments and re-interpretations by both the European Court of Justice (ECJ) and the Commission have 'increased the effectiveness of the infringement procedure'. Key in this process were the introduction of sanctions and interim measures.[165] Similarly, the authors show that the Commission's embracement of a discretionary approach in setting enforcement priorities has streamlined the procedure's potential as a 'policy tool'.[166] However, such developments do not call into question the fact that the core provisions of Arts 258 and 260(1) TFEU 'have remained unchanged since the Treaty of Rome'.[167] Consequently, the infringement procedure, through its changes, has 'evolved and become more effective'.[168] The insistence on 'effectiveness' as a concept with an intrinsic means-end focus suggests that, over the years, the infringement procedure has simply come to better serve its always-intended purpose: ensuring the seamless efficacy of EU law. Chapter 14 further complements this picture. It reflects on several technical facets of the interplay between regulatory and competition law, skilfully tinkered by the European Commission as 'the clock master' of the EU's internal market.[169] This interplay's key pivot is identified in the liberalisation of monopolistic network markets effected by EU law throughout the 1980s and the 1990s. This is understood as an exercise which mixed concerns at maximising economic efficiency with the pursuance of ulterior 'legitimate public interests' of a non-economic nature.[170] In the authors' account, these developments are to be seen in the context of the Schuman Declaration's 'functionalist approach', which '[s]ince the creation of the European Communities' has led to 'the accomplishment of the four fundamental freedoms […] with different intensity depending on the focus […] the sector and the period'.[171] Viewed in this light, the phenomena described in Chapter 14 show that '[t]here is continuity in the regulation of the internal market, but also adaptation to changed circumstances and challenges, the internal market being a living instrument characterised by

165 Banks and von Rintelen (n. 164), 300-304.

166 Banks and von Rintelen (n. 164), 305-307. The authors refer to the important Communication: European Commission, 'EU Law: Better Results Through Better Application' (C/2016/8600) [2017] EU OJ C18/10.

167 Banks and von Rintelen (n. 164), 296.

168 Banks and von Rintelen (n. 164), 310.

169 Dimitrios Triantafyllou and Luigi Malferrari, 'The European Commission: The Clock Master of the European Union Internal Market' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 311-334.

170 Triantafyllou and Malferrari (n. 169), 312-326.

171 Triantafyllou and Malferrari (n. 169), 311.

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dynamism'.[172] Such dynamic adaptation is thus once again framed as a wise accomplishment of the founding Treaties. In this framing, Schuman's functionalism laid the foundations for a common market ever since 1950. This unchanged project has gradually adjusted its likewise unchanged core to respond to the challenges posed by 70 years of European integration.

Overall, the picture above can be strongly characterised in the sense of continuity proposed in Section III above. Several of the book's Chapters do not deny that 'change' has taken place in EU law: much less so, change is at the very heart of the story they tell. The authors of the several Chapters rather underline, on the one hand, that such change has taken place to respond to new circumstances. On the other hand, they stress that this has not questioned the 70-year-old foundations originally laid down in the Treaties. In fact, these responsive changes have been enabled by those very foundations, and have merely expanded upon them. This theme emerges forcefully in the book's overarching and more 'political' contributions.[173] It is within this overall interpretive horizon that the Chapter's circling between past and future should be understood.[174] Against this background, one can better understand the Chapter's concluding statement as the ultimate embodiment of the ideal of continuity with the pristine foundations of 1951: '[w]hatever the path of the future of EU law is, the EU is a dynamic and adaptable project. The past 70 years of EU law have led to very concrete

172 Triantafyllou and Malferrari (n. 169), 334.

173 See Ursula von der Leyen, 'Preface' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 3-4, according to which '[f]or the past 70 years, law has been the driving force behind the ever deeper integration of Europe' (3). Von der Leyen then submits that '[the EU] has […] demonstrated its resilience in standing united in the face of extraordinary challenges and using its legal framework as a tool to successfully tackle recent crises […]' (3-4). The President of the Commission hence praises the EU institutions' 'strong political will to use the full potential of the EU's institutional and legal framework' as the key precondition for the EU's 'most recent achievements' (4). Similarly, Metsola (n. 21) claims that '[t]he Treaty of Paris on 23 July 1953 changed the course of Europe. Our community laid down the foundations of EU law and the path of European integration began' (8). Building on this foundation, the President of the European Parliament maintains that '[t]here is no question that the world – Europe included – will continue to change throughout the course of time. Yet, with steadfast values, solid foundations and meaningful institutions safeguarded by EU law, our project can persist even when faced with autocratic threats' (9). Finally, Calleja and Rusche (n. 22) open their synopsis of EU law's historical path by narrating an extraordinary meeting of the European Commission in the same venue where the first meeting of the High Authority took place 70 years earlier. Based on this circling symbolism, they submit that '[s]eventy years [after the beginning of the integration process] the ideal of peace remains very much at the heart of the European project and, in order to achieve it, the scope of action of the European Union has expanded beyond the remit of a purely economic organisation' (15-16).

174 See n. 33 above and surrounding text.

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results for EU citizens […] [B]ased on the EU leaders' strong political will to act unitedly, EU law is a powerful and effective tool to deliver responses to new and unforeseen crises'.[175] I thus contend that, in order to make sense of the Chapter's imagination of EU law's future, one needs to place it within the continuity paradigm through which the book reconstructs EU law's past.

Against this background, the picture emerging from the book can be contrasted with the account of the very same developments hereby surveyed to be found in the literature. Take, for instance, Chapter 1's insistence on Art. 2 TEU as the 'already-said/never-said' of European integration.[176] Such reading sits uneasily with reconstructions which attribute a key role to the qualitatively new stage of European integration which spanned from the Maastricht to the Lisbon Treaties. In this account, the turn to values in EU law does not form part of a foundation immanent to EU law since 1951.[177] Rather, it much more flows from a contested process which unfolded over two decades, starting in the 1990s and culminating in the Constitutional and Lisbon Treaties.[178] Similarly, consider Chapter 6's presentation of the 'humanisation' of EU labour law as the progressive implementation of principles latent in the Treaty establishing the European Economic Community (TEEC).[179] The book's account in this respect can be contrasted with much more widespread recollections in the literature. These emphasise not only, as the book also does, the progressive (if incomplete) detachment of this body of law from its original commodifying logic. Rather, the scholarly debate often stresses how even the introduction of the economy-centred account which the book takes as the starting point entailed, to a large extent, a rupture with the initial Treaty framework. This rupture unfolded through contested recalibrations of the Treaty's substantive and procedural content. Once prevailed, it attracted to the supranational level labour and social law- and policy-making to an extent arguably higher than originally intended.[180]

Coming to Chapter 8, the book's understanding of continuity in the transition of the CAP and the CFP towards 'multifunctionality' is also not

175 Calleja and Ladenburger (n. 24), 392.

176 See n. 145-149 above and surrounding text.

177 In the iconic words of Weiler, 'The Political and Legal Culture' (n. 10), '[d]emocracy was not part of the original DNA of European integration. It still feels like a foreign implant.' (694).

178 See Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism', CML Rev. 61 (2024), 1471-1500 (1474-1478, 1480-1481 and 1488-1490).

179 See n. 150-157 above and surrounding text.

180 See Diamond Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', ELJ 19 (2013), 303-324 (307 f.); with further references, Steiert (n. 79).

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the only available interpretation.[181] Alternative understandings point out that the CAP's controversial and all-absorbing emphasis on producer support in the early years was, in itself, not compelled by the TEEC provisions. Rather, the TEEC enshrined a plethora of contradictory objectives, in a spirit of compromise between competing views. The CAP's corporatist and protectionist configuration only properly emerged during the 1960s, after hard-fought bargaining amongst the MS. This was to the detriment of other possible articulations which, however, would also have been possible under the Treaty framework.[182] If not even the CAP's protectionism can be predicated to amount to a seamless propagation of the 1957 foundational moment, this goes all the more for the subsequent transition to multifunctionality.[183] Also remarkable is Chapter 13's assumption of continuity in the configuration of the infringement procedure. As highlighted above, the book tells this story as the progressive increase in efficiency of an instrument whose nature was never fundamentally revised.[184] Different accounts rather point to a more fundamental reshuffling of the procedure's systemic significance. These insist, *inter alia*, on the broadening palette of substantive provisions amenable to enforcement, as well as on the very same heightened discretion in setting enforcement priorities which the book itself recollects. Against this background, many an author has underlined how the infringement procedure currently looks less like the law-enforcement tool initially envisaged, and more like a policy-making device.[185] Finally, consider Chapter 14's reading of

181 See n. 158-163 above and surrounding text.

182 Although this configuration admittedly aligned with France's protectionist stance, which was in turn the main reason for the CAP to be included in the TEEC to start with. See, without having to uphold liberal intergovernmentalism as a general theory of European integration, the historical record surveyed in Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998), 208-216.

183 Especially if one considers that the transition to multifunctionality has itself entailed the radical restructuring of many a market, as configured by the CAP's mercantilistic orientation since the 1960s. See Francis Snyder, 'CAP' in: Erik Jones, Anand Menon, and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012), 484-495 (486-491).

184 See n. 164-168 above and surrounding text.

185 Admittedly, a partial concession to this reading is perhaps implied by the book's qualification of infringement proceedings as a 'policy tool' (see n. 166 above and surrounding text). However, the authors do not develop the implications of this opening into acknowledging the changing systemic significance of the procedure. On this structural change, see e. g. Maria Mendrinou, 'Non-Compliance and the European Commission's Role in Integration', Journal of European Public Policy 3 (1996), 1-22 (9-18); Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2012), 17-26; Luca Prete and Ben Smulders, 'The Age of Maturity of Infringement Proceedings', CML Rev. 58 (2021), 285-332 (289-294, 296-300, and 330-332). Interestingly, while this is no longer the case at the time of writing, Prete and Smulders have been members of the Legal Service of the Commission. While

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the liberalisations of the 1980s and 1990s as a marginal 'adaptation' of the initial common market project.[186] This continuity can be contrasted with scholarly accounts which understand both the liberalisations specifically, and the path of the common/single/internal market more broadly, as having brought about a radical recalibration in the EU's economic constitution.[187] Under this view, the current internal market is not just a marginal refurbishment of the common market of the 1950s. Rather, it is a completely reconfigured socio-economic space, brought about by a radical discontinuity with the initial economic constitutional model.[188]

To be sure, the contrast above can be nuanced in turn. The book makes significant openings to the concept of discontinuity in some passages,[189] and the literature also offers continuity-inspired readings.[190] However, this does not detract from the overall picture emerging from the above. I thus hope to have made colourable my claim that the divarication highlighted in Section II

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still affiliated with the Legal Service, they also co-authored a contribution which already started tracing developments along these lines: see Luca Prete and Ben Smulders, 'The Coming of Age of Infringement Proceedings', CML Rev. 47 (2010), 9-61 (13-15 and 18-24).

186 See n. 169-172 above and surrounding text.

187 On the shifting conceptualisation of the European market from 'common', to 'single', to 'internal', see Jukka Snell, 'The Internal Market and the Philosophies of Market Integration' in: Catherine Barnard and Steve Peers (eds), *European Union Law* (4th edn, Oxford University Press 2023), 336-365 (343-353).

188 This discontinuity is commonly conceptualised as a move away from 'embedded liberalism' towards a neoliberal paradigm. For the seminal theorisation of 'embedded liberalism', see John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', IO 36 (1982), 379-415. On its 'unravelling' in the EU in general, see Ashiagbor (n. 180), 304-316; specifically insisting on liberalisations, Matthias Goldmann, 'Die Wirtschaftsverfassung' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht: Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2025), 299-386 (332-338).

189 See, for instance, Galindo Martín et al. (n. 150), who break free with the continuity paradigm underlying their presentation of labour law (see n. 150-157 and surrounding text) when addressing other developments. In fact, the authors acknowledge that healthcare mobility (140-142) and student mobility (142-144) amount to a creation by the ECJ with no basis in the original Treaties. Also see Giacomo Gattinara et al., 'Protecting the Environment and Tackling Climate Change' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 158-178. This Chapter presents the evolution of EU environmental law as the result of a creative use of available legal basis starting in the 1970s (see 158-159). Implicit therein is an acknowledgement that the original Treaty framework completely ignored environmental questions.

190 See e. g. Steve Peers and Marios Costa, 'The Old Dog Learns New Tricks: Reinvigorating Infringement Proceedings to Enhance the Effectiveness of EU Law', E. L. Rev. 46 (2021), 228-241. In fact, Peer and Costa interpret the infringement procedure's developments as having simply streamlined its 'effectiveness', much in the same spirit as n. 164-168 above and surrounding text.

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above reflects deeper divergences in the underlying approaches to the *longue durée* of EU law.

V. Conclusion: Narrating Change in EU Law

For a long time now, EU law has essentially been conceived of as a diachronic process.[191] The notion of dynamic historical development is thus of fundamental importance in EU legal discourse. In the context of European modernity's composite temporality, this leads to a centrality of EU law's past when thinking about its future. However, both the past and the future are best understood as positional projects. One's presentation of both is crucially shaped by their assumptions and aspirations, and ultimately aims at situating claims to discursive authority in the here-and-now. With this in mind, it is easier to make sense of the sharp dissonance between the Chapter's focus on questions of procedure, and the literature's emphasis on matters of substance. These can be understood as exercises in different legal imaginations, shaped by broader assumptions about the overall trajectory of EU law. In fact, the book's general understanding of EU law's past strongly resonates with the concept of continuity. More often than not, the book presents the changes which occurred over the years as the progressive unfolding of the founders' forward-looking vision. However, this understanding is far from exhausting the range of possible interpretations. Also more often than not the scholarly literature understands those very same changes as having rather entailed a discontinuity with the Treaties' foundations. In this account, change in EU law has not progressively actualised the immanent project of the 1950s. Rather, it has at once signalled and sustained the emergence of altogether different projects.

Against this background, I understand the procedural tinkering imagined by the Chapter as a projection of the book's continuity paradigm into the future. In the broader context of the book, divorcing procedure from substance is in line with the notion that EU law is all about further streamlining its original project. The assumptions underlying that project thus need not be fundamentally questioned; rather, their translation into practice is to be made more efficient through enhanced supranationalisation and democratisation. In other words, the Chapter imagines a future for EU law which is, in turn, a project of continuity with the original Treaties. By contrast, the literature's more fundamental questioning of the substance of EU law can be interpreted as a call for discontinuity with the *status quo*. It is therefore tempting to see

191 See La Torre (n. 117).

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this as a function of the general predisposition in the field to see this very *status quo* as being, in turn, the product of manifold discontinuities with the original Treaties.

To be sure, this is not the only available interpretation of the materials I presented. Other factors may be responsible for shaping the diverging legal imaginations surveyed in this piece. For instance, the Chapter's emphasis on procedure might be reflective of a much more concrete policy concern: overcoming the stalemate caused by Hungary's policy of systematically obstructing EU decision-making.[192] Conversely, the respective emphasis on continuity and discontinuity might be due not so much to semi-deliberate choices on how to formulate claims to authority, as to the very structure of the Legal Service's and legal academia's epistemes. While the importance of precedent in legal practice incentivises those engaged therein (particularly in an institutional setting) to emphasise continuity with the past, legal academics earn reputation as creative thinkers by proposing novel (read: discontinuous) interpretations.[193] These interpretations are surely at least as tenable as the one hereby advanced. However, rejecting mono-causality, I deem it equally arguable that the broader horizons of continuity and discontinuity are co-determinative of our thinking about the law. Epistemic enrichment in the realm of social phenomena does not derive exclusively from univocal causal determinations (if any are possible at all in this domain). It can also be reaped

192 I am indebted to Armin von Bogdandy for raising this point. The question is particularly acute in the field of external relations, and has given rise to extensive debate: see, amongst many others, Peter van Elsuwege, 'How Viktor Orbán Challenges the EU's Common Foreign and Security Policy', Verfassungsblog, 9 July 2024, doi: 10.59704/da56a3449b491903; Peter van Elsuwege, 'How Hungary's Withdrawal from the International Criminal Court Affects the Credibility of the European Union', Verfassungsblog, 9 April 2025, doi: 10.59704/5b203c654819dbae. Luke D. Spieker, 'Tackling the Union's "Orbán Problem" Now: Seizing Momentum, Reviving Article 7 TEU, Sharpening Conditionality', Verfassungsblog, 10 April 2025, doi: 10.59704/9b1855f0d7899719; Armin von Bogdandy and Luke D. Spieker, 'Overcoming the Hungarian Veto: Advancing Europe's Geopolitical Agency', Verfassungsblog, 13 June 2025, doi: 10.59704/7dbcc468d0db22c4; Martijn van den Brink and Mark Dawson, 'The European Union's Fantastical Constitution: A Response to von Bogdandy and Spieker', Verfassungsblog, 27 June 2025, doi: 10.59704/683c73f664fc9a0b; Lucia S. Rossi, 'A Legal Scalpel Instead of an Axe: How a Reinterpretation of Article 7 TEU Could Neutralise Hungary's CFSP Veto Strategy', Verfassungsblog, 9 July 2025, doi: 10.59704/0ddbf23ae5f67774; Armin von Bogdandy and Luke D. Spieker, 'Overcoming Objections to Overcome the Hungarian Veto: A Rejoinder to Dawson and van den Brink', Verfassungsblog, 31 August 2025, doi: 10.59704/91d8d12473fca44a; Johannes Schäffer, 'EU Sanctions and the Mirage of Unanimity: Overcoming the Hungarian Veto One Step after Another Under the Letter of EU Law', Verfassungsblog, 8 October 2025, doi: 10.59704/6dcbcf81e23133c5.

193 Thanks to Michael Ioannidis, one reviewer, as well as Robert Stendel, for stressing the importance of this point. On the intrinsic orientation towards continuity in the Legal Service's episteme, also see Leino-Sandberg, '70 Years of EU Law' (n. 23).

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from defensible ways to make sense of those phenomena.[194] I thus hope to have proposed a convincing way to interpret the visible mismatch to which the present paper was devoted. Furthermore, above and beyond this issue's focus on the book, I hope to contribute to a broader discussion on the epistemology of EU law.[195] In this context, I believe that an archaeological approach can generate remarkable insights on how knowledge about EU law is produced. This approach can thus hopefully be put to use in other critical analyses of how EU law's diachronicity is construed.

A final note is in order. In line with Geschenkron's remarks on (dis)continuity as hermeneutics, I do not aim here at characterising one or the other paradigm as 'correct' *per se*. In fact, I do not aim at such characterisation in respect of either EU law as a whole (which I believe would be simply wrong), nor of any particular areas of the EU legal system. To be sure, it must have transpired that I believe that a discontinuity paradigm captures many developments in EU law better than a continuity one. Relatedly, one of the main reasons why I find a discontinuity-centred understanding so attractive is undoubtedly its critical potential.[196] However, my point is primarily analytical, rather than normative. In other words, I wish to highlight first and foremost that our thinking on EU law's past spills over into our imagination of its future; or, better, that our thinking of both EU law's past and its future is shaped by assumptions which guide us in undertaking those (re-)constructions. In turn, these assumptions are a function our situated perception of EU law's present, and of the projects we wish to pursue through and about it. This can be seen as a question of narratives of EU law; that is, the construction of discourses on EU law based on assumptions about the attribution of meaning. These assumptions shape what is told and how it is told, in the overall effort to make sense of inchoate social

194 Armin von Bogdandy, 'Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's *Comparative Matters*', VRÜ 49 (2016), 278-290 (285-287).

195 See e. g. Marija Bartl and Jessica C. Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022); Martijn W. Hesselink, 'Knowing EU Law', Cambridge Yearbook of European Legal Studies 26 (2024), 155-183.

196 This however admittedly raises one further question. This is whether discontinuity carries critical potential under all circumstances; or whether there exist instances where emphasising discontinuity legitimises arrangements which, on closer (critical) scrutiny, can actually be understood as embodying continuity with previous foundations assumed to be problematic. I generally think that the latter is the case (think of the overstatement of the EU's break with Europe's colonial past: see n. 85 above). Roughly, this can be a function of the temporal scale within which the inquiry is undertaken, as well as of the pre-existing conditions of the discursive camp within which the claim is formulated. However, space reasons prevent me from pursuing this point any further on this occasion.

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and legal phenomena.[197] However, narrative assumptions do not only structure one's understanding. Rather, they are dialectically reinforced in turn by their actualisation in the narrative. This discursively limits the range of possible courses of future action to those which conform with those assumptions.[198] Against this background, narrating EU law's past as a story of continuity contributes to shaping an imagination of its future which conforms with that continuity. Acknowledging that past changes have rather entailed discontinuities can thus liberate our capacity to imagine discontinuous change also for the future.

197 See, seminally, Robert M. Cover, 'Foreword: *Nomos* and Narrative', Harv. L. Rev. 97 (1983), 4-68 (4-11). With further references, also see Julia Otten, 'Narratives in International Law', KritV 99 (2016), 187-216 (188-206); Daniel R. Quiroga-Villamarín, A *Histoire Juridique Commune*? Historiographical Frames in European and Inter-American Human Rights Narratives (January 15, 2025). MPIL Research Paper No. 2025-03, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098631 (2-7). Note, however, that the literature on law and narratology often refers to the narrative function performed by legal materials themselves (e. g. the 'stories' narrated in judgements, statutes, or treaties). Here, I rather understand the Legal Service's book, at a higher level of generality, as a narrative *of* EU law and its diachronic development. Other authors similarly scrutinised the rhetoric which underlies institutional practice and public discourse on EU law and policy: see Kalypso Nicolaïdis and Robert Howse, '"This Is My Eutopia …": Narrative as Power', J. Common Mkt. Stud. 40 (2002), 767-792; Floris de Witte, 'Integrating the Subject: Narratives of Emancipation in Regionalism', EJIL 30 (2019), 257-278; Catherine E. de Vries, 'How Foundational Narratives Shape European Union Politics', J. Common Mkt. Stud. 61 (2023), 867-881. For an approach focusing more on legal acts as narrators on their own right, see however Antoine Bailleux, Elsa Bernard, and Sophie Jacquot (eds*), Les récits judiciaries de l'Europe: Concepts et typologie* (Bruylant 2019).

198 Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019), 162-171.

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The Formation of the EU Legal System

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Abstract

This paper examines how far, and in what way, the decision-making of the European Court of Justice (ECJ) has been integral to the formation of the European Union (EU) legal system, and what this means for the study of EU law. Taking the volume 70 Years of EU Law as a starting point, it notes that many of the concepts and principles central to EU law's self-understanding – such as direct effect, primacy, autonomy, fundamental rights, and the rule of law – emerged and took shape in the ECJ's rulings, entering the legal order through case law rather than by virtue of an established constitutional text. Against this background, the paper identifies two temptations arising from the centrality of case law: first, to portray the ECJ's decisions as forming a consistent and continuous line of reasoning, without turns or leaps; and secondly, to regard those decisions as expressions of a conceptually necessary truth of law rather than as criticisable claims to the best or right reading of

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the law. The paper contends that these temptations are reinforced by the evolutionary scheme of legal development adopted in 70 Years of EU Law, which depicts change as gradual and natural and carries assumptions of continuity, directionality, and self-sustaining momentum. Such a scheme, the paper argues, sits uneasily with the peculiarities of a system whose basic concepts and general principles developed largely in and through case law. It fails to capture moments of genuine transformation and instances of deliberate construction, and risks obscuring the interpretive nature of adjudication and the argumentative character of legal practice. Ultimately, the paper suggests that, in our understanding of EU law's past and present, we must cultivate an awareness of ambiguity and contradiction, and, in our analysis of the ECJ's decisions, a sense of good and bad argument – neither of which is adequately supported by the evolutionary scheme of legal development.

Keywords

EU Legal Development – Constructive Interpretation – General Principles of EU Law – Process of European Integration – Evolution of EU Law – Evolutionary Theories of Law

I. Introduction

In present-day scholarship, the study of the legal system of the EU is often viewed as an inquiry into an ongoing process of formation[1]. On this view, the analysis of the EU legal system involves not a photograph of law, but the retelling of a story about the 'roots and routes'[2] of law; not so much a snapshot of a fixed object on the legal landscape as the reconstruction of the origins and movements of a living body of legal norms. A proper under-

1 Particularly revealing, in this regard, are some of the phrases that typically adorn the covers of books, book chapters, and articles on EU law: Joseph H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999); Neil Walker, 'The European Union's Unresolved Constitution' in: Michel Rosenfeld, András Sajó, Susanne Baer and Michel R. Mancini (eds), *The Oxford Handbook of Comparative Constitutional Law* (2nd edn, Oxford University Press 2019), 537-562; Stephen Martin (ed.), *The Construction of Europe: Essays in Honour of Émile Noël* (Springer 1994); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Koen Lenaerts, 'Federalism: Essential Concepts in Evolution – The Case of the European Union', Fordham Int'l L. J. 21 (1997), 746-798; Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021).

2 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983), v.

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standing of EU law, in other words, requires a *genealogical* approach – one that goes beyond the description of a static set of forms to 'look back from what is to what went before'[3].

The volume *70 Years of EU Law*[4], written by members of the Legal Service of the European Commission, illustrates this methodological orientation well. Across its 16 chapters, the book reflects on the past, present, and future of EU law – its origins, development, and legacy as a distinct legal system. As the introduction puts it, 'EU law characterises the past 70 years of the EU, from the European Coal and Steel Community (ECSC) to the EU of today'[5], and, in those 70 years, 'the EU has evolved from an economic union to a union for its citizens'[6]. EU law is 'the guiding thread of European integration'[7], for 'all major steps forward in the process of integration are reflected in acts of EU law'[8]. But the narrative advanced by *70 Years of EU Law* is not only retrospective; it is also forward-looking. The book asserts that 'EU law also offers plenty of opportunities and is very adaptive to new challenges'[9], and concludes with a final chapter entitled 'The Future of European Union Law'[10]. In all these ways, the volume pursues the theme that EU law possesses a genealogy – a history of formation extending over seven decades. It thus reflects a core premise of the methodological approach just described: that to know EU law is to trace the story of how the EU legal system has grown into its present form.

In *70 Years of EU Law*, this approach presents two particular aspects, both of which seem to inform the book's overall perspective. The first is a reliance on case-law-based accounts for the elucidation of the salient features of the legal system, rather than on 'formal schemata for the exposition of the law'[11].

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3 Georg Henrik von Wright, *Explanation and Understanding* (Routledge 2009), 2.

4 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023).

5 Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (17).

6 Calleja and Rusche (n. 5), 31.

7 Calleja and Rusche (n. 5), 17.

8 Calleja and Rusche (n. 5), 17.

9 Calleja and Rusche (n. 5), 17.

10 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-392. For a discussion of the cited chapter, and, more broadly, of the temporal framing and narrative of past, present, and future in EU law, see Paolo Mazzotti, 'An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity', HJIL 86 (2026), 85-131, in particular Section 1.

11 Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D. Reidel Publishing Company 1986), 17.

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This is particularly evident in the introductory chapter of *70 Years of EU Law*, in which the foremost principles of EU law are outlined in a series of cases.[12] More specifically, the chapter sets out familiar pairings of cases and principles: *van Gend & Loos*[13] and direct effect, *Costa*[14] and primacy, *Handelsgesellschaft*[15] and fundamental rights, *Cassis de Dijon*[16] and mutual recognition, *Roquette*[17] and democracy, *Les Verts*[18] and the rule of law, and many more. Throughout the book, these principles are referred to variously as 'the administrative law principles of EU law'[19], the 'major principles that ensure that, to this day, EU law is, first and foremost, a law for citizens'[20], 'the basic principles by which the EU had to abide'[21], and 'the general principles of EU law'[22]. Their precise character – administrative or general, interpretive or structural – thus remains somewhat indeterminate. What the introduction makes clear, however, is that in EU law, legal principles are intimately intertwined with judicial decisions.

This point receives fuller treatment in the first chapter of the book, which begins by noting that 'the Court of Justice progressively integrated a number of general principles into the EU legal order, thereby endowing these princi-

12 Calleja and Rusche (n. 5), 18-20.

13 ECJ, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, judgement of 5 February 1963, case no. 26/62, ECLI:EU:C:1963:1.

14 ECJ, *Costa v. ENEL*, judgement of 15 July 1964, case no. 6/64, ECLI:EU:C:1964:66.

15 ECJ, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, judgement of 17 December 1970, case no. 11/70, ECLI:EU:C:1970:114.

16 ECJ, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, judgement of 20 February 1979, case no. 120/78, ECLI:EU:C:1979:42.

17 ECJ, *Roquette Frères v. Council*, judgement of 29 October 1980, case no. 138/79, ECLI:EU:C:1980:249.

18 ECJ, *Parti écologiste 'Les Verts' v. European Parliament*, judgement of 23 April 1986, case no. 294/83, ECLI:EU:C:1986:166.

19 Calleja and Rusche (n. 5), 18.

20 Calleja and Rusche (n. 5), 18.

21 Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 34-57 (36). For a discussion of the cited chapter, see: Maciej Krogel, 'Is It Enough to Say "Common Values" When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order, HJIL 86 (2026), 225-244.

22 Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 76-94 (80, 81, 87). For a discussion of the cited chapter, see Henri de Waele, 'Beyond the Posture, Beyond the Pale – Assessing the EU's Real Record as An International Human Rights Actor', HJIL 86 (2026), 245-260.

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ples with legal effects'[23]. The chapter then turns to human rights, the constitutive principles of the rule of law, and the principle of democracy – all of which, it argues, entered the EU legal order through the case law of the European Court of Justice[24]. On this account, the fundamental principles of EU law are norms distilled from the adjudication of specific disputes: they are associated with cases because they are, in essence, judicial doctrines formulated by the ECJ in the course of deciding cases. Through such principles, the case law of the ECJ comes to occupy an important place in the EU legal system. Further evidence of its importance is found in other chapters of the book, which show that the ECJ has played a crucial role not only in articulating EU legal principles but also in consolidating core areas of EU law, such as external relations law[25], citizenship law[26], and competition law[27]. The book observes, for example, that 'the Court laid the foundations for the action of the Union on the international scene'[28]; that 'EU citizenship and the rights attached to that status have, to a large extent, developed and evolved through the case law of the Court of Justice'[29]; and that the right to claim damages for an infringement of competition law has been 'shaped, in particular, by the case law of the Court of Justice'[30]. All of this suggests that the cases in which citizens assert their rights – and the judgements of the ECJ that follow – add something vital to our understanding of EU law.

The second aspect of the book's approach is a reliance on the evolutionary model of change. References to evolution abound in *70 Years of EU Law*: 'evolution of the case law'[31], evolution of EU values[32], evolution of EU

23 Erlbacher and Herrmann (n. 21), 34.

24 Erlbacher and Herrmann (n. 21), 34 f.

25 Bruti Liberati, Ramopoulos and Bianchi (n. 22).

26 Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 96-114. For a discussion of the cited chapter, see Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297.

27 Liane Wildpanner and Clio Zois, 'The Benefits of European Union Competition Law Enforcement for Consumers' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 229-250.

28 Calleja and Rusche (n. 5), 20.

29 Tomkin and Montaguti (n. 26), 96.

30 Wildpanner and Zois (n. 27), 229.

31 Wim Roels, 'The Removal of Tax Obstacles to Living, Working, Investing, Retiring and Dying in Another Member State' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 207-227 (221). For a discussion of the cited chapter, see Aitor Navarro, 'The EU as a Catalyst for Tax Harmonisation – Triumphs and Challenges in an Asymmetric Cooperation Model', HJIL 86 (2026), 357-378.

32 Calleja and Rusche (n. 5), 30: 'values have *evolved* from principles to legal obligations'.

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citizenship rights[33], or 'evolution of EU law'[34], to cite a few. At first sight, such references might seem innocuous. The ubiquity of the term 'evolution', and the understated way in which it is used throughout to qualify EU law, reinforce this impression. They suggest that, whatever implications the terminology of evolution may carry in other fields of inquiry, within the book itself the term serves purely descriptive or rhetorical purposes – that it makes no substantive claims about EU law, its system, or its history. Yet on closer inspection, 'evolution' is neither a neutral descriptor nor a flowery turn of phrase.

The term appears in the book alongside a specific set of verbs and adverbs denoting the pace and direction of change: EU law has 'grown'[35], 'driven forward'[36] the process of integration, and done so 'gradually'[37] and 'progressively'[38]. The implication is that evolution is not merely a metaphor for change, but a model of change – one that carries with it a range of assumptions about the dynamics and nature of legal development. Moreover, the term features prominently in both the introductory and concluding chapters of the book. In the introduction, it frames the path of past legal development[39]; in the conclusion, it anticipates the path of prospective legal development[40]. In this way, the theme of evolution informs both the prelude and the epilogue of *70 Years of EU Law*, providing the lens through which its authors make sense of EU law's history and imagine its future. Far from a casual idiom, therefore, evolution is here embraced as an interpretive framework for understanding EU law.

In this paper, I will argue that these two aspects – the reliance on the case law of the ECJ to account for the structuring principles of the EU legal system, on the one hand, and the reliance on the evolutionary model of change to account for the development of that same system, on the other – interact in ways that flatten our sense of how judicial decisions have shaped EU law and of what adjudication at EU level involves.

33 Tomkin and Montaguti (n. 26), 96: 'EU citizenship and the rights attached to that status have, to a large extent, *evolved* through the case law of the Court of Justice'.

34 Calleja and Rusche (n. 5), 18.

35 Ursula von der Leyen, 'Preface' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 4.

36 Von der Leyen (n. 35), 4: 'This is a unique feature of the European project: The legal order of the Union is the *driver of integration*, a supranational Union built on law.'.

37 Erlbacher and Herrmann (n. 21), 43.

38 Erlbacher and Herrmann (n. 21), 34.

39 See Calleja and Rusche (n. 5), 1-23

40 See Calleja and Ladenburger (n. 10), 391 f.

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The argument runs along the following lines: EU law's self-understanding as a legal system owes much to the case law of the ECJ, to the point where such case law may be regarded as central to the formation of the EU legal system. This centrality invites a *genealogical* approach – one that integrates history into our accounts of EU law not as a backdrop but as a constitutive element. On such an approach, EU law appears not as a fixed entity, constituted once and for all by an original act of foundation, but as a dynamic structure undergoing continual development. Yet in theoretical inquiry and critical appraisal alike, the centrality of the ECJ's case law gives rise to two temptations – neither of which the *genealogical* approach is effective in mitigating. The first is to portray the decisions of the ECJ as a consistent, clear-cut, ever-advancing body of knowledge, thereby smoothing over any contradictions, ambiguities, or breaks in judicial reasoning. The second is to treat those decisions as expressions of a conceptually necessary truth of law, rather than as claims to the *best* or *right* reading of the law. Both temptations are reinforced by the evolutionary scheme of legal development, which conceives of change in law as an incremental and self-generating process. Applied to the history of EU law, this scheme suggests a view of the case law of the ECJ as both the source and the product of evolutionary change, and of the ECJ itself as engaged in uncovering what was merely latent. Such a view obscures the interpretive nature of adjudication and the argumentative character of legal practice more broadly, turning judicial decisions into inevitable outcomes and replacing historical complexity with Panglossian optimism.

For the purposes of this argument, I will address four questions. First, has the case law of the ECJ, in fact, been central to the formation of the EU legal system? Secondly, if so, what does this entail for the study of EU law? Thirdly, what does it mean to say that a legal system has developed by evolution? Fourthly, is the evolutionary model of change well-suited to capture the peculiarities of the formation of the EU legal system? It is these four questions that structure the discussion that follows.

II. The Centrality of the ECJ's Case Law

That the case law of the ECJ is important to the functioning of the EU legal system is widely recognised and rarely contested. It is likewise generally accepted that case law analysis offers a valuable method for the study of EU law. Yet, viewed in historical perspective, the significance of the ECJ's case law does not appear merely *functional*, nor, therefore, does case law analysis appear simply as one method of inquiry among others. Indeed, who, among

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those seeking to impose order on the miscellany of EU rules, could dispense with the rulings of the ECJ as a source of unity? Or, thinking in terms other than formal consistency, who, among those striving to grasp the ways in which EU law is conceived of and operates in social life – to paraphrase Hart[41] – could overlook the thread running from *van Gend & Loos*[42] and *Costa*[43] to the rule-of-law[44] and value[45] jurisprudence of our own time? The ECJ's case law seems deeply interwoven with the self-understanding of EU law as a legal system. So much so that any account of the latter must, in some measure, reckon with the former – with the ECJ's institutional activity, the nature of its role, and the circumstances surrounding its decisions. The following discussion explores this relationship – between the ECJ's decision-making and EU law's self-understanding – and the ways in which it manifests itself in the basic elements of EU law.

The extent to which the understanding of EU law as a system has been informed by the case law of the ECJ is apparent in the concepts of EU law – that is, when seeking to elucidate the categories through which the vast body of EU legal material may be treated in an organised and generalised manner. These concepts are often bound to the decisions of the ECJ. More precisely, they are judicially bound in two different ways. First, they are judicially recognised, having been identified by the ECJ as the terms in which the system of EU law should be understood; secondly, they are judicially defined, in that the ECJ determines their meaning independently of analogous concepts in national or international law.[46] While the latter statement remains broadly true, the former is not consistently borne out. Certain concepts of EU law, such as *freedom of movement*[47] or *citizenship*[48], find their first

41 Herbert L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983), 93.

42 ECJ, *van Gend & Loos* (n. 13).

43 ECJ, *Costa* (n. 14).

44 See, *inter alia* ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgement of 27 February 2018, case no. 64/16, ECLI:EU:C:2018:117; ECJ, *European Commission v. Poland*, judgement of 15 July 2021, case no. 791/19, ECLI:EU:C:2021:596; ECJ, *European Commission v. Poland*, judgement of 5 June 2023, case no. 204/21, ECLI:EU:C:2023:442.

45 See, *inter alia* ECJ, *Repubblika v. Il-Prim Ministru*, judgement of 20 April 2021, case no. 896/19, ECLI:EU:C:2021:311; ECJ, *Hungary v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. 156/21, ECLI:EU:C:2022:97; ECJ, *Poland v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. 157/21, ECLI:EU:C:2022:98.

46 On the ECJ's interpretation of EU law concepts, see Koen Lenaerts and José A. Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice (2013). European University Institute, Academy of European Law, EUI Working Paper AEL 2013/9.

47 Treaty establishing the European Economic Community (Treaty of Rome, 1957), Art. 48.

48 Treaty on European Union (Treaty of Maastricht, 1992), Art. 8.

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expression in the EU Treaties, whereas others, such as *equal treatment*[49] or *concentration*[50], appear for the first time in EU legislation. Nevertheless, both statements accurately describe the more fundamental concepts of EU law – those that mark it out as a distinct, unified legal system. Specifically, they apply to *direct effect*, *primacy*, and *autonomy*, which, on the ECJ's own account, stem from 'the nature of EU law'[51] as 'a new kind of legal order peculiar to the EU'[52], and which, as commonly acknowledged in the literature, serve as 'cornerstones'[53] of the EU legal system.

Direct effect, primacy, and autonomy are not, strictly speaking, part of the linguistic stock of the EU Treaties. They receive no express mention in Treaty provisions.[54] They are not, in this sense, concepts of EU Treaty law awaiting interpretation in concrete cases. They are, rather, concepts introduced and deployed in support of particular interpretations of EU Treaty law, themselves advanced in justification of judicial decisions. From these concepts, the ECJ has derived principles and rules to be followed and applied by national judicial, legislative, and administrative authorities.[55] In this way, they operate as norms: they help determine what forms of behaviour are permitted or required, and they constitute reasons for demanding conformity with such behavioural standards. Yet whether one focuses on the concepts or on the principles and rules associated with them, direct effect, primacy, and autonomy arise in the ECJ's legal argumentation and acquire their meaning within

49 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40.

50 Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (EU Merger Regulation), OJ 2004 L 24/1.

51 ECJ, Opinion *2/13*, opinion of 18 December 2014, ECLI:EU:C:2014:2454, para. 166.

52 ECJ, *2/13* (n. 51), para. 158.

53 Daniele Gallo, 'Rethinking Direct Effect and Its Evolution', European Law Open 1 (2022), 576-605 (580: direct effect as a 'legal cornerstone of EU law'); Antonis Metaxas, 'Opinion 1/17 and the Autonomy of the EU Legal Order', European Papers 6 (2021), 631-644 (633: primacy as an 'existential cornerstone of the EU legal order'); Justin Lindeboom and Ramses A. Wessel, 'The Autonomy of EU Law, Legal Theory and European Integration', European Papers 8 (2023), 1247-1254 (1249: autonomy as a 'cornerstone of EU constitutional law').

54 Primacy is expressly referred to in Declaration 17 annexed to the Final Act of the Treaty of Lisbon. However, Declaration 17 is not part of the EU Treaties and does not have primary-law status. It simply restates the primacy doctrine as developed in the ECJ's case law, without elevating that doctrine into a codified, Treaty-level norm.

55 For an overview of the concepts of direct effect and primacy, and their related principles and rules, see: Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order', in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021), 187–227. For an overview of the concept of autonomy, and its related principles and rules, see Koen Lenaerts, 'The Autonomy of European Union Law', Post AISDUE 1 (2019), 1-11.

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that context. More than this, and as the ECJ's own case law makes clear[56], they must be understood as carrying a meaning peculiar to the legal practice in which they emerge and develop – independently of whatever conventional meanings they may bear in other institutional settings. They are, in sum, judicial doctrines: doctrines devised in the context of adjudication for the purposes of the correct and effective enforcement of the law, and whose content is fixed by their meaning in EU legal practice alone. If this holds, then direct effect, primacy, and autonomy – the very concepts that demarcate and unify the EU legal system – may, indeed, be regarded as bound to the ECJ's decision-making. This, in turn, makes it possible to say of the ECJ that it has undertaken much of 'the conceptualisation of general legal terms'[57], such that the formulation of the concepts underlying legal rules and structuring the legal system comes to be situated within the administration of justice.

A further illustration of this claim can be found in the general principles of EU law, which, as highly generalised and legally binding norms, both exemplify abstract legal concepts and produce concrete legal effects. As is well known, both the category of 'general principles of EU law' and the principles themselves are rooted in the ECJ's case law.[58] The ECJ identified and articulated these principles in a piecemeal and pragmatic fashion – across numerous rulings and in response to demands for the application or interpretation of the law. Consider, for example, *fundamental rights* and the *rule of law*. Officially enshrined as 'foundational principles' in the Treaty of Amsterdam[59] and later regrouped under the label of 'foundational values' in the Treaty of Lisbon[60], both first appeared in the ECJ's case law during the era of the European Economic Community, under the more modest designation of 'general principles'. In *Internationale Handelsgesellschaft*[61], the ECJ acknowledged fundamental rights as relevant to Community legal practice. It did so in the context of a preliminary reference concerning the conformity of a Community deposit-guarantee scheme with the German Basic Law, and as part of a self-declared mission to secure 'the efficacy of Community law'[62].

56 ECJ, *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, judgement of 6 October 1982, case no. 283/81, ECLI:EU:C:1982:335, para. 19.

57 Berman (n. 2), 150.

58 For the first express mention of 'general principles', see ECJ, *Stauder v. City of Ulm – Sozialamt*, judgement of 12 November 1969, case no. 29/69, ECLI:EU:C:1969:57, para. 7. For an account of the origins and early development of the general principles of EU law, see Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2007), Chapter 1.

59 Treaty on European Union (Treaty of Amsterdam, 1997), Art. 6.

60 Treaty on European Union (Treaty of Lisbon, 2009), Art. 2.

61 ECJ, *Internationale Handelsgesellschaft* (n. 15).

62 ECJ, *Internationale Handelsgesellschaft* (n. 15), para. 3.

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Likewise, in *Les Verts*[63], the ECJ invoked the rule of law as constitutive of the Community's normative basis. It did so in the context of litigation over political party funding, and as part of an effort to extend judicial review to acts of the European Parliament. Exactly which rights qualify as 'fundamental', and which sub-principles are encompassed by the rule of law, was not decided in these two rulings; nor could it have been, given the ECJ's obligation to confine itself to the legal issues placed before it, per the principle of *ne ultra petita*. It was only in subsequent rulings[64] – again, in a patchwork, case-driven manner – that specific rights and sub-principles were recognised as belonging to fundamental rights and the rule of law, respectively.

There is no doubt that, in the years since *Internationale Handelsgesellschaft* and *Les Verts*, much has been done outside the courtroom to flesh out fundamental rights and the rule of law as legally-binding norms. A catalogue of fundamental rights was laid down by means of the *Charter of Fundamental Rights of the European Union*[65] more than two decades ago, while the rule of law has more recently been given a supranational definition and made enforceable through the *Rule of Law Conditionality Regulation*[66]. Both fundamental rights and the rule of law now also feature in the EU Treaties: they have been written down and incorporated into the basic, supreme law of the EU. Yet it is noteworthy that two such central features of the tradition of constitutional legality first appeared *decidendo* – as objects of judicial decision rather than as constitutional commands guiding the process of judicial decision-making. The upshot is clear: fundamental rights and the rule of law were introduced as norms of EU law not by a founding act of constitution, but by judicial fiat. It is not merely that they were specified for application by the ECJ; rather, it was the ECJ that endowed them with the status of law in the first place. They were posited as legal norms – conditions for the organisation and exercise of EU regulatory power – in the course of adjudication. So it may be said, in this respect, that the requirements of formal and substantive legality in the EU were set by judicial practice, and thus shaped in some measure by the practical concerns arising in the administration of justice.

63 ECJ, *Les Verts* (n. 18).

64 For a survey of the case law in which various fundamental rights and rule-of-law sub-principles were identified and elaborated, see Tridimas (n. 58), Chapters 6 and 7.

65 Charter of Fundamental Rights of the European Union, originally proclaimed on 7 December 2000 and re-proclaimed on 12 December 2007, OJ 2012 C 326/391.

66 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation), OJ 2020 L 433/1.

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From this brief examination, two conclusions emerge, both carrying methodological significance. First, EU legal principles and EU judicial doctrines are intimately related: the former have traditionally derived from the latter. Accordingly, when inquiring into the principles of EU law and their interrelations, the case law of the ECJ remains both the unavoidable starting point and the essential point of reference. Consider, for instance, the principle of direct effect. Can it be analysed in isolation from the decisions of the ECJ – the series of cases in which its meaning and practical consequences, its limits and exceptions, have been progressively articulated? Few would deny that the principle of direct effect – its criteria, precise requirements, and relationship with the principle of primacy – becomes intelligible only in light of the ECJ's case law. This is because judicial doctrine has served both as a source and as a means of development. The principle is, in other words, an extension of the ECJ's decisions, best understood against the background of the ECJ's broader decision-making practice. Secondly, the ECJ has historically borne much of the burden of developing EU law. In doing so, it has assumed two distinct roles: that of moulding EU law into a coherent system of abstract legal rules, aimed at generalisation, formal equality, and certainty; and that of settling disputes according to EU law, oriented toward particularity, fairness, and effectiveness. Put differently, the ECJ has developed EU law not only by making its rules more concrete, but also by providing those rules with a conceptual framework. This, in turn, invites a narrow conception of law, whereby EU law is characterised first and foremost by the doctrines of the ECJ. Tellingly, the ECJ itself refers to its doctrines of direct effect, primacy, and autonomy as the 'essential characteristics of EU law'[67] – 'the specific characteristics arising from the very nature of EU law'[68]. Any conceptual elucidation of EU law must therefore engage with how – and why – the ECJ arrived at the decisions that have come to 'characterise' EU law as a system.

Taken together, these conclusions reveal a close connection between the case law of the ECJ and the self-understanding of EU law as a distinct legal system – so close that it becomes difficult to proceed *in vacuo*, from an acontextual standpoint, particularly when seeking to describe and account for the features of the EU legal system. For this purpose, it seems more fitting to begin from 'the experience of applying principles in concrete cases'[69] and to work upward – from the discourse of norm-application in which judicial doctrines are embedded, to the general principles, the basic concepts, and the overarching conception of law. The legal system may thus

67 ECJ, *2/13* (n. 51), para. 167.
68 ECJ, *2/13* (n. 51), para. 166.
69 Berman (n. 2), 153.

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be approached genealogically, by tracing legal principles through lines of case law back to their source. On this approach, the key to the understanding of EU law lies in particular cases: the practical problems that arise in litigation shape judicial decisions, which in turn generate legal principles, from which the general concepts emerge that, together, give structure and coherence to the legal system. Yet this approach is not without methodological challenges. Again, it proceeds from the insight that the case law of the ECJ has long been central to the distinctiveness of EU law as a legal system. Owing to the centrality of such case law, the approach comes to construe the internal character of the EU legal system through the particular decisions of the ECJ, and thus risks treating adjudication not as a practice of decision-making or a form of dispute resolution, but as a process of uncovering a pre-existing conceptual truth.[70]

III. Two Objections Considered

If the preceding analysis has portrayed the ECJ's case law as centrally important to the self-understanding of EU law as a legal system, this portrayal cannot go unexamined. The peculiarities and methodological implications of the relationship between the ECJ's decision-making and EU law's self-understanding merit closer consideration. Two familiar points of comparison present themselves. It may be observed that the judicial decisions of the courts at Westminster, from the thirteenth to the nineteenth centuries, were integral to the development of the common law of England.[71] By extension, one could argue that the formation of the EU legal system relied on established judicial practice and convention in much the same way as the

70 Nothing here is meant to suggest that the ECJ is an isolated actor or that its case law develops in a vacuum. A substantial socio-legal literature has shown how the ECJ's decisions are conditioned by a broader constellation of political, social, and institutional factors. See, *inter alia* Antoine Vauchez, *L'Union par le droit: L'invention d'un programme institutionnel pour l'Europe* (Presses de Sciences Po 2013); Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022). The present argument, however, addresses a different question: it does not seek to explain why – that is, for what motives or under what external influences – the ECJ decides as it does, but to examine how EU law understands itself as a system through its own concepts, principles, and rules, and how far, and in what way, that self-understanding is connected with the ECJ's case law. Accordingly, the focus lies not with the broader environment of ECJ adjudication, but with the conceptual and interpretive structures through which EU law conceives and presents itself.

71 See John P. Dawson, *The Oracles of the Law* (The University of Michigan Law School 1968), Chapter. 1; John Baker, *An Introduction to English Legal History* (5th edn, Oxford University Press 2019).

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English common-law system did in its own time. It may also be noted that in a number of EU Member States – many of which, as civil law countries, have traditionally privileged the authority of statute over that of judicial decision – the case law of higher and constitutional courts has acquired significant authority and weight.[72] So much so that, in the legal systems of several EU Member States, constitutional case law is implicitly recognised as a source of law.[73] In this respect, the role of constitutional courts in the Member States may be seen as analogous to that which the ECJ has historically played within the EU. The suggestion that the ECJ's contribution to the system of EU law is in any way remarkable, or liable to raise methodological concerns, therefore encounters two objections. The centrality of the ECJ's case law has both a historical precedent and a contemporary counterpart. First, it finds a historical parallel in the English common-law tradition – specifically, in the importance of judicial decisions to the common-law. Secondly, it reflects a broader trend in contemporary European constitutionalism – namely, the growing importance of courts in addressing constitutional questions.[74]

1. First Objection: The Common-Law Comparison

One reply to the first objection is that, unlike the English common-law system[75], it is difficult to regard the EU legal system as the product of the cumulative practice of multiple courts. The articulation of the 'essential characteristics' of EU law was not part of a collective judicial enterprise, but rather the work of a single court – the ECJ. Admittedly, much of this work has taken place through preliminary rulings, in which the ECJ, at the request

72 See Council of Europe, *Overview of the National Mechanisms to Ensure Uniformity of Judicial Practice / Case Law* (June 2023) <https://rm.coe.int/overview-of-the-national-mechanisms-to-ensure-uniformity-of-judicial-p/1680af07ad>, last access 26 January 2026.

73 See Sébastien Platon, 'Dr. "Law-Discoverer" and Mr. "Law-Maker": The Strange Case of Case-Law in France', Verfassungsblog, 24 April 2015, doi: 10.17176/20170213-150018.; John A. Gealfow, 'Case Law and Its Binding Effect in the System of Formal Sources of Law', Juridiskā zinātne / Law 11 (2018), 38-61; Juan Manuel Goig Martínez, José Maria Cayetano Núñez Rivero and Maria Acracia Núñez Martínez, *El sistema de fuentes del derecho constitucional en la jurisprudencia del Tribunal Constitucional Español* (Universitas 2019).

74 For a discussion of constitutional adjudication as a defining feature of both European and global constitutionalism, see Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism', Colum. J. Transnat'l L. 47 (2008-2009), 72-164.

75 As legal historians have observed, the English common law developed through the interaction between several royal courts – the King's Bench, Common Pleas, and Exchequer – each cultivating its own practice while borrowing from the others. Thus, the common law emerged from the operation of the royal courts rather than from any single institutional source. In this regard, see Baker (n. 71), Chapter 2.

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of national courts, has sought to clarify points of EU law. As is well known, the doctrines of direct effect and primacy were developed in response to such requests. In this sense, they may be described as outcomes of the preliminary ruling procedure – often characterised as 'a mechanism for judicial cooperation'[76] or 'a relationship of mutual trust between the ECJ and national judges'[77]. It might therefore be assumed that such doctrines are the result of collaboration or cross-fertilisation between the ECJ and national courts. Yet it is doubtful whether the preliminary ruling procedure can be understood in this way – as having created a space for the joint formulation of the basic concepts of EU law. The very existence of the preliminary ruling procedure – the fact that it involves national courts putting questions to the ECJ as to the meaning of EU law – suggests the contrary: that the interpretation of EU law is a monopoly held by the ECJ rather than an area of genuine collaboration or cross-fertilisation among courts.

To be sure, the preliminary ruling procedure does not, of itself, establish hierarchical relations between national courts and the ECJ – at least not in the sense in which the relations between lower courts and higher courts are ordinarily deemed to be hierarchically organised. The ECJ has neither the jurisdiction to review the legal determinations of national courts, nor does it possess the power to overturn national judicial decisions. Arguably, however, doctrines developed by the ECJ regarding its own interpretive mandate introduce an element of informal hierarchy into the broader legal-judicial architecture within which the preliminary ruling procedure operates. Two doctrines are important here. First, the ECJ claims binding *erga omnes* effect for the interpretations contained in its judgements.[78] Accordingly, the interpretation of EU law given in a preliminary ruling is binding not only on 'the national court that referred the question and the parties to the original case'[79], but also on all the national courts subsequently required to apply EU law.

76 Virginia Passalacqua and Francesco Costamagna, 'The Law and Facts of the Preliminary Reference Procedure: A Critical Assessment of the EU Court of Justice's Source of Knowledge', European Law Open 2 (2023), 322-344 (322).

77 Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice', CML Rev. 45 (2008), 1611-1643 (1611).

78 ECJ, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v. Netherlands Inland Revenue Administration*, judgement of 27 March 1963, joined cases nos 28/62, 29/62 and 30/62, ECLI:EU:C:1963:6, 38-39, where the Court held that there was no need to give a new ruling when the question referred was materially identical to one already decided and no new factor had been submitted; ECJ, *Luigi Benedetti v. Munari F.lli s. a. s.*, judgement of 3 February 1977, case no. 52/76, ECLI:EU:C:1977:16, para. 26, stating that 'the purpose of a preliminary ruling by the Court is to decide a question of law, and that ruling is binding on the national court as to the interpretation of the Community provisions and acts in question'.

79 Rafał Mańko, 60 Years of Da Costa en Schaake: Asserting the Binding Authority of European Court of Justice Case Law (European Parliamentary Research Service 2023), 1-11 (8).

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Secondly, the ECJ claims for itself the role of sole final interpreter of EU law. This was made explicit in Opinion *2/13*[80], where the ECJ affirmed that its 'exclusive jurisdiction over the definitive interpretation of EU law'[81] is of such importance as to constitute a legal principle. The interpretation of EU law given in a preliminary ruling is thus conclusive for national courts, which must proceed on that basis when applying EU law. Read together, these doctrines ensure that it is the ECJ which determines, 'bindingly and definitively'[82], the meaning of EU law.

From this, it follows that the preliminary ruling procedure cannot be thought of as a framework for collaboration – that is, as underpinning a practice in which multiple actors work together to produce something. National courts do not 'collaborate' with the ECJ in the interpretation of EU law; they apply EU law in accordance with the interpretive rules and standards set out by the ECJ in its case law. Nor can the preliminary ruling procedure be conceived as a process of cross-fertilisation. Within that procedure, the relationship between national courts and the ECJ is not one of reciprocal influence and adaptation, as between the common-law courts of England[83], but one of superiority and subordination. The interpretive statements issued by the ECJ in the course of the preliminary ruling procedure are binding on, and conclusive for, national courts, and so, as far as EU law is concerned, the interpretive powers of national courts are wholly subordinate to those of the ECJ.[84] Thus, the essential characteristics of EU law are rooted much more in the ECJ's interpretive monopoly than in any collective construction of meaning. Correspondingly, EU law's self-understanding as a legal system may be said to rest on the case law of a single court, rather than

80 ECJ, *2/13* (n. 51).

81 ECJ, *2/13* (n. 51), para. 246.

82 Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation', ELJ (2018), 358-375 (364).

83 See Baker (n. 71), Chapter 3.

84 None of this is to deny that episodes of national judicial disagreement with the ECJ may arise in the context of the preliminary ruling procedure – the *Taricco* saga being a prominent example. See: ECJ, *Criminal proceedings against Ivo Taricco and Others*, judgement of 8 September 2015, case no. 105/14, ECLI:EU:C:2015:555; Italian Constitutional Court, *M. A. S. and M. B.*, order (ordinanza) of 23 November 2017, case no. 24/17; ECJ, *Criminal proceedings against M. A. S. and M. B.*, judgement of 5 December 2017, case no. 42/17, ECLI:EU:C:2017:936. Nevertheless, instances of judicial disagreement over EU law do not, in my view, signal the existence of a shared interpretive authority. They occur precisely because national courts interact with the ECJ within a procedural framework that obliges them to apply EU law as authoritatively interpreted by the ECJ. Disagreements such as *Taricco* illuminate the tensions inherent in a system in which the power to interpret the law is ultimately centralised in a single court.

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on the independent yet parallel case law of several courts, as in the common-law tradition.

Why this should pose a methodological challenge is not, perhaps, immediately obvious. At first glance, the fact that the defining features of the EU legal system find their source and expression in the case law of a single court may appear to facilitate the tasks of description and elucidation. Yet, when combined with the reality of the EU legal landscape – which, having undergone numerous treaty revisions within a relatively short period, has proved to be fluid – the centrality of the ECJ's case law to the self-understanding of EU law presents methodological difficulties. It does so in two respects: in how we account for the 'relatively enduring and settled character'[85] of EU law, aspects considered typical of the modern legal system[86]; and in how we engage with the ECJ's decision-making, particularly in light of contemporary theories of law and adjudication[87], which tend to conceive adjudication as an inherently argumentative practice and to locate its legitimacy in legal reasoning. More specifically, it gives rise to a twofold temptation: first, to represent the EU legal system as a dynamic entity whose identity is preserved in the case law of the ECJ, which serves as its constant and consistent reference point; secondly, to treat the ECJ's case law not as a series of judicial decisions open to scrutiny and criticism, but as the immovable foundations of the legal system itself.

This temptation arises in the following way. If we understand the basic concepts and general principles of EU law – the elements that give it structure and coherence, and thus make it into a distinct system – as particularly indebted to the ECJ, then it is easy to view the ECJ's decisions as revealing the character or 'very nature of EU law'. If we also consider the particularities of the history of EU law – the law of an association that has seen changes in name, institutional arrangement, substantive purpose and scope of activity within less than seventy years – that view is only reinforced. For amidst institutional and treaty change, the case law of the ECJ survives. Against this backdrop, it may be tempting, on the one hand, to anchor the enduring identity of the legal system not in the stability of a formal framework, but in the continuity of the case law of a single court. The system of EU law thus

85 Herbert L. A. Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994), 24.

86 Both Hart and Kelsen, for instance, treat continuity as a characteristic feature of legal systems. In this regard, see Hart, *Concept of Law* (n. 85), Chapters 4 and 5; Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 2007), 115-124.

87 See Aulis Aarnio, The Rational as Reasonable: A Treatise on Legal Justification (Reidel 1987); Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Clarendon Press 1989); and Manuel Atienza, El derecho como argumentación: Concepciones de la argumentación jurídica (Ariel 2006).

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appears as a shifting, amorphous entity, with little sense of fixity or coherence beyond that supplied by the ECJ's case law. Hence, any ambiguity, contradiction, or rupture in the ECJ's decision-making practice risks being downplayed – subsumed under the linear narrative needed to sustain the self-understanding of EU law as one continuous legal system. On the other hand, it may also be tempting to treat interpretation as a process of conceptual discovery rather than as an exercise in reasoned justification. Judicial decision-making accordingly appears inherently legitimate: it no longer requires legitimisation through the persuasive force of legal reasoning but comes instead to be regarded as expressing the law's supposed essence. Thus, whatever the ECJ decides risks being presumed as conceptually necessary rather than examined as a criticisable claim to normative rightness.

2. Second Objection: The Constitutional-Court Comparison

The second objection, concerning the role of constitutional courts in EU Member States, is more difficult to address. The status, effects, and interpretive styles of constitutional case law vary widely across the EU.[88] Notwithstanding these variations, what characterises constitutional states, generally speaking,[89] is the existence of a written text establishing not only the rules that allocate and organise governmental power, but also the principles that express the ideals and values of the political community. What European constitutional courts have in common, then, is that their practice is disciplined by fidelity to the principles of their respective constitutions: they must conduct themselves in accordance with those principles and with a view to their realisation. This is already quite different from the EU legal experience, for the Treaty of Rome,[90] with its focus on the establishment of the common market, was not a document of principles in the way constitutions typically are. The interpretive leeway historically enjoyed by the ECJ has therefore been broader than that available to Member State constitutional courts when

88 For a comprehensive overview of the differing status and effects of constitutional case law across Europe, see European Commission for Democracy through Law (Venice Commission), *Compilation on Constitutional Justice* (2022), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)050-e>, last access 21 January 2026. For differing interpretive styles, see Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014).

89 With the notable exceptions of the United Kingdom, New Zealand, and a few other countries, which are said to have 'unwritten' constitutions. For an assessment of the merits of written and unwritten constitutions, see Jane Pek, 'Things Better Left Unwritten?: Constitutional Text and the Rule of Law', N. Y. U. L. Rev. 83 (2008), 1979-2021.

90 Treaty of Rome (n. 47).

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formulating constitutional doctrine – if only because, in developing its case law, the ECJ was not originally constrained by the integrated set of principles contained in a constitutional text, as is the case for post-1945 European constitutional courts.

Fidelity to written constitutional principles is reflected in the case law of constitutional courts across Europe, as the following examples illustrate:

The Spanish Constitutional Court has declared that 'the general principles of law included in the Constitution inform the entire legal order, which must therefore be interpreted in accordance with them'.[91] This understanding underlies the doctrine of constitution-conforming interpretation, consistently reaffirmed by the Court.[92]

The Italian Constitutional Court has acknowledged the existence of certain supreme principles of the constitutional order, which are primarily to be found among those enshrined in Articles 1-12 of the Constitution.[93] Moreover, the Court has repeatedly held that ordinary legislation must, where possible, be interpreted in a manner consistent with the Constitution.[94]

The German Federal Constitutional Court has stated that Article 20 of the Basic Law enshrines the fundamental structural principles of the constitutional order of the Federal Republic of Germany, namely, democracy, the rule of law, the social state, the republic, and the federal state.[95] It has further clarified that, together with the guarantee of human dignity in Article 1(1) of the Basic Law, these principles make up the inviolable core content of the constitutional order, which the Federal Republic of Germany must respect and protect, including in its participation in the EU.[96]

The Czech Constitutional Court has maintained that the Constitution is not merely a formal legal framework but incorporates within its text the fundamental principles and values that define the Czech Republic as a democratic state governed by the rule of law.[97] Ordinary legislation must therefore

91 Tribunal Constitucional (Spain), judgement no. 4/1981, 2 February 1981, para. 1.

92 See, *inter alia* Tribunal Constitucional (Spain), judgement no. 22/1985, 15 February 1985; Tribunal Constitucional (Spain), judgement no. 150/1990, 4 October 1990; Tribunal Constitucional (Spain), judgement no. 222/1992, 11 December 1992.

93 Corte costituzionale (Italy), judgement no. 1146/1988, 16 December 1988, para. 2.

94 See, *inter alia* Corte costituzionale (Italy), judgement no. 356/1996, 14 October 1996; Corte costituzionale (Italy), judgement no. 206/2004, 5 July 2004.

95 Bundesverfassungsgericht (Germany), judgement of 30 June 2009, 2 BvE 2/08 (*Lisbon* Judgement), para. 217.

96 See, *inter alia* Bundesverfassungsgericht (Germany), judgement of 21 June 2016, 2 BvR 2728/13 (*OMT* Judgement); Bundesverfassungsgericht (Germany), judgement of 5 May 2020, 2 BvR 859/15 (*Weiss* Judgement).

97 Ústavní soud České republiky (Czech Republic), Pl. ÚS 19/93, 21 December 1993, 50.

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be interpreted, where possible, in a manner consistent with the Constitution.[98]

According to the Romanian Constitutional Court, Article 1 of the Constitution lays down the general principles defining the Romanian state.[99] In its case law, the Court has stressed that these constitutional principles inform and permeate the entire legal order, requiring that legislation be interpreted and applied in conformity with them.[100]

These examples make clear that the principles governing and justifying the legal system as a whole – and by which courts decide cases – are pre-established: they are enshrined in the provisions of the Constitution. Constitutional courts, accordingly, operate within the bounds set by these principles. To be sure, in adjudicating they select among them those pertinent to the matter at hand and reconcile conflicts where such arise. Still, constitutional principles are given rather than subject to choice; they are antecedent to judicial decision. Indeed, as the previous examples show, the principles contained in the constitutional text furnish both a coherent conception of law and a heuristic guide for adjudication.

In EU law, the closest equivalent to a provision setting out the constitutional principles of the political-legal order is Article 2 Treaty on European Union (TEU). As already noted, this article lists the foundational values of the EU, the protection and promotion of which may be regarded as the purpose – or 'point' – of EU law.[101] Academic discussion has focused on the justiciability of Article 2 TEU as a stand-alone provision[102] and, where concretisation is required, on which institution or institutions possess the authority to articulate the EU's values before they can be applied to individual cases[103]. Yet, whether or not these

98 See, *inter alia* Ústavní soud České republiky (Czech Republic), III. ÚS 252/04, 25 January 2005; Ústavní soud České republiky (Czech Republic), Pl. ÚS 77/06, 3 March 2008.

99 Curtea Constituțională a României (Romania), Decizia nr. 80/2014, 16 February 2014, paras 20-21.

100 See, *inter alia* Curtea Constituțională a României (Romania), Decizia nr. 415/2010, 14 April 2010; Curtea Constituțională a României (Romania), Decizia nr. 80/2014, 16 February 2014; Curtea Constituțională a României (Romania), Decizia nr. 51/2016, 16 February 2016.

101 I use the expression 'the purpose or point of EU law' following Dworkin. In this regard, see Ronald Dworkin, *Law's Empire* (Harvard University Press 1986), 90-94.

102 See, *inter alia* Lucia Serena Rossi, '"Concretised", "Flanked" or "Standalone"? Some Reflections on the Application of Article 2 TEU', European Papers (2025), 1-24; Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union', YBEL 39 (2020), 3-121.

103 See, *inter alia* Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', Hague Journal on the Rule of Law 14 (2022), 107-138; Werner Schroeder, 'The Rule of Law as a Constitutional Mandate for the EU', Hague Journal on the Rule of Law 15 (2023), 1-17.

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values are directly enforceable, and whether their concretisation falls primarily on the ECJ or on the EU legislature, it is clear that Article 2 TEU now functions as a heuristic for the ECJ's decision-making – as evidenced by its emerging line of 'value-operationalising case law'.[104] The existence of this provision, and its growing presence in the ECJ's case law, should not, however, obscure the institutional history of the EU legal system. Until the Treaty of Amsterdam, there was no written statement or catalogue of constitutional principles in EU primary law. For much of the EU's history – indeed, for more than half its lifetime – the ECJ thus operated without a heuristic guide of the kind employed by constitutional courts when interpreting their respective constitutions. It moved within a relatively open interpretive landscape, one in which judicial reasoning – though guided by the rules of EU law, the questions referred by national courts, and the circumstances of each case – was largely unbounded at the level of abstract principle.

None of the above is to say that constitutional courts – or courts *tout court* – do not engage in abstract, theoretical argument. As contemporary accounts of adjudication emphasise, legal interpretation cannot be reduced to the mechanical application of norms – that is, to a logical operation whereby judges deduce their decisions from rules with predetermined meaning.[105] In this respect, Habermas suggests that,[106] when interpreting open-textured constitutional clauses, constitutional courts reconstruct the existing law in a manner not unlike that of the legal philosopher: namely, on the basis of a theory of law. Similarly, Dworkin argues that,[107] when deciding cases, judges inevitably rely on a more or less explicit, more or less articulated conception of law: they must have a view of what 'the law of their community, properly understood, really is'[108] in order to say what the law in any given case requires. For both Habermas and Dworkin, therefore, the line between theory construction and application becomes blurred in judicial interpretation.

Yet this line seems to dissolve altogether in the early decision-making practice of the ECJ. Consider the following decisions. In *ERTA*[109], the ECJ invoked the logic of the *effet utile* principle to accord the European Economic Community treaty-making powers in a policy area where such powers had

104 For a critical discussion of this line of case law, see Benedikt Riedl, 'ECJ Encroachment on Domestic Judicial Autonomy? – An Evaluation of ECJ Value-Operationalizing Case Law in Juízes Portugueses and Subsequent Cases', European Public Law 30 (2024), 157-186.

105 Hart, *Concept of Law* (n. 85), 204-205.

106 Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996), Chapter 5.

107 Dworkin (n. 101), Chapter 2.

108 Dworkin (n. 101), 256.

109 ECJ, *Commission of the European Communities v. Council of the European Communities (ERTA)*, judgement of 31 March 1971, case no. 22/70, ECLI:EU:C:1971:32, para. 22.

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not been explicitly provided for in Treaty law. In *Grad*[110] and *van Duyn*[111], it extended the doctrine of direct effect from regulations, the only type of Community act expressly recognised by the Treaty of Rome as 'directly applicable in all Member States'[112], to decisions and directives. In *Les Verts*[113], as previously discussed, the general principle of the rule of law served to broaden the scope of judicial review to include acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties. Finally, in *Simmenthal*[114] and *Costanzo*[115], the ECJ drew on the doctrine of primacy to impose on national authorities – judicial, legislative, and administrative – a duty to disapply national laws conflicting with Community law.

Collectively, these decisions illustrate how the ECJ has built on its own judicial doctrines to reconstruct the EU legal system – and hence, in effect, how the reasoning involved in such decisions is constructive rather than reconstructive. The decisions concern, respectively, the power-conferring rules, the legal sources, the judicial remedies, and the mechanisms of norm-conflict resolution in EU law. These, in turn, are all *constituent* elements of the EU legal system – *constituent* in that they either systematise the positive laws of the EU or govern the actual operation of those laws, thereby constituting a 'distinct, integrated body of law'.[116] When the ECJ rules on the external powers of the EU, the legal effect of EU directives, the extent of judicial review within the EU, and the method for resolving conflicts between norms of EU law and norms of national law, it might therefore be seen as reconstructing the self-understanding of EU law, to use Habermas's language. But, in doing so, the ECJ relies primarily on doctrines of its own creation. That is to say, the ECJ formulates judicial doctrines which are themselves justified in terms of other doctrines it has developed. The legal powers, effects, remedies, and duties articulated in the above decisions – and the principles that ground them – are all of judicial origin. It is in this sense that the ECJ is largely unbounded at the level of principle: both the norms and the justification of those norms are found nowhere but in the legal discourse of the ECJ itself. Thus, the ECJ is engaged not so much in a

110 ECJ, *Franz Grad v. Finanzamt Traunstein*, judgement of 6 October 1970, case no. 9/70, ECLI:EU:C:1970:78.

111 ECJ, *Yvonne Van Duyn v. Home Office*, judgement of 4 December 1974, case no. 41/74, ECLI:EU:C:1974:133, para. 12.

112 Treaty of Rome (n. 47), Art. 189.

113 ECJ, *Les Verts* (n. 18), paras 23-25.

114 ECJ, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, judgement of 9 March 1978, case no. 106/77, ECLI:EU:C:1978:49, paras 17-24.

115 ECJ, *Fratelli Costanzo SpA v. Comune di Milano*, judgement of 22 June 1989, case no. 103/88, ECLI:EU:C:1989:256, paras 31-33.

116 Berman (n. 2), 49.

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reconstructive enterprise as in a constructive one. Through its decisions, it constructs the elements of EU law's self-understanding as a legal system. Indeed, this is precisely how the ECJ appeared to conceive of its role early on, in *van Gend & Loos* and *Costa*: as an agent in the construction of a 'new legal order'[117], 'a system of its own'[118], distinct from the legal systems of the Member States.

The constructive dimension of the ECJ's early case law – made possible by the ECJ's wide interpretive leeway during its first three to four decades – gives rise to methodological difficulty. If the ECJ's case law has served not only to reconstruct the existing law of the EU legal system but also to construct the system itself, then it becomes difficult to treat the ECJ's decisions as merely advancing interpretive claims. It becomes difficult, in other words, to view such decisions as interpretations of legal text, which, as such, might prove inadequate and amenable to change. Where case law has a constructive function, the study of the features and components of the legal system must, to some extent, involve an *ex post facto* rationalisation of judicial decisions. Any suggestion that such decisions are poorly reasoned – or simply wrong – might thus be seen as misplaced. Indeed, it might be taken as casting doubt on the structure and coherence of the system as a whole. To say, for instance, that the doctrines of direct effect or primacy are ill-conceived or unfounded seems almost implausible, and tantamount to denying that EU law has, in fact, become the 'new legal order', the 'system of its own', which the ECJ proclaimed in *van Gend & Loos* and *Costa*, and which EU legal practice has long assumed it to be. Regardless of how they were justified, the doctrines formulated by the ECJ have proved central to the formation of the EU legal system: as discussed above, they lend the system distinctiveness and coherence, and they support its further development. The question of whether such doctrines provide the 'right' or, at any rate, 'rationally acceptable' answer in a given case might thus appear misguided, if not beside the point.

This brings us back to the temptation to view the ECJ's decisions as self-justifying statements of what EU law *is* – to treat them not as criticisable acts, as claims to the best reading of a legal text, but as elements of a closed canon thought to reveal the law's nature. As the comparison with the English common law suggests, this temptation arises precisely because the ECJ's singular contribution to the EU legal system makes it difficult to engage critically with its case law without, at the same time, engaging critically with EU law's own self-understanding as a legal system. Yet, as the comparison

117 ECJ, *van Gend & Loos* (n. 13), 12.
118 ECJ, *Costa* (n. 14), 593.

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with European constitutional courts indicates, what matters is not only the *extent* of the ECJ's contribution, but also its *nature*: not merely *what* the ECJ has developed, but *how* it has done so.

Of course, if by 'development' we mean the production of the detailed written rules that make up the bulk of EU law, then this concerns the work of the EU legislature. Development in this sense is plainly the prerogative of the EU's law-making institutions. But if by development we refer to the elaboration of those norms that give the legal system its distinctive character, as the basic concepts of EU law do, and its substantive coherence, as the general principles of EU law do, then the ECJ has indeed played a role in the 'development' of EU law. This is the dimension of *what*. Beyond this, the ECJ has developed EU law in a further, methodologically significant sense: it has used those essential characteristics and general principles as the basis for constructing some of the constituent elements of the legal system – building on its own doctrines to determine its structures and modes of operation. This is the dimension of *how*. Taken together, these two dimensions – *what* and *how* – highlight why critical engagement with the ECJ's case law is methodologically demanding. To question the ECJ's reasoning in its past decisions is, in part, to question the fundamental design of the system of EU law as it is understood today. For in the constructive case law of the ECJ, the reasons for decision are difficult to disentangle from the effects of those decisions on the formation of the system itself.

IV. The Idea of Evolution

The comparative and methodological reflections above have sought to address the first two questions posed at the outset: whether the case law of the ECJ has been central to the formation of the EU legal system, and what this entails for the study of EU law. The discussion has shown that the ECJ has contributed, in important respects, to the formation of the EU legal system, and that this raises distinctive methodological challenges. Yet, as already suggested, these challenges point beyond questions of method. They concern the very framework through which legal development is conceived. To represent EU law as a system in formation is, implicitly, to adopt a view of how development takes place – and, as the volume *70 Years of EU Law* illustrates, that view is often expressed in the language of evolution.

In EU legal studies, the issue of what evolution entails, that is, the implications of saying that EU law *evolves* or that the system of EU law is a *result of evolution*, seems to have attracted little direct attention. It is as though evolution were a simple fact of legal history, standing independently of any appreciation

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or assessment. If this view were taken to its logical conclusion, the scholar's task would be merely to chart the *parcours* of EU law given the fact of evolution. Yet the way in which we observe differences in the EU legal system over time and interpret such differences – the way in which we account for the system's enduring identity – hinges on this seemingly uncontroversial fact. To say that a legal system has formed by evolution is not to make a matter-of-fact statement about the forms of that system over time; it is to provide an interpretive key to the identity of a legal system despite change in that same legal system. Evolution is thus not part of the factual basis for an interpretive scheme of legal development; it is, rather, an interpretive scheme in itself. As such, it cannot be discovered empirically but only understood as a system of ideas, and, when applied to a specific legal context, defended or challenged as a more or less persuasive framework of understanding. The question to be considered, then, is whether the evolutionary scheme of legal development furthers our understanding of the process by which the EU legal system was formed – and, in particular, of the ECJ's central role within that process.

In approaching this question, however, a prior one arises: what does it mean to liken the formation of the system of EU law to an evolution? To answer this, it is necessary to explore the idea of evolution itself – an element central to the evolutionary mode of change and, thus, crucial to the interpretation of EU legal development in evolutionary terms. This idea has a long and complex intellectual history. Like many ideas, it has been used in different senses, at different points in time, and in different social contexts. Yet, even by that standard, evolution stands out for its malleability and persistence. Originating in the murky depths of eighteenth-century embryology,[119] the idea of evolution has long exceeded the boundaries of the natural sciences and now operates across multiple disciplines. Today, a discussion of evolution seems as fitting in a biology class as in lectures on history, philosophy, sociology or economics. Indeed, among the books of any university library, the term 'evolution' can be found applied to embryos,[120] world history,[121] epistemology,[122] society,[123] and even financial markets[124].

119 For a history of the idea of evolution, see Peter J. Bowler, 'The Changing Meaning of Evolution', Journal of the History of Ideas 36 (1975), 95-114.

120 Gavin de Beer, *Embryology and Evolution* (Clarendon Press 1930).

121 Dominic Sachsenmaier, 'The Evolution of World Histories' in: David Christian (ed.), *The Cambridge World History, Vol. 1: Introducing World History, to 10,000 BCE* (Cambridge University Press 2015), 56-83.

122 Gerard Radnitzky and William Warren Bartley III (eds), *Evolutionary Epistemology, Rationality, and the Sociology of Knowledge* (Open Court 1987).

123 Jürgen Habermas, *Communication and the Evolution of Society* (Beacon Press 1979).

124 Andrew W. Lo, *Adaptive Markets: Financial Evolution at the Speed of Thought* (Princeton University Press 2017).

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It is interesting to note that the many applications of the idea of evolution dovetail with the many layers of meaning attached to the term itself. Its wide scope of application is matched by an equally wide semantic range. The way in which evolution is spoken of today among scholars of EU law is patently not the way it was thought of by eighteenth-century biologists, nineteenth-century sociologists, or twentieth-century political scientists, in historical settings not so far removed from our own. Even within a single discipline, regarding the same subject of inquiry and during the same era, there exists a spectrum of subtle yet significant variations in meaning. The evolution of the embryo does not carry the same connotations for Albrecht von Haller[125] as it does for Karl Ernst von Baer[126], to name two of the leading biological thinkers of late eighteenth- and early nineteenth-century Europe. In a similar vein, Oliver Wendell Holmes's understanding of evolution in law[127] does not quite correspond to Roscoe Pound's use of the same expression[128], to mention two of the most notable common-law theorists of late 19th century/early 20th century America. This, no doubt, has to do with the *discursive* nature of ideas as a broad logical category: ideas acquire meaning through deliberation and argument and thus come and go on the tide of conversational interchange – losing and gaining signifying and expressive capacity, with each new contribution to the discourse.

Nonetheless, a closer look at the preceding examples reveals some common ground. The disagreement over the correct meaning of 'evolution' is not so great as to make comparison impossible. In the first case, the divergence rests on whether biological evolution should be taken to describe a *predetermined* process of development – one following a design – or a *progressive* process of development – one guided by a tendency. In the second case, the difference lies in whether cultural evolution, and legal evolution as one of its component strands, should be regarded as a process governed by competitive or by collaborative forces. However stark the contrast, in both instances the disagreement does not concern whether something evolves or how it evolves. On the contrary, the contentious issue is: evolution according to which laws? Thus, if it is misleading to suggest that evolution constitutes a fixed notion, unaffected by the multiplicity of uses it has enjoyed in the past and continues to enjoy today, it is equally misleading to suggest that the term 'evolution' has no central core of meaning – that there is no minimal use of the word or that it cannot be translated from one realm of scientific discourse to another.

125 Bowler (n. 119), 96 f.

126 Bowler (n. 119), 100 f.

127 Herbert J. Hovenkamp, 'Evolutionary Models in Jurisprudence', Tex. L. Rev. 64 (1985), 645-685 (656-664).

128 Hovenkamp (n. 127), 677-683.

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The power of the idea of evolution lies in the simplicity of its ingredients. It is precisely this simplicity that renders the idea broadly palatable and easily applicable to widely differing objects of study. Whether conceived as predetermined or progressive, competitive or cooperative, evolution has always been about development. More specifically, the term 'evolution' has consistently referred to a particular kind of development and, by extension, to a particular theory of change. Although the details of that theory have varied, the essential features of evolutionary change have rarely been disputed. At a minimum, 'evolution' denotes change that is (i) *gradual*, in the sense of proceeding by gradation, and (ii) *natural*, in the sense of being directed by nature. As the foregoing examples suggest, it is the second feature that has generated greater controversy. What is meant by 'directed by nature' remains ambiguous. Yet whether understood as directed by the nature of a preexisting design or by the nature of a progressive tendency, evolution is essentially a natural process of development – and, as the saying goes, *natura non facit saltus*. The idea of evolution may, thus, be summed up in a simple formula: gradual and natural change. To disregard this core meaning is to eliminate precisely those features that define evolution as a distinct mode of change. It is to dissolve the very distinction between gradual and natural change, on the one hand, and radical and sudden change, on the other. The idea of evolution would then be so capacious and flexible so as to be of little use in clarifying our conception of change or in offering a coherent scheme for understanding how change happens.

V. EU Law and Evolution

The idea of evolution has followed a winding course across disciplines and generations and, through it all, has managed to retain a kernel of meaning. So long as the sense remains that change happens *gradually* and *naturally*, any intellectual framework in virtually any field of study may qualify as 'evolutionary'. Having established a minimal definition of sorts, it remains to be considered whether the evolutionary interpretive scheme distorts or advances our understanding of EU law. But before diving into this question, that is, before assessing how well the evolutionary scheme of legal development captures the peculiarities of the formation of the EU legal system, it is worth reflecting on how the concept of law itself has been explored in conjunction with the idea of evolution. It is important, in other words, to briefly examine the connection between evolution and law, more generally. After all, the

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characterisation of the EU legal system as the outcome of an evolutionary process ultimately rests on how that connection is drawn.

At the outset, it should be noted that the relationship between evolution and law[129] is far from a narrow topic area. The nature of this relationship has occupied many minds across the spectrum of legal thought. For all its breadth, the topic has most often been associated, traditionally, with English theories of common law,[130] and more recently, with neo-evolutionary theories of law[131]. The former are closely intertwined with the historical school of jurisprudence, while the latter are more firmly rooted in the sociological school of jurisprudence. Yet, despite the difference in general philosophical outlook, both common-law and neo-evolutionary theories reject the claim that law originates in the enactments of the sovereign. By the same token, both depart from the notion that law is laid down by an act of will. They are not, in this sense, 'voluntaristic' theories of law. Advocates of both theories, indeed, would agree with Hayek, one of the leading exponents of socio-cultural evolutionary theory, that 'law is not a product of intellectual engineering, but the result of a process of evolution'.[132] Whether seen as a 'significant passage of historical events'[133] or 'a structure of society'[134], whether viewed through a historical or sociological lens, law is not conceived as a deliberately constructed order. Rather, in the eyes of common lawyers and neo-evolutionists alike, law is an emergent and spontaneous order. On this view, law bears the two defining features of the evolutionary mode of change: the uninterrupted continuity of gradual change and the inherent directionality of natural change. According to both common-law and neo-evolutionary theories, therefore, evolution does not merely provide a framework for explaining change in law but a framework for understanding law itself. Within the bounds of either set of theories, the idea of evolution functions as a model *of* law, that is, as the basic component of the model of law *as* evolution.

In adopting the model of law as evolution, both common lawyers and neo-evolutionists advance two descriptive claims. The first is that law is self-adjusting: a self-maintaining process that continually adapts to new situations and, as the principle of adaptation suggests, does so by degrees. The second is

129 For a thorough overview on the subject, see Mauro Barberis, *Diritto in Evoluzione* (Giappichelli 2022).

130 See: Harold J. Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale', Yale L. J. 103 (1994), 1651-1738.

131 See Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law', L. & Soc. Rev. 17 (1983), 239-286.

132 Friedrich Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1998), 207.

133 Berman (n. 2), 403.

134 Niklas Luhmann, *A Sociological Theory of Law* (Routledge & Kegan Paul 1985), 134.

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that law is self-directing: a self-ordering process guided by its own internal logic rather than by the self-chosen purposes of a political organisation. These two claims converge in the proposition that law is self-sufficient. In the realm of common-law theories, this is taken to mean that law is a process of gradual self-perfection; in neo-evolutionary theories, that law is a process of gradual self-reproduction. To assert that law perfects or reproduces itself, however, is not only to place law under a particular description. Such an assertion carries an implicit normative implication – namely, that law is oriented toward progress or efficiency. Indeed, both among eighteenth-century common-law theorists and among twentieth-century neo-evolutionary theorists, there are some who make no attempt to conceal this normative dimension of law as self-perfection or self-reproduction.

In the camp of common lawyers, Selden and Hale explicitly acknowledge the normative dimension of the process by which English customary law evolved. They describe English legal history as 'a process of improvement'[135] and, in so doing, they present the English common law as the embodiment of a 'necessary progress toward some metaphysically guaranteed goal ascribed to god or reason'[136]. In the camp of neo-evolutionists, Habermas is careful to emphasise that social evolution – or the process of societal rationalisation, as he sometimes calls it – cannot be simply equated with progress.[137] All the same, he seems to understand social evolution as a learning process that unfolds through the transmission of intersubjectively shared knowledge from one generation to the next.[138] On this understanding, the evolution of society is a cumulative and directional process – one oriented towards increasing complexity and comprehensiveness at the collective level of learning. Thus, social evolution – and legal evolution as one of its constituent strands – retains distinct normative connotations: either of a limitless advance in knowledge, enabled by 'the central experience of the unconstrained, unifying, consensus-bringing force of argumentative speech'[139], or, at the very least, of efficiency gains, attained through 'informed disposition over, and intelligent adaptation to, conditions of a contingent environment'[140].

The foregoing, in a nutshell, sets out the tenets of the two main positions that legal philosophers have generally taken on the relationship between evolution and law. With these in mind, the question can now be raised, does

135 Berman (n. 130), 1697.

136 Habermas, *Communication* (n. 123), ix.

137 Habermas, *Communication* (n. 123), 163-165.

138 Habermas, *Communication* (n. 123), 171.

139 Jürgen Habermas, The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society (Beacon Press 1984), 10.

140 Habermas, *Theory* (n. 139), 10.

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evolution fit the reality of the process of formation of the EU legal system? Can it account for the centrality of the case law of the ECJ in this process? This question is best approached at the crossroads of the simple idea of evolution and the more complex model of law as evolution. Across centuries and scientific communities, incrementalism and directionality have been the two features most consistently used to distinguish evolution as a specific mode of change. And, as both common law theorists and neo-evolutionary theorists appear to acknowledge, to speak of law as an evolution is to conceive of law as an incremental and directional process. Thus, if there is one insight to be drawn from the discussion of the idea of evolution and the examination of the model of law as evolution, it is this: to characterise the EU legal system as the outcome of an evolutionary process is to posit that EU law has developed – from its origins to its present form – in a *gradual* and *natural* manner.

Two claims come to the fore when the evolutionary scheme of legal development is applied to the historical reality of EU law. The first is that EU law has developed step by step. The second is that it has developed in a single direction – and, more specifically, in the direction dictated by its own nature. The first claim implies that there are no breaks in the formation of the EU legal system: no shifts, no jerks, no lurches. To claim that EU law has developed gradually – to describe EU law as having *evolved* in this first sense of the term – is, therefore, to deprive its history of moments of genuine transformation. The second claim implies that the formation of the EU legal system is driven purely by its own momentum. In other words, the EU legal system is a product of its own making rather than the outcome of acts of decision-making. To claim that EU law has developed *naturally* – to describe EU law as having evolved in this second sense of the term – is, accordingly, to deprive its history of any instances of deliberate construction. Taken as a whole, these claims reveal an assumption inherent in the evolutionary interpretive scheme as applied to EU legal history: that the development of EU law is not attributable to any actor or group of actors engaged in constructing and shaping a legal system. This assumption is problematic on both descriptive and normative grounds.

Descriptively, the assumption underlying the evolutionary scheme of legal development is at odds with how the self-understanding of EU law as a legal system was in fact constructed. As discussed in earlier sections, it is particularly illuminating to analyse the EU legal system through the lines of case law, focusing on the relationship between norms and cases. This method of analysis is characteristic of what I have called the *genealogical* approach to EU law. It is *genealogical* in that the effort to understand EU law proceeds through a series of chronologically ordered and genealogically related judicial

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decisions. The basic concepts and general principles of EU law are identified by reference to past rulings of the ECJ, such that norms and cases – the law and the case law – are treated as inseparable. This approach is compelling precisely because it accommodates the peculiarities of the formation of the EU legal system – chief among them, the close relationship between the ECJ's case law, on the one hand, and EU law's self-understanding as a legal system, on the other.

Within the system of EU law, as already noted, case law arguably shapes the law's self-understanding more directly than it has in other case-law-based systems such as the English common law, since it stems from the decisions of a single court rather than from the cumulative practice of multiple courts. This gives the ECJ a position of singular influence. More importantly, however, the role that the ECJ has historically played within the EU differs fundamentally from that of the constitutional courts of the Member States. As previously discussed, national constitutional courts are generally tasked with reconstructing their legal systems on the basis of the principles and values enshrined in their constitutional texts. Their case law thus performs a *reconstructive* function. The ECJ's case law, by contrast, has often performed a *constructive* function – particularly in the early decades of European integration. Indeed, whereas national constitutional courts typically regard themselves as operating *within* an established legal system already marked by completeness, coherence, and integrity, the ECJ has traditionally conceived of itself as working *toward* an autonomous legal system – one in which those very qualities are secured and guaranteed from within.

The ECJ's peculiar self-conception is evident in the different formulas that it has used to describe the EU legal system at various junctures: the 'new legal order of international law'[141] in *van Gend & Loos*; the 'special' and 'original' legal system[142] in *Costa*; or the 'complete system of legal remedies and procedures'[143], based on a 'constitutional charter'[144], in *Les Verts*. These statements are, of course, familiar, but they are not for that reason self-evident. Each amounts to a fundamental recasting of the treaty framework. Each marks an inflection point in the process of formation of the EU legal system. Each tells us what EU law *is* as a legal system – how it is to be understood as such – at a given moment in time.

The evolutionary scheme of legal development obscures the significance of the foregoing statements and the human agency invested in making them.

141 ECJ, *van Gend & Loos* (n. 13), 12.
142 ECJ, *Costa* (n. 14), 593.
143 ECJ, *Les Verts* (n. 18), para. 23.
144 ECJ, *Les Verts* (n. 18), para. 23.

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This makes it difficult to appreciate the full weight of each judicial pronouncement, for it minimises the magnitude of what are – in effect, if not in intention – changes to the self-understanding of EU law as a legal system. It also detracts from the decision-making power of the ECJ, for it overlooks the choices involved in delivering such pronouncements. It discounts, in other words, the reasons for casting a treaty-based regime as an order of international law, a *sui generis* order, or a constitutional order. The evolutionary interpretive scheme, therefore, cannot meaningfully advance our understanding of EU law. It cannot do so because it allows for neither fundamental change in *la donne* nor for the creation of something new. It only makes allowance for the unfolding of what is already there, folded up in some way that cannot be undone. Thus, it fails to capture the reality of transformation and construction in the formation of the EU legal system.

Normatively, the assumption underpinning the evolutionary scheme of legal development is misguided, in that it risks blurring a distinction central to both the study and the practice of law – namely, the distinction between *is* and *ought*. As we have seen, the model of law as evolution attaches normative value to the very process it purports to describe and is, for that reason, normatively charged. Under the two rival conceptions on which this model rests – the conception of law as a process of self-perfection and that of law as a process of self-reproduction – descriptive claims too easily collapse into normative ones. A common objection[145] to the model of law as evolution concerns precisely this conflation of statements of fact and judgements of value. The gist of the objection is as follows. According to the model of evolution, legal norms are conducive to a process of self-perfection or self-reproduction: they emerge from this process and advance it further. In describing the development of a legal system as evolutionary, therefore, the scholar commits himself to the notion that the existing norms of that system represent the latest stage in a process whose end is teleologically or functionally given. This means that those norms are, themselves, a *desirable* or *necessary* step along the path of development. In this way, the scholar risks falling into what may be called the *Panglossian fallacy*: the belief that evolution yields the most viable and thus the best of all possible worlds – 'a world in which whatever is, is desirable or efficient'.[146]

In the context of EU law, this objection takes on particular relevance. It suggests that adopting the evolutionary scheme of legal development can

145 For an articulation of this line of critique, see: Timothy M. Sandefur, 'Some Problems with Spontaneous Order', The Independent Review 14 (2009), 5-26 (11-13).

146 Douglas Glen Whitman, 'Hayek Contra Pangloss on Evolutionary Systems', Constitutional Political Economy 9 (1998), 45-66 (45).

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hinder critical engagement with the decisions of the ECJ – an institution that has, after all, played a decisive role in the very formation of the EU legal system. To describe EU legal development in evolutionary terms is, under the model of law as evolution, to assume that whatever counts as law necessarily advances a process of self-perfection or self-reproduction. This assumption extends to the ECJ's rulings, which determine what the law is in concrete cases, and even more so to its past rulings, which, in articulating the basic concepts and general principles of EU law, have shaped the EU legal system both formally and substantively. On the strength of that assumption, the ECJ's decisions come to be presumed justified by reference to the desirability of a pre-given end or the effectiveness of the means employed to achieve it. If this presumption holds, the space for critical scrutiny of the ECJ's case law correspondingly narrows, since whatever is decided as law is, by the same token, deemed justifiable by some measure of value or utility. The evolutionary scheme of legal development, in following the model of law as evolution, may thus lead to a troubling implication: that, in the long run, no judicial decision can be ruled out as wrong.

VI. Conclusion

The understanding of EU law as a legal system is much indebted to the decision-making practice of the ECJ – so much so that the ECJ's case law may be said to have been central to the very formation of the EU legal system. This centrality calls for a properly *genealogical* approach to EU law – one that treats history not as background, but as constitutive of the object of study. Such an approach situates EU law within the context of its own emergence and development and, in doing so, invites an understanding of EU law not as a system fixed by a single foundational event but as a process of system-building.

Yet, the ECJ's central contribution to the EU legal system gives rise to two temptations – temptations that become all the more acute when the law is approached in this genealogical way.

The first, in seeking to account for the unity and continuity of the EU legal system, is to construe the ECJ's case law as itself consistent and continuous over time – an unbroken line of reasoning without turns or leaps. The second, in seeking to assess the merits of the ECJ's rulings, is to treat adjudication as the revelation of the unwritten laws of an immanent order rather than the interpretation of the written laws of an existing one.

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These temptations are not diminished but reinforced by the evolutionary scheme of legal development, which posits that change occurs gradually and naturally. Within this scheme, discontinuity and intention are effectively assumed away, so that change appears incremental and purposeless – a product of its own internal logic.

Applied to the EU legal system, the evolutionary interpretive scheme encourages a view of the ECJ's decision-making practice as both a source and a product of evolutionary change – that is, as a seamless process of uncovering what was always there. This view is problematic. It misrepresents the nature of judicial decision-making, portraying it as a spontaneous activity rather than a series of deliberate acts, and as expressing not a reasoned interpretation but the law's inherent truth or value. The danger of such a view, in sum, is that whatever the ECJ decides comes to be regarded as necessary – whether conceptually or empirically – or even desirable, and thus as already justified.

In this light, the challenge for legal scholarship is to resist the allure of evolutionary inevitability and to cultivate, in our analysis of ECJ adjudication, an awareness of ambiguity and contradiction – and a sense of good and bad argument – that restores complexity to our understanding of the past and present of EU law.

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Festschrift or Fiction? Omissions, Gaps and Blind Spots in 70 Years of EU Law

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Abstract

This article interrogates the celebratory narrative advanced in *70 Years of EU Law – A Union for Its Citizens*. It focuses on those aspects of European Union (EU) law's history that are omitted from the narrative or only appear in a heavily redacted form. Specifically, this article shows how key moments of crisis, contestation, and exclusion are left out in an attempt to sustain a highly idealised depiction of EU law. In doing so, it argues that 70 Years of EU Law overstates both the centrality of EU law as well as the benefit it offers to EU citizens. This argument is developed through an analysis of

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three central themes of 70 Years of EU Law, namely, the presentation of EU law as the driving force of integration, the invocation of Article 2 Treaty on European Union (TEU) values as a renewed integrative principle, and the construction of citizens as beneficiaries of the legal order. Ultimately, this article advocates for a more reflexive understanding of EU law by situating its institutional successes alongside its structural blind spots and failures.

Keywords

EU Law – Legal History – Legitimacy – Anachronisms

I. Introduction: A Festschrift for EU Law

70 Years of EU Law – A Union for Its Citizens celebrates EU law and its continued relevance for the project of European integration. The premise of the book is that EU law matters – especially for the citizens it refers to in its subtitle. The story of the book will be familiar to any scholar of EU law. It presents the evolution of the EU legal order as part of a linear and progressive movement towards a more integrated future. While the foundational values of Article 2 TEU are a new element in this story, they serve to reinforce its central theme, forming the new integrative force that pushes the EU legal order forwards. This legal-integrative movement concretely benefits citizens, or so the argument goes. Most substantive chapters of the book are written in a way to substantiate this point, showcasing how EU law provides rights to citizens, protects consumers, and improves the lives of all. Overall, 70 Years of EU Law reads as a Festschrift in honour of EU law, depicting its history as a success that is worth celebrating.

The framing, structure and style of the book reflect a sustained effort to present EU law in the best possible light. But to achieve such a highly idealistic representation, the history and evolution of EU law appear in a heavily redacted form. Moments of crisis and political contestation are omitted from the historical record or framed in such a way that obscures their impact and consequences. Controversial judgements of the Court of Justice are either completely missing or relegated to the footnotes. Several areas of EU law are entirely left out.[1] Finally, there is the cast and characters:

[1] Despite being increasingly central to EU legal order, the AFSJ is only mentioned once in the entire book. See Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn,

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while Walter Hallstein and Jean Monnet prominently figure throughout the book, Ms. Dano and Ms. Achbita have not made it in the final text.[2]

The aim of this article is to critically discuss these and other omissions, gaps, and blind spots in *70 Years of EU Law*. It does by contrasting the narrative of the Legal Service with insights from recent legal scholarship which aims to move beyond a purely doctrinal approach to the study of EU law. In response to the various crises the EU has faced over the last decades, EU legal scholarship has witnessed a 'critical turn'.[3] Rather than just analysing legal doctrine, scholars have begun to point out the weaknesses of EU law's conceptual paradigms, they routinely criticise the Court and Commission for their (in)actions, and try to identify the blind spots, inequalities, and hierarchies that are reproduced through EU law.[4] While such deconstructive attitudes might appear to undermine the authority of the EU and its law, there are good reasons to include the insights from this body of scholarship in any future celebrations or Festschrifts dedicated to EU law. European citizens only stand to benefit when EU institutional actors adopt a more reflexive posture and present their successes alongside their failures.

The article proceeds as follows. First, it discusses how *70 Years of EU Law* frames the role of law as central to the process of European integration (section II.). Secondly, it dissects how the Legal Service frames the evolution of the EU from a Community of law to a Union of values (section III.). Finally, it turns to the question of how *70 Years of EU Law* presents the role and positions of EU citizens (section IV.). Each of these sections aims to show that the reality of European legal integration is far more complex than the narrative of the Legal Service suggests. By showing how *70 Years of EU Law* smooths over virtually all of the more contentious aspects of the past and present of EU law, this article ultimately concludes that the book

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Publications Office of the European Union 2023), 11-28 (21). Also see the contribution of Christian Thönnes, 'Invisible Infrigements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330.

2 ECJ, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, judgement of 11 November 2014, case no. C-333/13, ECLI:EU:C:2014:2358; ECJ, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, judgement of 14 March 2017, case no. C-157/15, ECLI:EU:C:2017:203.

3 Loïc Azoulai, 'Editorial Comments: The Critical Turn in EU Legal Studies', CML Rev. 52 (2015), 881-888. Also see Päivi Neuvonen, 'The "Crisis of Critique" in EU Law', Verfassungsblog, 7 May 2025, doi: 10.59704/cb13eadbe0ff62fe.

4 Ivana Isailović, 'Introduction: Critical Legal Approaches in EU Law – Reflections on New Research Directions', Transnational Legal Theory 15 (2024), 493-499; For an early effort see for example Damjan Kukovec, 'Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market', Mich. J. Int'l L. 38 (2016), 1-55. Also see Païvi Neuvonen and Paul Linden-Retek (eds), *Critical Theory and European Union Law: The Question of Postnational Emancipation* (Hart Publishing, forthcoming 2026).

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presents a missed opportunity to initiate a more productive engagement between institutional lawyers and legal academics (section V.).

II. How Central is EU Law? The Role of Law in Times of Crisis and Contestation

While the EU has dramatically changed over the past seven decades, the central artifacts, concepts, and motives of the book appeal to a distant past, ranging from the preamble of the Treaty of Paris (1951) to Walter Hallstein's *Rechtsgemeinschaft* (1962) and Jean Monnet's famous dictum that 'Europe is forged in Crisis' (1976). These concepts are mobilised to assert the importance of European integration over the past seven decades and to present EU law as a key instrument in ensuring peace, tackling crisis, and promoting economic prosperity (II. 1.). As a consequence, however, the overall framing of *70 Years of EU Law* appears outdated and anachronistic, overlooking how the role of EU law has increasingly been marginalised during the crisis-era (II. 2.) and failing to come to terms with the increased contestation of EU law (II. 3.).

1. The Centrality of Law in European Integration

To understand how *70 Years of EU Law* explains the role of law in the process of integration, it is necessary to consider the wider narratives about the role of EU law that appear throughout the book. In the words of Robert Cover, '[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning'.[5] The book appeals to various 'foundational narratives' of European integration, which explain and justify the integration project with an appeal to peace, stability, and prosperity.[6] While these narratives emerged 70 years ago, they continue to influence the politics of the European Union in the present, capturing the 'collective imagination and collective intentions about how political societies should be organised'.[7] By reaffirming these old justifications of European integration,

5 Robert M. Cover, 'Foreword: Nomos and Narrative', Harv. L. Rev. 97 (1983), 4-68; For an illustration, see Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

6 Catherine E. De Vries, 'How Foundational Narratives Shape European Union Politics', JCMS 61 (2023), 867-881.

7 De Vries (n. 6), 869.

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70 Years of EU Law continues to speak in the messianic register that has characterised the integration process from its very founding.[8]

The main message of *70 Years of EU Law* is that EU law has played and continues to play a central role in the project of European integration. In the introduction to the volume, Commission president Von der Leyen states that the law forms 'the driving force behind the deeper integration of the EU' and a 'unique feature of the European Project', meaning that the 'community of law is the foundation of everything we have achieved and everything we are yet to do. It is Europe's hallmark'.[9] Similarly, the Legal Service of the Commission introduces the volume by emphasising the distinctiveness of law to the project of European integration, claiming that 'law has been at the centre of European integration', that 'the heart of the European project is the existence of rule-based institutions' and that everything 'the EU does is possible first and foremost because it is based on the respect of EU law'.[10] Finally, in her guest contribution, the president of the European Parliament Roberta Metsola states that the on-going war in Ukraine illustrates why 'our unique community based on values and laws is so important'. In her narration of the past, the absence of a shared legal framework even appears as a cause of war: 'with countries applying their own rules and standards, Europe started the only two world wars our planet has ever seen'.[11]

The book also frames EU law as a powerful instrument to get things done. Specifically, the law is presented as an effective tool to tackle the various crises that the EU has faced. Von der Leyen emphasises that the EU has used 'its legal framework as a tool to successfully tackle recent crises such as COVID-19 and the repercussions of Russia's war of aggression against Ukraine'.[12] Roberta Metsola stresses how EU law allows the integration project to 'persist even when faced with autocratic threats'.[13] The Legal Service claims that whenever confronted with crises 'the law of the Union has been the tool to successfully deal with them, to bring change and to adapt to new challenges'.[14] Consequently, it presents the Carbon Border Adjust-

8 Joseph H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', I.CON 9 (2011), 678-694.

9 Ursula von der Leyen, 'Preface' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 3-4.

10 Roberta Metsola, 'Guest Contribution' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 8-10.

11 Metsola (n. 10), 8.

12 von der Leyen (n. 9), 3.

13 Metsola (n. 10), 10.

14 Calleja and Rusche (n. 1), 13.

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ment Mechanism as 'an important tool for tackling global climate change.[15] And in similar vein, it describes the rule of law conditionality regulation as an 'essential addition to the EU's toolbox to protect the budget […] in light of the declining respect for the rule of law in some parts of the EU'.[16] The idea that runs throughout the book, in other words, is a claim first made by Walter Hallstein, namely that the Union 'exclusively depends on law in order to carry out its functions […] its only tool, its only weapon, is the law that it establishes'.[17]

Finally, EU law is also presented as a functional means to generate prosperity for businesses and consumers alike. The goal of prosperity appears throughout the book. Roberta Metsola writes how 'enactment of EU law was a means to achieve a Europe of everlasting peace *and prosperity*'.[18] The introduction of the Legal Service recounts how 'the pursuit of a functionalist method of integration [allows] Europe to develop this successful and original process of integration'.[19] Similarly, the book emphasises the importance of level-playing fields for businesses and consumer rights for citizens. The centrality of these rights is repeated time and again; from discussions on food regulation,[20] to the enforcement of competition law in the pharmaceutical sector[21] and in relation to the liberalisation of the railway sector.[22] Even EU citizenship is framed through the functional lens of (economic) rights as the legal service speaks about the 'gradual awareness of the importance of rights of citizens *as recipients of goods and services*'.[23] As such, as Päivi Leino-

15 Giacomo Gattinara et al., 'Protecting the Environment and Tackling Climate Change' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 158-178 (174 ff.).

16 Julio Baquero Cruz and Jean-Paul Kepenne, 'Fundamental Values, Constitutional Identity and the Protection of the European Union Budget Against Breaches of the Rule of Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 58-75.

17 Calleja and Rusche (n. 1), 16.

18 Metsola (n. 10), 9 (my emphasis).

19 Calleja and Rusche (n. 1), 15.

20 Isabel Galino Martín et al., 'From an Economic Community to a Union for Its Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 133-156 (150-152).

21 Lianne Wildpanner and Clio Zois, 'The Benefits of European Union Competition Law Enforcement for Consumers' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 229-250 (245-248).

22 Luigi Malferrari and Dimitrios Triantafyllou, 'The European Commission: The Clock Master of the European Union Internal Market' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 311-334 (320 ff.).

23 Galino Martín et al. (n. 20), 147 (my emphasis).

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Sandberg observes elsewhere in this special issue, *70 Years of EU Law* 'relies on the classic justification for EU integration: privileging of function demand […] as the primary driver of legal or institutional change'.[24]

In summary, by presenting EU law as central to the success of the European integration project, *70 Years of EU Law* celebrates the success of legal procedures, lawyers, and courts in pushing the project forward. The red thread that runs through the book is straightforward: 'the reality speaks for itself. EU law in Europe has been a success'.[25]

2. The Marginalisation of EU Law in Times of Crisis

In light of the EU's recent past, however, the 'reality' presented in *70 Years of EU Law* appears overly idealised. Over the last decades, the EU has been confronted with a prolonged series of overlapping and mutually re-enforcing crises, which have dispelled many previously held convictions about European integration. As the editors of *The End of the Eurocrats' Dream* aptly remarked, the crises gave rise to the need to 're-examine what we once thought were valid assumptions'.[26] Yet such a reflexive attitude is entirely missing from the book. Rather than questioning or revisiting past certainties, *70 Years of EU Law* does everything it can to reaffirm the centrality of EU law, thereby obscuring moments of crisis in which EU law is contested.

In 2008 the historian Mark Gilbert published an article titled *Narrating the Process: Questioning the Progressive Story of European Integration* in which he questioned the conviction, implicit in much scholarship on the EU, that 'the institutions of the EU are the outcome of a historical process whereby national institutions are being superseded and replaced by supranational ones'.[27] He argued that such a view is overly simplistic and unhistoric, as it prematurely discounted the possibility that the future would look different than both the past and present.

In hindsight, the timing of his message proved prescient. The 2008 worldwide financial crisis marked the beginning of a tumultuous period for the EU of recurrent and profound crisis. The 2010 Eurozone crisis not only exposed deep structural problems within the EU's legal-political framework, but

24 See also the contribution of Päivi Leino Sandberg, '70 Years of EU Law – The Politics of a Professional Language', HJIL 86 (2026), 59-83.

25 Metsola (n. 10), 9.

26 Christian Joerges, Damian Chalmers and Markus Jachtenfuchs (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016), ix-x.

27 Mark Gilbert, 'Narrating the Process: Questioning the Progressive Story of European Integration', JCMS 46 (2008), 641-662 (641).

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questioned the very foundations of the integration process as such.[28] This was a time when European Council meetings captured the attention of the entire continent, when public dissatisfaction with the EU reached unprecedented level (remember the famous Greek *ochi*), and when the structural inequalities between the Member States were at display with more clarity than before. Today the lives of many European are still shaped by the aftermath and effects of the Eurozone crisis (the impact of the crisis on youth unemployment, poverty, and health in Greece and other debtor countries is telling in this regard[29]). The migrant crisis that followed shortly after not only brought an unspeakable degree of human suffering to the European continent, but also shattered the image of the European Union as a cosmopolitan political actor.[30] The Covid-19 Pandemic, the climate emergency, and the rise of illiberalism continue to highlight the social and political faultlines within and between the EU's Member States.

Yet none of the political drama, uncertainty, and despair that are part of the collective memory of so many Europeans[31] are reflected in *70 years of EU Law*. In the story of the Legal Service European legal integration occurs unencumbered by public contestation, political strive, or struggles over alternative directions. Instead, the Legal Service presents crises as moments of political opportunity and institutional building. It discusses how during the Eurozone crisis the EU centralised the banking system (thereby 'creating a quasi-federal regulatory structure') and the Member states 'created the European Stability Mechanism outside the system of EU law'.[32] The refugee crisis, in contrast, 'showed the difficulties of agreeing on a just mechanism for redistributing refugees between Member States'. On a more optimistic note, we read that the COVID-19 crisis 'demonstrated the full potential of EU law' inter alia through 'the issuing of EU debt to finance the reconstruction of the EU economy'.[33] Without explicitly referring to the 'rule of law crisis',

28 Agustín José Menéndez, 'The Existential Crisis of the European Union', GLJ 14 (2013), 453-526.

29 See e. g. Maria Drakaki et al., 'Inequalities, Vulnerability and Precarity Among Youth in Greece: The Case of Neets', Urbanities 12 (2022), 114-130; George Petrakos, Konstantions Rontos, Chara Vavoura and Ioannis Vavouras, 'The Impact of Recent Economic Crises on Income Inequality and the Risk of Poverty in Greece', Economies 11 (2023), 166-188; John Yfantopoulos, Athanasios Chantzaras and Platon Yfantopoulos, 'The Health Gap and HRQoL Inequalities in Greece Before and During the Economic Crisis', Frontiers in Public Health 11 (2023), 1-13.

30 Annette Jünemann, Nikolas Scherer and Nicolas Fromm (eds), *Fortress Europe?: Challenges and Failures of Migration and Asylum Policies* (Springer 2017).

31 Depending to a large extent, of course, on whether one experienced these events in the centre or the periphery, or in a debtor or a creditor state.

32 Calleja and Rusche (n. 1), 22.

33 Calleja and Rusche (n. 1), 22.

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finally, we also learn that the EU has successfully adopted various instruments 'to defend the values at the heart of the European project'.[34]

The purport of the Legal Service's characterisation of the crisis-era is essentially a repetition of Jean Monnet's famous dictum that 'Europe will be forged in crises' (which is indeed approvingly cited).[35] Yet there are at least two profound problems with such a framing.[36] The first issue is that it displays 'too much optimism' about how 'crisis politics [can be] deployed as a solution' and pays too little attention to the 'essential challenges exposed […] by crisis'.[37] This point has perhaps most forcefully been made by the political theorist Luuk van Middelaar, who argues that the EU's rules-based approach (relying on depoliticization, expert-knowledge, and bureaucracy) is completely unequipped to address moments of crisis characterised by high political salience, unpredictability, and time sensitivity.[38] In other words, technocratic and depoliticised procedures fall short in addressing highly political and emotive situations. The difficulty noted by the Legal Service to come to a 'just mechanism for redistributing refugees between the Member States' illustrates the point. In the words of van Middelaar, negotiating fish quota is not the same as devising mandatory refugee quotas; to treat them as such is simply a category errorthat confuses policy with politics.[39]

The second problem with the frame that the EU is forged in crises is that it hides the qualitative changes of the EU's legal political framework as a result of the way in which the EU attempts to overcome moments of crisis. While the Legal Service explains the various crises that the EU has faced in a familiar vocabulary of institution building, legal scholarship has conceptualised the changes in rather different terms such as mutation, disintegration, and re-foundation.[40] This scholarly vocabulary acknowledges that the crisis over the last fifteen years have challenged the centrality of law in the integration process. In doing so, scholars have not only shown how the EU's response to the crises led the marginalisation of EU law as an instrument of integration,

34 Calleja and Rusche (n. 1), 24.

35 Calleja and Rusche (n. 1), 17.

36 De Vries (n. 6), 872-875.

37 Christian Joerges and Christian Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science Between Critique and Complacency', ELJ 23 (2017), 118-139 (118).

38 Luuk van Middelaar, *Alarums and Excursions* (Agenda Publishing 2019).

39 van Middelaar (n. 38), 6.

40 Nicole Scicluna, 'Integration Through the Disintegration of Law? The ECB and EU Constitutionalism in the Crisis', Journal of European Public Policy 25 (2018), 1874-1891; For the idea of 'mutation', see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis* (Cambridge University Press 2013); For the notion of refoundation, see van Middelaar (n. 38).

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but also conceptualised the crises of the EU as *a crisis of EU law*.[41] A few examples will suffice.

During the eurozone crisis, constitutional requirements, procedural guarantees, and fundamental rights protection were frequently set aside to facilitate political decision-making.[42] Decision-making was centralised in informal institutions such as the Eurogroup and the *Troika* that were neither subject to democratic accountability nor judicial review. In the literature, the consequences of these developments have been described as the emergence of legal 'grey zones' and situations of 'liminal legality' in which various elements of the bailout programmes imposed on debtor states existed 'in a contested border zone between law and non-law', raising profound questions about the justiciability and justifiability of the exercise of public authority.[43]

Throughout the refugee crisis similar patterns have been observed in the field of EU asylum and migration law. The EU and its member States have increasingly turned to 'soft law' and informal methods of cooperation to control migratory flows. The 'constitutional dismantling' in the field of external migration policy has the explicit purpose to 'realise the "paramount priority" of increasing return rates and foster "fast and operational expulsions" – whatever the cost to the rule of law'.[44] Such an impetus also underpins the EU Pact on Migration and Asylum that was presented in 2024, which has been described as a form of 'embedded illiberalism' and as 'hollowing out the very essence of international asylum law'.[45]

A final example relates to how Member States have circumvented their obligations under EU primary law through the use of inter-se agreements and by concluding international agreements with third countries. Examples of such forms of 'parallel integration' include the creation of the European Stability Mechanism and the EU Turkey Deal, which expand the power of

41 Christian Joerges, 'Integration Through Law and the Crisis of Law in Europe's Emergency' in: Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream* (Cambridge University Press 2016).

42 Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford University Press 2019).

43 Claire Kilpatrick, 'The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality', Current Legal Probs. 70 (2017), 337-362; also see: Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', Oxford J. Legal Stud. 35 (2015), 325-353.

44 Violeta Moreno-Lax, EU Constitutional Dismantling Through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-Integration (2023). EUI Working Paper LAW 2023/3, available at: https://hdl.handle.net/1814/75959.

45 Sarah Wolff, 'The New Pact on Migration: Embedded Illiberalism?', JCMS 62 (2024), 113-123. Also see Maciej Grześkowiak, 'EU Asylum Law in the Face of a Paradigm Shift – The latest trends in EU asylum law amount to hollowing out the very essence of international asylum law', Verfassungsblog, 1 November 2024, doi: 10.59704/f450711bdbd171fd.

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the EU while acting outside the remit of its legal framework.[46] The problematic consequences of this approach can be illustrated with the ruling of the General Court in *NF v. Others*.[47] The General Court decided that the controversial EU-Turkey Statement fell outside of its jurisdiction. The General Court reached this conclusion after it found that the agreement was not concluded by the EU as such but rather by the collective of the Member States, even though various strong indications suggested the contrary.[48] The reasoning of the General Court in this case has been widely denounced as an 'avoidance technique' which was used to hide the real issue at stake, namely 'the dubious consistency of the Statement with international and EU law'.[49]

Of course, all of these examples are well known – that is precisely the point. The history of EU law, especially during the past few decades, is much more complicated, ambiguous, and multi-faceted than presented in *70 Years of EU Law*. One could easily come up with a completely alternative account than the one presented by the Legal Service. In this alternative story, legal procedures and constitutional constraints fade away as the EU's *modus operandi* becomes one of 'a politics of last resort'.[50] It emphasises how legal instruments and tools are increasingly supplemented and replaced by alternative forms of governance such as soft law, financial coercion and intergovernmental co-operation and coordination.[51] Consequently, EU law appears not only as less central to the process of European integration, but also as a less effective tool in solving problems than in *70 Years of EU Law.* This alternative story also stresses the structural shortcomings of the EU's legal framework, as exemplified by the structural shortcomings of the European Monetary Union and the Asylum and Refugee framework.[52] Finally, it also foregrounds how EU law was instrumental in shifting economic and social costs from the centre to the periphery and from creditor to debtor states.[53] In

46 Sacha Garben, 'Competence Creep Revisited', JCMS 57 (2019), 205-222.

47 General Court, *NF v. European Council,* order of 28 February 2017, case T-192/16.

48 The agreement was negotiated by the President of the European Council and the President of the Commission, adopted at a meeting between the European Council and Turkey, and communicated by the European Council as a decision of the European Council. See Council of the European Union, *EU-Turkey Statement*, 18 March 2016, <https://www.refworld.org/policy/statements/council/2016/en/114316>, last access 4 February 2026.

49 Enzo Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council', European Papers 2 (2027), 251-257 (257).

50 White (n. 42).

51 Christopher J. Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', JCMS 53 (2015), 703-722.

52 Agustin Jose Menendez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration', ELJ 22 (2016), 388-416.

53 Paul Linden-Retek, *Postnational Constitutionalism: Europe and the Time of Law* (Oxford University Press 2023).

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the most damning version, this alternative story narrates how EU law sustained and perpetuated a form of 'authoritarian liberalism'.[54]

3. The Absence of Contestation in 70 Years of EU Law

For the purposes of this paper it is not necessary to determine which story is more accurate, but it is important to note that the alternative version discussed above has an explanatory advantage: it helps to account for the increased contestation of EU law over the past decades. The increased contestation of the EU and its law forms a manifestation of the changed nature of the integration project: what once perhaps could be understood as a technical and a-political process, has now become decisively political and controversial.[55] Decisions of the EU institutions affect both the redistribution of resources within and between Member States (think for example about the EU Green Deal and the NextGeneration EU initiative) and concern highly sensitive social and cultural issues, as the different responses of the Member States to the refugee crisis illustrate. As such, the EU not only generates prosperity, but also inequality and (perceived) inequities. The crisis-era can thus be seen as a catalysator that has brought many of the deep political cleavages in the EU to the foreground.

Yet none of these controversies and moments of contestation feature in *70 Years of EU Law*. The increased contestation of the EU by political and social actors remains unmentioned: think only about the farmers in Brussels, the rising euroscepticism in both national and European Parliaments, and the illiberal governments that defy what they consider to be 'the diktats' from Brussels.[56] Brexit is mentioned only once (!) in the entire book; not to discuss its profound constitutional and political implications, but in relation to the mundane matter of the shared management of fishing stock.[57] Similarly, the various instances of contestation by national constitutional courts are only

54 Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

55 Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', B. J. Pol. S. 39 (2009), 1-23.

56 Sara B. Hobolt and Toni Rodon (eds), *Domestic Contestation of the European Union* (Routledge 2021); Tanja A. Börzel, Philipp Broniecki, Miriam Hartlapp, Lukas Obholzer, 'Contesting Europe: Eurosceptic Dissent and Integration Polarization in the European Parliament', JCMS 61 (2023), 1100-1118.

57 Jacqueline Aquilina et al, 'Of Farms, Fish and Forks: Towards Safe, Sustainable and High-Quality Farming and Fishing in the EU' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 179-206 (197).

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present in their absence. Famous rulings of national constitutional courts in the Member States, such as *Ajos*, *Gauweiler*, *Taricco*, and *Weiß*, are not part of this history of EU Law; even the infamous K-3/21 ruling of the Polish Constitutional Court that challenged the primacy of EU law only appears in the footnotes.[58] In other words, the book completely ignores those who disagree or contest the process of European integration in its current form and thereby perpetuates an idea of European integration as 'an elite-led project, far removed from public contestation and therefore highly depoliticized'.[59]

III. From Community of Law to Union of Values? Contextualising the Evolution of EU Law

While *70 Years of EU Law* predominantly relies on past narratives and ideals, it also innovates by foregrounding the centrality of the foundational values of Article 2 Treaty on European Union (TEU) within the EU's legal order, presenting these as being 'at the heart of the European project'[60]. As such, the book presents a story in which EU law is transforming from a Community of law to a Union of Values. This story, however, is told in a rather decontextualised manner that obscures the agency of different actors, the contingency of EU law's evolution, and the continuous contestation of its development. Recent sociological and historical research has emphasised these contextual factors in the making of the EU as a Community of Law (III. 1.). Their insights are also relevant in reflecting on the way in which *70 Years of EU Law* narrates the emergence of the Union of Values (III. 2.).

1. Contextualising the Constructing of the Community of Law

Throughout *70 Years of EU Law* the Legal service reiterates the 'common sense'[61] narrative of legal integration by invoking Walter Hallstein's idea of

58 Friedrich Erlbacher and Katarzyna Hermann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023) 34-57 (53, n. 125).

59 De Vries (n. 6), 869.

60 Calleja and Rusche (n. 1) 23.

61 See Antoine Vauchez, 'Integration-Through-Law': Contribution to a Socio-History of EU Political Commonsense (2008). EUI Working Paper No. RSCAS 2008/10, available at: https://hdl.handle.net/1814/8307.

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the EU as a *Rechtsgemeinschaft:* 'The EU is a community of law, a union built on law'.[62] This narrative chronicles the evolution of EU law as a process of integration through law and underlines the role of the Court of Justice in constructing the EU legal order through its case law. The story begins with the Court of Justice's landmark judgements *Van Gend en Loos* and *Costa v. ENEL* in the 1960s. These are seen as essential to the success of the integration project, because they shaped the EU legal order as a self-referential legal system operating according to its own rules and principles. Acting as a 'self-made Statesman', the judicial interventions of the Court helped to overcome political paralysis, constrained the Member States' nationalistic tendencies and enabled the pursuit of common objectives.[63] In the words of *70 Years of EU Law*, these were 'seminal judgements' in which 'the Court of Justice upheld the primacy and autonomy of the EU legal order, in favour of which Member States have limited their sovereignty'.[64] The European Commission, of course, played a major role in this story by presenting the arguments and rationales that often paved the way for the Court's judgements.[65]

The commonsense narrative explains EU law's evolution as a result of the intrinsic logic of the Treaties. It is best captured in former European Court of Justice (ECJ) judge Mancini's claim that the 'preference for Europe is determined by the *genetic code transmitted to the Court by the founding fathers*'.[66] As a consequence, the evolution of EU law is portrayed in a way that is both anachronistic and decontextualised. It is illustrative, in the words of Judith Shklar, of the belief that law 'has an integral history of its own, that it follows a definite pattern of evolution, and, above all, that its laws of growth can be understood without reference to the history of the societies in which law exists'.[67]

Over the past decades, this decontextualised narrative of legal evolution has increasingly been challenged in the work of sociologists and historians who foreground the role of specific actors in the construction of EU law.

62 Calleja and Rusche (n. 1), 17.

63 This is the central argument in publications such as Robert Lecourt, *Le juge devant le Marché commun* (Institut universitaire de hautes études internationales 1970); Pierre Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations* (Sijthoff 1974); For a more academic and nuanced version of the same story see Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', AJIL 75 (1981), 1-27; Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483 (2405).

64 Baquero Cruz and Kepenne (n. 16), 76.

65 Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend En Loos Judgment', I.CON 12 (2014), 136-163.

66 G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice', M. L. R. 57 (1994), 175-190 (186).

67 Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1986), 137.

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Through archival research, and armed with Bourdieu's field theory, these scholars have reconstructed in detail how transnational elites produced 'in-house legal and political doctrines (narratives, rationalizations, theories, etc.) that would interpret the European Treaty as providing them with a degree of autonomy, even if relative'.[68] In this rendering, concepts like 'community of law' appear as weapons in a conceptual struggle about the form and content of the integration project rather than as neutral descriptions of reality. Indeed, one of the key lessons of this strand of research is that the success of such concepts depended less on their ability to capture the 'reality' of the integration project than on the social and political capital of the actors who used these concepts.[69] In this way their work shows how EU law does not naturally *evolve* as a result of its inherent logic, but is *made* through social processes and political struggles.[70]

One of the main contributions of this literature is that it reintroduces a sense of contingency in EU law's evolution by showing how EU law could have developed. At the time that Hallstein developed his concept of *Rechtsgemeinschaft*, for example, there were at least two alternative ways to conceptualise the integration project. The first promoted the idea of a European constitutional democracy founded on a constitutional assembly; the second depicted the integration project as a purely functional project of market building.[71] Similarly, the legal-functionalist approach that the Court of Justice promoted through its foundational rulings was only one among various paths by which legal integration could have proceeded.[72] These alternative visions and roads not taken illustrate the contingency of our current understanding of what EU law is and highlight the agency of institutional actors in its making.[73]

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68 Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015), 22.

69 See e. g. Hugo Canihac, 'The Making of an Imagined "Community of Law": Law, Market and Democracy in the Early Constitutional Imaginaries of European Integration', Eu Const. L. Rev. 18 (2022), 2-29; Anne Boerger and Morten Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet', Am. J. Legal Hist. 57 (2017), 51-82; William Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt', EJIL 28 (2017), 935-957.

70 See also the contribution of Giulia La Torre, 'The Formation of the EU Legal System', HJIL 86 (2026), 133-166.

71 Canihac (n. 69).

72 Vauchez (n. 61).

73 For further discussions of 'roads not taken' see Grainne de Burca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', AJIL 105 (2011), 649-693; Aurélie Dianara Andry, *Social Europe, the Road Not Taken: The Left and European Integration in the Long 1970s* (Oxford University Press 2023).

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The archival investigations of the 'New Legal Historians' further emphasise such contingencies by showing how EU legal doctrines have faced continuous resistance from national courts and political actors.[74] For example, Bill Davies has shown how key principles of EU constitutional law were debated and contested in Western Germany's legal, political, and public discourses.[75] Similarly, Rasmussen narrates how the Court of Justice's introduction of direct effect of directives led to such significant resistance from French national courts that the Court ultimately changed course.[76] Moreover, their findings suggest that it was not EU law's normative strength, but rather its relative insignificance that allowed the building process of this legal order to proceed.[77]

Concludingly, these sociological and historical insights, brought back to us from the archives, reveal that EU law's evolution was neither logical, nor necessary, nor without controversy. Rather, the construction of legal knowledge appears as a haphazard and pragmatic process that occurred in the heat of the moment – a form of *bricolage*, so to speak.[78] Moreover, it shows how EU legal knowledge is neither neutral nor objective, but always reflects the perspective of those actors with a specific vision of the integration process. And finally, it reveals how the evolution of EU law has always been accompanied with contestation and dissent.

2. The Decontextualised Emergence of the Union of Values

These insights help to understand how *70 Years of EU Law* frames the evolution of the EU from a Community of law to a Union of Values – and specifically the Commission's own role in that process. Throughout the book the Commission presents itself as the guardian of the EU's foundational values. For example, Ursula von der Leyen writes that the 'Commission has

74 Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', Contemporary European History 21 (2012), 305-318; Morten Rasmussen, 'Towards a Legal History of European Law', European Papers 6 (2021), 923-932.

75 Bill Davies, Resisting the European Court of Justice West Germany's Confrontation with European Law, 1949-1979 (Cambridge University Press 2012).

76 Morten Rasmussen, 'How to Enforce European Law? A New History of the Battle Over the Direct Effect of Directives, 1958-1987', ELJ 23 (2017), 290-308.

77 Rasmussen, 'How to Enforce?' (n. 76); Morten Rasmussen and Dorte Sindbjerg Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies', ELJ 25 (2019), 251-272; Anne Boerger and Morten Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993', Eu. Const. L. Rev. 10 (2014), 199-225.

78 Mark Tushnet, 'The Bricoleur at the Center', U. Chi. L. Rev. 60 (1993), 1071-1116.

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acted decisively to protect our common values' and that it 'uses its powers to ensure that Member States respect the common values on which the EU is built'.[79] In doing so, however, the narrative in *70 Years of EU Law* understates the agency of the Court of justice and the contestation of EU law that has driven the turn to Article 2 TEU values.

During the last decade, the EU has begun to deploy to use Article 2 TEU values as legal instruments that contain binding legal obligations on the Member States. The foundational values have been central to the efforts of the Court of Justice's to impose novel obligations on EU member states to safeguard the rule of law. The values play a central role, for example, in the Court of Justice's reasoning in the rule of law conditionality judgement, which Chapter 2 of the book discusses in detail.[80] Yet in the narrative of the Commission, the agency and the intervention of the Court of Justice mostly disappear. Instead, the emergence of 'values' as enforceable norms appear as an evident and logical consequence of the choices made by the Masters of the Treaty and as the inevitable result of the EU's incremental development.

To frame the legal mobilisation of Article 2 TEU values in this way, *70 Years of EU Law* essentially tells a story of incremental evolution and continuity. In the words of Von der Leyen, the 'EU has grown into a Union founded on values in which we stand together for fundamental rights, democracy and the rule of law, as directly enshrined in the treaties'.[81] The legal mobilisation of Article 2 TEU values is presented as reaffirming the original *sui generis* approach of the law-driven integration model that has characterised European integration from the start. This is most obvious when the book claims that '70 years of putting one stone on another *have brought the inner idealistic heart of the EU into the daylight* of the ongoing political and legal construction of the EU'.[82]

Even when recognising a moment of juncture, the narrative foregrounds continuity. This is specifically clear when the Legal Service argues that the succession from the Treaty of Maastricht (1992) to the Treaty of Amsterdam (1999) led to a 'paradigmatic shift' as the former Treaty explicates certain foundational principles to which the EU *is bound*, whereas the latter states that the Union *is founded* on principles such as liberty, democracy, and

79 von der Leyen (n. 9), 8.

80 Baquero Cruz and Kepenne (n. 16). See also the contribution of Maciej Krogel, 'Is It Enough to Say "Common Values" When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order, HJIL 86 (2026), 225-244.

81 von der Leyen (n. 9), 3.

82 Calleja and Rusche (n. 1), 30.

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respect for human rights.[83] The claim is that as a result of this changed wording the value-provision 'grew from a restrictive obligation to a constitutive and forward-looking one'.[84] While at first sight, this might appear as a moment of rupture, the story of the Legal Service foregrounds how the emergence of values as binding legal provisions was a deliberate choice of the Member States that is in line with the gradual and incremental evolution of EU law.[85]

In other words, in the narrative of the Legal Service the emergence of values as binding legal obligations appears a natural and logical unfolding of EU law's inner logic. In doing so, this decontextualised account obscures moments of agency, contingency, and contestation, thereby helping to legitimise the legal mobilisation of Article 2 TEU values.

Specifically, the narrative told of the Legal Service overlooks the real moment of disjuncture, namely the Court of Justice's ruling in *Associação Sindical dos Juízes Portugueses*.[86] In this ruling the Court found for the first time that Article 2 TEU can serve to articulate binding legal principles. While the Legal Service recognises this judgement as 'seminal' it does not feature in the section that explains the genesis of Article 2 values. This in stark contrast to the academic literature, in which *Associação Sindical dos Juízes Portugueses* is seen as a pivotal. The judgement has been described as 'on par with the Court's judgements in *Van Gend en Loos* and *Costa*'.[87] An even starker description of this judgement is found on the pages of this special issue, namely as marking the change 'from a functional (effet-utile) constitutionalism […] to a genuine, a principled constitutionalism'.[88]

Secondly, and relatedly, the Legal Service also obscures the agency of the Court. As such, the narrative presented in *70 Years of EU Law* stands in stark contrast to the academic literature, which has shown how the Court of Justice 'strategically exploited suitable characteristics of an inconspicuous

83 Erlbacher and Hermann (n. 58), 37.

84 Erlbacher and Hermann (n. 58), 36.

85 In more detail, see the contribution of Paolo Mazzotti, 'An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity', HJIL 86 (2026), 85-131. For further discussion on the question of continuity and juncture, see also the contributions of Giulia La Torre (n. 70) and Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408.

86 ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgement of 27 February 2018, case no. C-64/16, ECLI:EU:C:2018:117.

87 Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case* (SIEPS 2021), 32.

88 See the contribution of von Bogdandy (n. 85).

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case to produce a landmark ruling'.[89] The legal controversy in *Associação Sindical dos Juízes Portugueses* did not concern the values of Article 2 TEU and none of the parties before the Court, including the Legal Service of the Commission, invoked Article 2 TEU as a legal basis for their claims. The Court of Justice thus played a key role in the legal mobilisation of Article 2 TEU values.

Thirdly, and finally, *70 Years of EU Law* ignores the context in which Article 2 TEU values emerged as binding legal principles, namely the rise of illiberalism in various Member States of the EU, in particular Poland and Hungary. This context is decisive in understanding the Court's ruling, because it offers the only credible explanation as to why the Court turned to Article 2 TEU in *Associação Sindical dos Juízes Portugueses*. The Court's judgement was neither logically necessary nor inevitable but formed a contingent and deliberate intervention to address the increased contestation of EU law and safeguard the uniform interpretation and application of EU law.[90]

Overall, therefore, *70 Years of EU Law* can be read as an attempt to legitimise the legal mobilisation of Article 2 TEU by claiming that these values have always been intrinsic to the EU's legal order. In doing so, however, the book downplays the agency, contingency, and contestation of the legal turn to values and insufficiently recognises the risks of legally enforcing Article 2 TEU value in the EU Member States.

3. Old Wine in a New Bottle?

Overall, the narrative in *70 Years of EU Law* reads as an attempt to transpose the unifying, harmonising, and centralising dynamic of market-integration that underpinned the EU's 'community of law' to the highly conflictual social and political domains that characterise the emerging value Union. The idea of a 'Union of values', in other words, appears as an old wine in a new bottle, repackaging the formal legal order in the cloak of values without changing the political and institutional apparatus at its foundation. Problematically, such a legalistic approach to EU values reproduces the

89 Michal Ovádek, 'The Making of Landmark Rulings in the European Union: The Case of National Judicial Independence', Journal of European Public Policy 30 (2023), 1119-1141 (1119).

90 Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses', Eu Const. L. Rev. 14 (2018), 622-643.

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depoliticised and top-down approach to European integration that at least explains in part the on-going political contestation of the EU.[91]

It seems therefore likely that the attempt to legally enforce common values will generate new forms of contestation and amplify existing ones.[92] The original impetus to provide Article 2 TEU with legal bite was the profound political disagreement about the meaning of the values (such as the rule of law) between the Member States. According to some, translating such political conflicts in legal terms will help to push the EU and its legal order forward, because EU law: 'conceptualizes the conflicts as European conflicts, civilizes them, and renders their legal outcomes valid, effective, and legitimate'.[93] The most optimistic reading then sees judicial proceedings as a means to forge a consensus about the meaning of values. For example, some scholars interpreted the recent infringement proceedings against Hungary's LGTBQ+ law as an instance of 'European society striking back' because sixteen Member States intervened in support of the European Commission.[94]

Such a view, however, appears overtly optimistic: of those sixteen Member States only two are Eastern European Member States.[95] Rather than enhancing the legitimacy of the EU, the legal mobilisation of values might thus also intensify political conflict over their meaning. The fact that these values are cast by the Court of Justice of the European Union (CJEU) as an expression of the *identity* of the EU's legal order, rather than – say – the *autonomy* of EU legal order is telling in this regard. The Court essentially mirrors the language of national constitutional courts but thereby adopts a discourse that is more openly political and conflictual, casting competence disputes in existential terms.[96]

While National Constitutional Courts have so far been acquiescent with regards to the Court of Justice's mobilisation of Article 2 TEU values, the future might look very different. It is one thing to protect the formal and

91 Floris De Witte, 'Interdependence and Contestation in European Integration', European Papers 2 (2018), 475-509.

92 Matteo Bonelli and Monica Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary', Maastricht J. Eur. & Comp. L. 30 (2023), 3-14.

93 Armin von Bogdandy, *The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024), 6.

94 Lena Kaiser, Andreas Knecht, Luke Dimitrios Spieker, *European Society Strikes Back: The Member States Embrace Article 2 TEU in Commission v. Hungary, Verfassungsblog,* 26 November 2024, doi: 10.59704/00f6c17a50fc172c.

95 Namely Slovakia and Estonia.

96 Loïc Azoulai, 'Contesting EU Law in Identity Terms' in: Mark Dawson, Bruno de Witte and Elise Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar Publishing 2024), 35-48.

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institutional structure on which the EU depends for its functioning with an appeal to the value of the rule of law, but it would be another for the Court to articulate a common understanding relating to, for example, the value of democracy or equality. As a 'modus vivendi' for the EU this might not be the best way forward, in the words of John Gray, '[w]e do not need common values in order to live together in peace. We need common institutions in which many forms of life can coexist.'[97]

IV. Who Are 'the Citizens' for Whom the Union Exists? Hierarchies in EU Citizenship Law

The Legal Service not only reaffirms the importance of law and the centrality of values, but also foregrounds the role of EU citizens. In the narrative of *70 Years of EU Law*, both the 'Community of Law' and the 'Union of Values' operate in the service of the Union's citizens. In her introduction, for example, the president of the Commission stresses that 'EU law protects every single EU citizen in the same way, across all Member States'. To this end, the Commission is tasked 'to ensure that all EU citizens can fully enjoy the rights granted to them by EU law'.[98] Throughout, *70 Years of EU Law* catalogues the many rights and freedoms EU citizens possesses and provides an emancipatory perspective on EU citizenship (section IV. 1.). In doing so, however, the book obscures how EU law perpetuates social hierarchies and how one's individual circumstances shape the extent to which EU citizens can enjoy formal rights (section IV. 2.). In other words, the book fails to recognise that EU law considers some citizens more equal than others (section IV. 3.).

1. Constructing the EU Citizen Through Law

Throughout *70 Years of EU Law* one of the central messages is that the EU and its law exist 'for' its citizens. Indeed, EU law is claimed to provide rights to EU citizens, improve the lives of EU citizens and as 'being in the service of EU citizens'.[99] The narrative of the book thereby corresponds to a

97 John Gray, *The Two Faces of Liberalism* (Polity Press 2000), 25.

98 von der Leyen (n. 9), 4.

99 Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 96-114.

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familiar theme in institutional and scholarly discourses which emphasise the way in which EU law empowers individuals. A defining feature of EU law is that it grants individuals the capacity to invoke norms of EU law directly before national courts. For example, during the conference the Court organised to celebrate the 50th anniversary of *Van Gend en Loos*, it was repeatedly emphasised how EU law contributes to 'the constitution of the individual as a European subject' and places 'the individual at centre stage'.[100] This is also the reading of *70 Years of EU Law*, which foregrounds how the 'Court of Justice established the major principles that ensure that, to this day, EU law is first and foremost a law for citizens'.[101]

The book, however, does not mention that the appeal to the legal heritage of individuals always has had functional undertone. In its appeal to the 'legal heritage' of individuals, the Court was motivated by a desire to promote the creation of the internal market rather than, in the words of Advocate General Jacobs, 'any moral duty on the part of the [EU] to protect individual rights'. In his estimation, the ECJ's focus on the individual 'has been essentially pragmatic and the recognition of individual rights has almost been instrumental, being seen as necessary to ensure the effectiveness of the legal order'.[102] The importance of individual rights to the construction of EU law is well-known: by litigating questions of EU law before national courts, individuals not only ensured the enforcement of EU law in specific instances (acting as decentralised enforcement agents) but also helped to generate a steady stream of preliminary references to the Court in Luxembourg.[103] In this reading, however, the citizens operates *for* the Union rather than the other way around.

The Legal Service also recounts many of the Court of Justice's landmark judgements in which it elaborated 'concrete rights of citizens'.[104] It is not necessary to recount this jurisprudential thread that runs from *Internationale Handelsgesellschaft*, to *Foster and Others v. British Gas*, via *Factortame* and *Francovich*, to *Roquette v. Council* and *Defrenne v. SABENA*.[105] The gist of the story is well known and is perhaps best captured by Jean Monnet's famous

100 Court of Justice of the European Union, *50th Anniversary of the Judgment in Van Gend En Loos, 1963-2013*, (Publications Office 2013), 14, 53.

101 Calleja and Rusche (n. 1) 18.

102 Francis Jacobs, 'The Evolution of the European Legal Order', CML Rev. 41 (2004), 303-316 (308).

103 Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022).

104 Calleja and Rusche (n. 1), 19.

105 Calleja and Rusche (n. 1), 19.

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expression: 'we are not forging coalition of states, we are uniting men'.[106] The academic expression of this slogan is found in the famous introduction to the *Integration Through Law* volumes. Here the editors of these volumes, Cappelleti, Seccombe, and Weiler, described how EU law no longer only engaged the individual in its economic capacity as a worker, but increasingly recognised individual as persons bearing certain inalienable rights. Reminiscent to the classic, 'stone by stone' approach of the Court, they noted that on the basis of an '*inductive exercise of adding the functional rights* [granted to individuals] *one by one*' one could arrive at something like a 'constitutional position of European citizenship'.[107] As such, they envisaged a role for the individual 'not merely as an object of the law but as an active subject which can play a cardinal role in this transnational virtue'.[108]

The introduction of EU citizenship in 1992 Maastricht Treaty can be seen as the capstone and apex of this vision as it formally severed the link between rights and economic activity by extending free movement rights to citizens that are not economically active. All of this illustrates how the individual in EU law has increasingly been presented as an *ethical end* rather than a *functional means*.[109] Importantly, in this familiar story (that is also the story of *70 Years of EU Law*) the defining element of European 'citizenship' is not its political character. The political element of EU citizenship remains incomplete and derivative in comparison with national citizenship, as various contributions to this special issue point out.[110] Rather than enhancing political agency, the promise of EU citizenship lies in the capacity to travel across borders. It promotes an emancipatory ambition, namely, to enable individuals to access 'forms and sites of self-realization beyond the control of the exclusionary processes of the nation states'.[111]

106 Jean Monnent, *Mémoires* (Fayard 1976) ('nous ne coalison pas des États, nous unissons des hommes').

107 Mauro Cappelletti, Joseph H. H. Weiler and Monica Seccombe, *Integration Through Law: Europe and the American Federal Experience. Volumne 1: Tools and Institutions*, (Walter de Gruyter 1986), 48.

108 Cappelletti, Weiler and Seccombe (n. 107), 68.

109 For some sceptical thoughts see Ulrich Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination', ELJ 9 (2003), 14-44; Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship', CML Rev. 47 (2010), 1597-1628.

110 See the contributions of Leino-Sandberg (n. 24); Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297 and von Bogdandy (n. 85).

111 Floris de Witte, 'The Liminal European: Subject to the EU Legal Order', YBEL 40 (2021), 56-81.

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The Legal Service embraces this emancipatory vision of EU citizenship in the Chapter titled *From an Economic Community to a Union for its Citizens*.[112] This Chapter opens with the fictional example of a young woman that dreams of 'working in Lisbon despite coming from Helsinki'.[113] The example shows the various ways in which EU law and her status as an EU citizen facilitate this young woman in realising her dream that 70 years ago would have been impossible. Due to the rights and freedoms that EU law provides, her company is able to transfer her to another country with ease. She can exercise her right to export her social security benefits, has a right not to be discriminated against in her working environment on the basis of her sex, and is even able to 'take for granted something as simple as having her family doctor's prescription dispensed in another Member State while on holiday'.[114] The EU's internal market also enables her to 'buy Finnish food products in Lisbon' while she also 'benefits from a high level of protection of consumer rights across the EU'.[115] All in all, this illustrates how EU law puts 'the citizen at the centre of the European project'.[116]

2. The Prescriptive Turn in EU Citizenship Law

This emancipatory – rather than functional – vision of free movement rights and EU Citizenship is and remains contested. As part of the 'critical turn' in EU legal scholarship, scholars have increasingly identified a variety of implicit hierarchies in free movement and EU Citizenship law, showing how EU law treats some individuals and citizens as more equal than others. These hierarchies remain mostly out of view in *70 Years of EU Law*, because the book simply does not discuss many of controversial cases. Indeed, the Legal Service presents 'the citizen' essentially as a legal status, as a bundle of formal rights and freedoms, without ever making concrete who the citizen is. The most embodied form in which the EU Citizen appears is the fictitious example discussed above, which presents the citizen as a highly educated and skilled worker employed by a multinational company. But what about all those other citizens? Those that work in low-skilled jobs, are economically inactive, or come from the EU's periphery? These individuals do not fit the 'emancipatory' narrative of EU citizenship, because they are not able – either

112 Galino Martín et al. (n. 20).
113 Galino Martín et al. (n. 20), 133.
114 Galino Martín et al. (n. 20), 133-134.
115 Galino Martín et al. (n. 20), 134.
116 Galino Martín et al. (n. 20), 134.

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de iure or *de facto* – to enjoy all rights potentially attached to that status. It is therefore telling that at no point in the book do these citizens appear to form part of the institutional imagination of 'the citizen' that the Legal Service promotes.

The absence of these citizens is reflected in the focus and framing of the chapter titled *EU Citizenship: In The Service of EU Citizens*, which analyses the development of the rights of family members and children of EU citizens.[117] This is a rather eclectic choice for a chapter on EU citizenship in a book that foregrounds the centrality of EU citizens to the project of integration. It stands in stark contrast to the conventional narrative of EU citizenship, that is found in most textbooks and taught in classrooms all over the continent. One version of this conventional story (the one I teach myself) would start with *Grzelczyk* in which the Court declared that EU citizenship is 'destined to be the fundamental status of nationals of the Member States'.[118] Next, it would narrate how the Court of Justice in landmark cases such as *Baumbast*, *Martinez Sala*, and *Bidar* expanded EU citizens' access to the welfare system of the host Member States with an appeal to equal treatment.[119] In other words, this conventional story is one of judicial expansion and integration through law. It would fit well with the celebratory and progressive narrative in *70 Years of EU Law* – it even seems as if the book is underselling the benefits of EU law to its citizens.[120] So why is it missing?

My suspicion is that it has something to do with how my class on EU citizenship normally continues. After narrating how the Court has expanded citizenship rights, we inevitable arrive at the turning point in its case law, namely the infamous 'Dano Trilogy'. This is a line of cases that began with *Brey*, followed by *Dano,* and ultimately *Alimanovic*, in which the Court of Justice adopted a more restrictive approach to welfare benefits.[121] These

117 Tomkin and Montaguti (n. 99).

118 ECJ, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, judgement of 20 September 2001, case no. C-184/99, ECLI:EU:C:2001:458, para. 31.

119 ECJ, *Baumbast and R v. Secretary of State for the Home Department*, judgement of 17 September 2002, case no. C-413/99, ECLI:EU:C:2002:493; ECJ, *María Martínez Sala v. Freistaat Bayern*, judgement of 12 May 1998, case no. C-85/96, ECLI:EU:C:1998:217; ECJ, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, judgement of 15 March 2005, case no. C-209/03, ECLI:EU:C:2005:169.

120 See the contribution of Meeusen (n. 110).

121 ECJ, *Pensionsversicherungsanstalt v. Peter Brey*, judgement of 19 September 2013, case no. C-140/12, ECLI:EU:C:2013:565; Case C-333/13; ECJ, *Dano* (n. 2); ECJ, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, judgement of 15 September 2015, case no. C-67/14, ECLI:EU:C:2015:597.

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judgements have generated extensive academic commentary and debate about the question to what extent these judgements form a rupture with the previous expansive case law of the Court.[122] Beyond questions of doctrinal consistency, however, the importance of these judgements is also that they bring into focus how EU law increasingly prescribes a specific vision of EU citizenship – one that is stratified, gendered and exclusionary.[123]

This 'prescriptive turn' is exemplified in the *Dano* judgement, which concerned the question whether German authorities could refuse granting Ms. Dano access to certain non-contributory social security benefits. The Court of Justice found, in a rather circular fashion, that the right to equal treatment and residence of EU citizens depends on their economically self-sufficiency.[124] One of the reasons why this case is so controversial, is because of the way in which the Court describes the personal situation and character of the applicant. Ms. Dano is a Romanian national, and member of the Roma minority, who moved to Germany to care for her sister's children. The Court of Justice's description of Ms. Dano, however, focused on the fact that she did not obtain any educational qualifications, only has a limited grasp of the German language, has not been trained in any profession and has not worked in either Germany or Romania. On top of that, the Court also noted that even though 'her ability to work is not in dispute, there is nothing to indicate that she has looked for a job'.[125] In other words, the Court essentially presents Ms. Dano as a 'lazy non-deserving applicant'.[126]

Dano illuminates how EU citizenship law perpetuates social hierarchies in relation to class, gender, and ethnicity. The fact that Ms. Dano has a lower socioeconomic status, is a woman, and is part of the Romani minority shapes her (in)ability to fully exercise EU Citizenship rights – and part of

122 Moritz Jesse and Daniel William Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in: Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020), 135-169.

123 de Witte (n. 111); Charlotte Rachel O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights', CML Rev. 53 (2016), 937-977; Sylvie Da Lomba and Rebecca Zahn, 'Post-Enlargement (Free) Movement in the EU: Who Really Counts as EU Citizen? Understanding Dano Through the Lens of Orientalism', Griffith Law Review 32 (2023), 387-409.

124 ECJ, *Dano* (n. 2).

125 ECJ, *Dano* (n. 2), para. 39.

126 Sarah Ganty, 'Poverty in Judgecraft: New Narratives Through the Language of Equality', GLJ 26 (2025), 170-179 (175). Also see Gareth Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' in: Susanne Schmidt, Michael Blauberger and Dorte Martinsen (eds), *Free Movement and Non-Discrimination in an Unequal Union* (Routledge 2020), 52-70.

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the problem is that EU law does not recognise how these different categories intersect.[127] First, Ms. Dano cannot claim a right to benefits under EU citizenship law, because she is not economically self-sufficient. Importantly, access to formal rights not only *de facto* depends on certain material preconditions, but EU law also *formalises* distinctions between citizens based on their material conditions. In the words of O'Brien, EU law is increasingly premised on 'an elitist model of free movement – alienating the working poor, and effectively awarding rights on the basis of socio-economic class'.[128]

Secondly, the fact that Ms. Dano is a woman also affects her capacity to exercise her free movement rights. Women who are exercising their right to free movement and decide to live in another Member State, as Nina Miller notes, 'are exposed to a disproportionately increased risk of legal and physical precarity, poverty, destitution, and exploitation'.[129] She argues that as a result of the *Dano* judgement, EU law no longer provides a social safety net to those with caring responsibilities, that prevent them from seeking employment, which in reality primarily concerns women. Strikingly, in *Dano* the Court of Justice does not consider that Ms. Dano cares for the children of her sister, thereby illustrating how care work is not recognised or rewarded as work under EU law.[130]

Finally, Ms. Dano is also part of an ethnic minority that has long been discriminated against, which undoubtedly has influenced her life opportunities and capacity to find work.[131] Again, however, the Court of Justice did not take this part of her personal circumstances into account. As such, the judgement also illustrates how EU citizenship law perpetuates an orientalist outlook in which Eastern Europeans in general (and Roma minorities in particular, I would add) are cast as the EU's 'internal other', namely as 'welfare tourist' or poverty migrant'.[132]

In sum, rather than as a 'fundamental status', EU citizenship appears, in the words of De Witte, as a *liminal* status, meaning it is a 'status bestowed on a *certain type of* individual but never *of* the individual'.[133] Enjoyment of the

127 Dagmar Schiek, 'On Uses, Mis-Uses and Non-Uses of Intersectionality before the Court of Justice (EU)', International Journal of Discrimination and the Law 18 (2018), 82-103.

128 O'Brien (n. 123), 939.

129 Nina Miller, 'Care on the Move: The Gender Care Gap and Intra-EU Mobility', J. L. & Soc. 50 (2023), 558-578 (558).

130 Miller (n. 129).

131 Julija Sardelic, *The Fringes of Citizenship: Romani Minorities in Europe and Civic Marginalisation* (Manchester University Press 2021).

132 Da Lomba and Zahn (n. 123). Also see Dagmar Myslinska, *Law, Migration, and the Construction of Whiteness: Mobility Within the European Union* (Routledge 2024).

133 de Witte (n. 111), 74.

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rights attached to EU citizenship is conditional upon conforming to a prescriptive vision of the 'good' EU citizen, namely one that is economically active, has no criminal record and forms 'a productive and integrated part of the society of the host State'.[134] In light of this, it is perhaps not surprising that the fictitious example in *70 Years of EU Law* is that of a Finnish woman moving from Helsinki to Lisbon, rather than, say, a Romanian woman moving to Germany. It rather adequately reflects the centre-periphery dynamics and class differences that shape how EU citizens move across the territory of the Union, but is that truly a cause for celebration?

3. All EU Citizens Are Equal, but Some Are More Equal than Others

Overall *70 Years of EU Law* presents a story in which the Court of Justice has created a coherent and 'substantial body of case law' that benefits individuals and has safeguarded 'the effectiveness of the rights conferred directly on EU citizens by the treaties'.[135] As such, also in this area the Legal Service overlooks how EU free movement law shapes contestation and social conflict. The fictitious example of the woman moving from Helsinki to Lisbon is again illustrative, because in recent years local residents in Lisbon have repeatedly protested against the gentrification, higher rents and living costs that result from the influx of expats and 'digital nomads'.[136] *70 Years of EU Law* fails to recognise how EU law is rife with tensions, conflicts, and contradictions that shape and fuel social conflicts. Yet many of the landmark cases that would be used in textbooks to explain how EU law deals with questions of redistribution (e. g. the famous 'Laval quartet[137]) or recognition

134 de Witte (n. 111), 73; see also Stephen Coutts, 'The Absence of Integration and the Responsibilisation of Union Citizenship', European Papers 3 (2018), 761-780 (780).

135 Galino Martín et al. (n. 20), 114.

136 Catarina Demony and Goncalo Almeida, 'Protesters Denounce Gentrification in Lisbon as Housing Prices Soar', Reuters (22 September 2018), <https://www.reuters.com/article/world/protesters-denounce-gentrification-in-lisbon-as-housing-prices-soar-idUSKCN1M20UL/>, last access 4 February 2026.

137 ECJ, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, jugement of 18 December 2007, case no. C-341/05, ECLI:EU:C:2007:809; ECJ, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, judgement of 11 December 2007, case no. C-438/05, ECLI:EU:C:2007:772; ECJ, *Commission of the European Communities v. Grand Duchy of Luxemburg*, judgement of 19 June 2008, case no. C-319/06, ECLI:EU:C:2008:350; ECJ, *Dirk Rüffert v. Land Niedersachsen*, judgement of 3 April 2008, case no. C-346/06, ECLI:EU:C:2008:189.

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(e. g. *Achbita* and *Bougnaoui*[138]) are conspicuously absent from *70 Years of EU Law*, hidden under the fiction that EU law protects all citizens equally. As such, the volume does not come to terms with the contemporary reality of European integration in which it becomes increasingly apparent that the benefits and burdens of EU law are distributed unequally.

V. Conclusion: 70 Years of EU Law as a Missed Opportunity

Overall, reading *70 Years of EU Law* is reminiscent of Martin Shapiro's famous description of Community legal scholarship as a form of 'constitutional law without politics'.[139] Writing in the 1980s, he critiqued the tendency of legal scholars to present the EU as a 'juristic idea' and focus on the formal law, rather than on the socio-economic and political dynamics that underpin the law, or the legal actors that played a role in its development. In similar vein, *70 Years of EU Law* tries to present EU law as an unqualified success story. Moments of political and legal crisis appear in a highly truncated form, instances of contestation and controversy are ignored, and rights only appear as paper abstractions, overlooking the messy practices of EU law on the ground.

Notwithstanding his criticisms, Shapiro recognised that from the perspective of 'European political action' a descriptive approach to EU law might be 'the best thing to do'.[140] In light of political contestation of the EU, he claimed it would be best 'to deal with juristic development as if they were autonomous, and to speak as little as possible about economic and political threats. *After all, legal realities are realities too*.'[141] But is this still true today? In light of contemporary scholarship, the 'legal realities' presented by the Legal Service appear outdated and no longer in line with the current practices of European integration. Indeed, the majority of the papers in this special issue question the perspective of *70 Years of EU Law* while pointing to the omissions, blind spots, and anachronisms it contains. In doing so, these contributions attest that a genuine commitment to EU law requires not

138 ECJ, *Achbita* (n. 2); ECJ, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA*, judgement of 14 March 2017, case no. C-188/15, ECLI:EU:C:2017:204.

139 Martin Shapiro, 'Comparative Law and Comparative Politics Symposium: Conference on Comparative Constitutional Law: Comment', S. Cal. L. 53 (1979), 537-542 (538).

140 Shapiro (n. 139), 542.

141 Shapiro (n. 139), 542(my italics).

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deference to tradition, but a willingness to rethink and challenge its foundations.

One would wish the Legal Service of the European Commission to also acknowledge the complexities and compromises that are inherently part of the making of EU law. In doing so, it could have written a book that praised the role of EU law while also recognising shortcomings and highlighting areas in need for reform and change. Such a book would have invited legal scholars to commence a dialogue with the Legal Service about the inevitable blind spots, alternative possibilities, and future trajectories of the EU legal order. It would not only have signalled institutional maturity and strength, but also enabled a more productive and meaningful discussion between EU institutions and legal academia. Alas, this is not the book that the Legal Service wrote.

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The European Union's Geoeconomic Turn: Less Openness and More Realpolitik

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Abstract

The European Union's (EU) geoeconomic turn has had a considerable impact on decision-making that involves security considerations. Tools such as the Foreign Subsidies Regulation or the Anti-Coercion Instrument address the weaponisation of chokepoints in a globally interdependent economy and safeguard economic security. Geopolitical developments such as Russia's invasion of Ukraine have become stealthy drivers of integration in the Union. As a result, an exceedingly larger no man's land is created where the bound-

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aries between the Common Foreign and Security Policy and its intergovernmental features, on the one hand, and the Common Commercial Policy's supranational paradigm, on the other, are increasingly blurred. This land is claimed by actors such as the European Commission through the Open Strategic Autonomy doctrine. Nonetheless, legitimacy issues arise when specific policy instruments are leveraged for purposes other than those envisaged for. This account of integration as a reaction to geopolitical imperatives contrasts the approach seen in the Commission's Legal Service book, '*70 Years of EU Law – A Union for Its Citizens*'. The latter frames European integration in a highly dominant neofunctionalist understanding, emphasising the primacy of law, but minimising the role of geopolitics. Considering the importance of the Book for the narrative of ever-deeper integration, the analysis suggests an enrichment of its theoretical background through an expanded lens that also considers how geopolitics can lead to further integration.

Keywords

European Integration – European Union Law – Common Foreign and Security Policy – Common Commercial Policy – Geopolitics – Geoeconomics

I. Introduction

The European Union's geoeconomic turn (the use of market instruments for ulterior geopolitical and geostrategic purposes[1]) has had a considerable impact on decision-making involving security considerations. It has also blurred the boundaries between the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) and their intergovernmental features,[2] on the one hand, and the Common Commercial Policy (CCP) which follows a supranational paradigm, on the other hand. By presenting this development as a consequence of the Union operating in an increasingly geopolitically volatile world, we aim to shed light on a missing perspective of the Legal Service's book, '70 Years of EU

1 For a similar, encompassing, definition, see Sarah Bauerle Danzman and Sophie Meunier, 'The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator', J. Common Mkt. Stud. 62 (2024), 1097-1115.

2 Any reference to the CFSP in this article also implicitly entails a reference to the CSDP.

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Law – A Union for Its Citizens':[3] that geopolitics (also) drives integration.[4] The Book represents a major exercise in narrative-building by the Commission's Legal Service, framing integration in terms of a citizen-focused, law-driven process,[5] reflective of a neofunctionalist account of integration. However, the increasingly politicised transfer of power to central actors such as the Commission,[6] coupled with the increased salience of transnational geopolitical threats that cause security risks,[7] have also created the impetus for further integration.

Securitisation processes also contribute to the reshuffling of the *status quo*. They entail an extension of the scope of security interests from a

3 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023) hereinafter 'Legal Service's Book' or 'Book']. The present article does not overlook the fact that the Book is a collaborative project of the Legal Service of the European Commission and that it is cautiously presented as not representative of the Commission's official position. Nonetheless, this article makes a couple of linkages between the Book and the Commission, further expanded in Section IV. At this point, it is sufficient to mention that the letter and the spirit of the Book's preface by President von der Leyen makes any denial of connection between the views of the Legal Service members and of the Commission's official stance less plausible. Additionally, the Legal Service's position is already reflective of the Commission's selective framing of integration through law. Despite the formal denial of connection, underlying premises are common in narrative-building exercises by both bodies. At the same time, the article also contextualises the Book, especially be reference to other official Commission positions where geopolitical events become acknowledged and more central to the framing of integration.

4 In this article, we understand integration as the transfer of decision-making power to Union institutions, such as the Commission, and agencies, especially when such capabilities empower these decision-makers to adopt new instruments to react to geopolitical threats that create security risks, such as the Anti-Coercion Instrument (Regulation 2023/2675/ of 22 November 2023 on the Protection of the Union and its Member States from Economic Coercion by Third Countries, OJ 2023 L 2675 ('Anti-Coercion Instrument'). See, also, Viktor Szép, 'The Legislative History of the EU's Anti-Coercion Instrument', ERA Forum 25 (2024), 127-139. Aspects such as the widening of European integration through enlargement as a result of geopolitical contingencies (see, for instance, Dmytro Panchuk, 'The Impact of the Russian Invasion of Ukraine on Public Support for EU Enlargement, Journal of European Public Policy 31 (2024), 3128-3150 (3128-3130) are beyond the scope of this article; Antoaneta L. Dimitrova, Seda Gürkan and Joachim Koops, 'Stuck on the Stairway of Change: The EU's Enlargement and Security and Defence Policies Post 2022', European Politics and Society (2025), 1-19.

5 See, also, Jacob van de Beeten, 'Festschrift or Fiction? Omissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

6 Sabine Saurugger, 'Politicisation and Integration Through Law: Whither Integration Theory?', W. Eur. Pol. 39 (2016), 933-952 (935-40); Vivien A. Schmidt, 'Theorising European Integration: The Four Phases Since Ernst Haas' Original Contribution', Journal of European Public Policy 31 (2024), 3346-3371 (3360-3364).

7 This includes, for instance, the US-China competition, or the development of EU-Russia relations. See, for instance, Anna Herranz-Surraellés, Chad Damro and Sandra Eckert, 'The Geoeconomic Turn of the Single European Market? Conceptual Challenges and Empirical Trends', JCMS 62 (2024), 919-937 (924-927).

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traditionally military and defence-oriented nexus to a wider, more open one, which includes economic security,[8] or digital sovereignty.[9] Such developments also lead to a transfer of epistemic authority to identify and address security threats beyond the traditional defence-military nexus.[10] In the EU, it is the Commission that is turning into an increasingly relevant securitisation actor.[11] As a result, one can witness an expansion of the types of instruments through which security goals are pursued that the Commission can leverage as part of the Union's geoeconomic toolkit. For instance, the Anti-Coercion instrument enables the Union to adopt measures such as tariffs or export controls in reaction to economic coercion by third countries.[12] Another example is the European Chips Act, which envisions a series of measures, such as the building of integrated production facilities, deemed to ensure resilience and security of supply in the semiconductor supply chain.[13]

In turn, the dynamic interplay between the CFSP and the CCP when security considerations inform decision-making changes. The CFSP reserves sovereignty space to Member States. While emphasising loyal cooperation,[14] it is characterised by an intergovernmental decision-making process, with unanimity the rule and the removal of the jurisdiction of the Court of Justice of the European Union over CFSP decisions, save for the imposition of targeted sanctions.[15] The CCP is characterised by a supranational paradigm (with qualified majority voting in the Council and considerable agenda-

8 Guri Rosen and Sophie Meunier, 'Economic Security and the Politics of Trade and Investment Policy in Europe', Politics and Governance 11 (2023), 122-128; Emilia Korkea-aho and Luigi Lonardo, 'How Russia's War Against Ukraine Changed EU Sanctions Decision-Making', Journal of European Integration 47 (2025), 1-22.

9 Jamal Shahin, 'Dancing to the Same Tune? EU and US Approaches to Standards Setting in the Global Digital Sector', Journal of European Integration 46 (2024), 1111-1131 (1116 f.); Georg Wenzelburger and Pascal D. König, 'Sending Signals or Building Bridges? Digital Sovereignty in EU Communicative and Co-Ordinative Discourse', J. Common Mkt. Stud. 63 (2025), 526-547 (528 f.).

10 J. Benton Heath, 'Making Sense of Security', AJIL 116 (2022), 289-339 (292 and 312).

11 See, generally, Thomas Verellen, 'Imperial Presidency Versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States', GLJ 24 (2023), 1127-1145.

12 Anti-Coercion Instrument (n. 4), Annex I.

13 Regulation 2023/1781/EU of 13 September 2023 Establishing a Framework of Measures for Strengthening Europe's Semiconductor Ecosystem […], OJ 2023 L 229, Art. 13.

14 Heidi Maurer and Nicholas Wright, 'How Much Unity Do You Need? Systemic Contestation in EU Foreign and Security Cooperation', European Security 30 (2021), 385-401 (393).

15 Art. 24(1) TEU; 275 TFEU. See, also, Peter van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice', CML Rev. 58 (2021), 1731-1760 (1732).

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setting powers for the Commission) and exclusive EU competence as the main pillars underlying decision-making in this area.[16] As a result of the EU's geopolitical awakening,[17] this division between the Member-State focused and politically driven foreign and security policymaking,[18] and the EU's trade and investment policies has become increasingly unclear.[19] Illustrative are developments such as those seeking to safeguard economic security interests.[20] These include measures taken to ensure supply chain resilience,[21] or to safeguard the Union's ability to defend itself from trade coercion[22] through the Anti-Coercion Instrument.[23] Examples also include the Foreign Subsidies Regulation (FSR),[24] foreign investment screening mechanisms,[25] or the use of

16 Billy A. Melo Araujo, *The EU Deep Trade Agenda: Law and Policy* (Oxford University Press 2016), 28, 59; Michal Ovádek and Akhil Raina, 'The Evolution of EU Trade Law Through the Prism of Competence: A Quantitative, Longitudinal Perspective', J. W. T. 53 (2019), 489-508 (493); Christian Freudlsperger, 'Failing Forward in the Common Commercial Policy? Deep Trade and the Perennial Question of EU Competence', Journal of European Public Policy 28 (2021), 1650-1668 (1655); Christian Freudlsperger and Sophie Meunier, 'When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument', J. Common Mkt Stud. 62 (2024), 1063-1079 (1067).

17 European Commission, 'Speech by President-Elect von der Leyen in the European Parliament Plenary on the "Occasion of the Presentation of her College of Commissioners and their Programme" <https://ec.europa.eu/commission/presscorner/detail/es/speech_19_6408>, last access 11 February 2026 ('This is the geopolitical Commission that I have in mind, and that Europe urgently needs.').

18 See, for instance, Katja Biedenkopf, Oriol Costa and Magdalena Góra, 'Introduction: Shades of Contestation and Politicisation of CFSP', European Security 30 (2021), 325-343 (332).

19 Andrea Christou and Chad Damro, 'Frames and Issue Linkage: EU Trade Policy in the Geoeconomic Turn', J. Common Mkt. Stud. 62 (2024), 1080-1096 (1087).

20 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"', JOIN(2023) 20 final, 2-3; Andi Hoxhaj, '*Securitizing the Economy: The European Economic Security Strategy as a Zeitenwende in the EU's Foreign and Economic Policy*', Verfassungsblog, 19 July 2023, doi: 10.17176/20230719-132106-0.

21 Luuk Schmitz and Timo Seidl, 'As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy', J. Common Mkt. Stud. 61 (2023), 834-682 (846).

22 Ben Czapnik and Bryan Mercurio, 'The Use of Trade Coercion and China's Model of 'Passive-Aggressive Legalism', JIEL 26 (2023), 322-342.

23 Anti-Coercion Instrument (n. 4).

24 Regulation 2022/2560/EU of 14 December 2022 on Foreign Subsidies Distorting the Internal Market, OJ 2022 L 330 ('Foreign Subsidies Regulation').

25 Regulation 2019/452/EU of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, OJ 2019 L 79I. Although the screening system hands over the decision-making power to the Member States, at the time of writing there is a legislative attempt towards more centralisation at EU level through the revision of the Screening Regulation.

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economic sanctions.[26] Ultimately, geopolitical and geoeconomic imperatives can drive integration through the 'backdoor', with the use of procedures typically not reserved for the pursuit of traditional security interests to still address such interests.[27]

In the process of reshuffling the boundaries between the CFSP and the CCP, the Commission gains a newfound importance. Not only does it remain a central decisionmaker in a Union acting within an increasingly geopoliticised global economy, but it also acts as an ideational entrepreneur.[28] The Commission plays an active role in contesting the status quo that has traditionally separated supranational decision-making from intergovernmental frameworks. Since geopolitics has been the domain of the CFSP, it paradoxically supports the Commission's interests to selectively minimise the role of geopolitics in integration, even as it attempts to refine and deploy the Union's geoeconomic toolkit. Otherwise, a widespread acknowledgment of the security threats that a 'Geopolitical Commission' faces can feed into the existing path dependencies that maintain power in the hands of the Member States acting in the European Council, and especially through the Council, to address security threats. This explains why the Commission remains selective in deploying language that indicates geopolitical awareness, depending on the target of the speech act and the goal behind the underlying narrative-building exercise. Such language is mostly missing from the Legal Service's Book. In it, European integration is presented as a neofunctionalist development, driven primarily through the adoption, implementation, and refinement of legal instruments.

At the same time, policy documents and declarations, such as Commission President von der Leyen's declaration before the EU Parliament prior to the start of her Commission's first mandate,[29] present a different, complimentary, narrative. This view acknowledges the fact that geopolitical threats (Russia's invasion of Ukraine, China's trade assertiveness, security of supply considerations in the energy sector etc.) are increasingly guiding EU action, or at

26 Since the latter has been institutionally integrated into the CFSP toolkit, the analysis does not focus on this geoeconomic tool. See, for more details, Luigi Lonardo, *EU Common Foreign and Security Policy After Lisbon. Between Law and Geopolitics* (Springer 2023), 73-88. Nonetheless, despite the centrality of the Council in sanctions decision-making, the Commission's role in this area has become more prominent. While this does not represent an example of the use of CCP procedures to achieve security goals, it remains an instance of ever-increasing transfer of competences to the Commission. See, for instance, Korkea-aho and Lonardo (n. 8), 1-6.

27 Generally, Julian Stueber, The Trade-Security Nexus in EU External Action: A Practice Approach (Springer 2022).

28 Ana E. Juncos and Sophie Vanhoonacker, 'The Ideational Power of Strategic Autonomy in EU Security and External Economic Policies', J. Common Mkt. Stud. 62 (2024), 955-972 (956-958, 960).

29 European Commission (n. 17).

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least Commission action.[30] In fact, in 2015, during the State of the Union Address, former Commission President Juncker went even further and explicitly linked the rise of geopolitical threats, such as Russia's 2014 annexation of Crimea, to a need for deepened integration: '[i]f we want to promote a more peaceful world, we will need more Europe and more Union in our foreign policy. This is most urgent towards Ukraine.'[31] Considering this tension in narrative-building exercises, the present analysis suggests an enrichment of the theoretical understanding of European integration – through an expanded lens that also considers the impact of geopolitics. Absent a more comprehensive theoretical account of integration, which also guides decision-making, the use of supranational procedures designed for goals other than safeguarding security to, nonetheless, achieve such objectives can affect the Union's legitimacy.[32]

Against this background, Section II explains how the EU's geoeconomic turn, particularly through the leveraging of market instruments under the umbrella of *Open Strategic Autonomy* (OSA), addresses security interests. Section III zooms in on the dynamic interplay between the CFSP and the CCP when security considerations influence decision-making. Section IV then explores the Commission's central role in this transition from intergovernmentalism to supranationalism. By particularly focusing on the Legal Service's Book, the analysis explores the extent to which the Commission leverages geopolitical and geoeconomic developments through narrative-building exercises.

II. Open Strategic Autonomy as a Doctrine That Integrates Geoeconomic Awareness

One threshold issue that needs to be clarified at the outset is the difference between 'geopolitics', 'geoeconomics', and 'OSA.' Understanding the exact scope of each, how they intersect, how they influence each other, and, especially, where they deviate from each other, becomes crucial to understanding their (acknowledged) role in the integration process. This analytical distinction is critical as geoeconomics increasingly blurs the boundaries between market policies and foreign policy. 'Geopolitics' refers to a view of

30 Ilias Alami et al., 'Geopolitics and the 'New' State Capitalism', Geopolitics 27 (2022), 995-1023 (1017).

31 Jean-Claude Juncker, 'State of the Union 2015' (9 September 2015), <https://commission.europa.eu/document/download/51a867db-890f-413d-89cf-0a6a0fa92a3f_en?filename=state_of_the_union_2015_en.pdf>, last access 11 February 2026, 20.

32 Ben Tonra, 'Democratic Foundations of EU Foreign Policy: Narrative and the Myth of EU Exceptionalism', Journal of European Public Policy 18 (2011), 1190-1207 (1190).

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international relations – and especially national interests – as determined by geographical constraints and by the interplay of various forces, such as ethnicity, economic (development), and state-specific internal politics.[33] In this case, territory plays a fundamental role in explaining how states (re)act and what drives their external action.[34] While not delving into the historical development of the concept, one aspect needs to be mentioned here: geopolitical views of the world have traditionally been associated with (historical and geographical) determinism.[35] Geographical positioning, resources, or the climate represented almost immutable forces around which states would craft their grand strategies, even determining expansionism to overcome such constraints.[36] In time, however, scholars have partially deviated from this highly deterministic view of international affairs, especially with the rise of what is known as 'critical geopolitics'.[37] Aspects such as the agency of

33 Antonia Colibăşanu, Geopolitics, Geoeconomics and Borderlands. A Study of Changing Eurasia and Its Implications for Europe (Springer 2023), 3-5.

34 Stefano Guzzini, 'Which Geopolitics?' in: Stefano Guzzini (ed.), *The Return of Geopolitics in Europe? Social Mechanisms and Foreign Policy Identity Crisis* (Cambridge University Press 2012), 18-44 (43-44); David Cadier, 'The Geopoliticisation of the EU's Eastern Partnership', Geopolitics 24 (2019), 71-99. For a more nuanced view, see John Agnew, 'Still Trapped in Territory?', Geopolitics 15 (2010), 779-784.

35 David T. Murphy, '"A Sum of the Most Wonderful Things": Raum, Geopolitics and the German Tradition of Environmental Determinism, 1900-1933', European Ideas 25 (1999), 121-133 (122-124); Harvey Starr, 'On Geopolitics: Spaces and Places', International Studies Quarterly 57 (2013), 433-439 (433-435, 437).

36 John Agnew, 'Capitalism, Territory and "Marxist Geopolitics"', Geopolitics 16 (2011), 230-233 (233). But see Lucian M. Ashworth, 'Realism and the Spirit of 1919: Halford Mackinder, Geopolitics and the Reality of the League of Nations', European Journal of International Relations 17 (2010), 279-301 (289-293) (rejecting the thesis that even Halford Mackinder, considered the main intellectual force behind modern geopolitics, premised his theses on an absolutely deterministic view of geopolitics); Tomasz Klin, 'Conducting the Study of Geopolitics: Three Approaches', Political Studies Review 16 (2018), 92-101 (98 f.) (arguing that early geopolitical theorists (from the beginning of the 20th century) were too readily qualified as determinists and that the intellectual landscape was much more sophisticated). See, also, Simon Dalby, 'History, Geopolitics and Climate Security', Environment and Security 3 (2025), 108-114 (109) (arguing that even climate determinism represents a flawed premise from which conclusions of geopolitical determinism are derived since climate change is a result of other developments, such as the evolution of human civilisation).

37 Vicki Squire, 'Reshaping Critical Geopolitics? The Materialist Challenge', Rev. Int'l Stud. 41 (2015), 139-159 (140, 149); Sami Moisio et al., 'Changing Geographies of the State: Themes, Challenges and Futures' in: Sami Moisio et al. (eds), *Handbook on the Changing Geographies of the State: New Spaces of Geopolitics* (Edward Elgar 2020), 2-4. See, also, Suleyman Orhun Altiparmak, 'China and Lithium Geopolitics in a Changing Global Market', Chinese Political Science Review 8 (2023), 487-506 (491). For a comprehensive account of this historical transformation, with a focus on the imperialist and authoritarian underpinnings of classical geopolitics, including the ideologisation of the term to justify imperial expansion, see Carsten Nickel, 'What Do We Talk About When We Talk About the "Return" of Geopolitics?', Int' l Aff. 1 (2024), 221-239 (224-227).

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subjects of geopolitics,[38] the impact of transnational phenomena like the flow of capital,[39] or the relevance of private technology companies in the pursuit of digital sovereignty[40] become essential for understanding contemporary geopolitical developments.

In any case, European integration cannot be satisfactorily explained by a deterministic view of history.[41] Neofunctionalism is often employed as a guiding theoretical account. It conceptualises integration as a result of incremental spillover and learning, with supranational civil servants in the Commission playing a leading role as a result of engaging with experts and interest groups.[42] Liberal intergovernmentalism, on the other hand, emphasises the main gatekeeping role played by the Member States in the process of European integration.[43] This involves both the articulation of their national preferences towards European integration and engaging in bargaining process with other Member States.[44] Outcomes ultimately depend on each government's relative power. Supranational institutions, including the European Commission, play a reduced role in this government-led process.[45]

None of the theories mentioned earlier contains any core premise of determinism in their structure. At the same time, such theories still fail to account for the role of geopolitical developments in European integration, even when the use of geopolitical lenses does not imply determinism. For instance, neofunctionalism has been criticised for failing to account for the realist layer of intergovernmentalism, the latter emphasising the role of the geopolitical interests as drivers of integration that shape Member State-driven

38 Jaroslav Kurfürst et al., 'Critical Geopolitics in the Era of Identitarian Populism', GeoJournal 89 (2024), 1-15 (7).

39 Alejandro Colás and Gonzalo Pozo, 'The Value of Territory: Towards a Marxist Geopolitics', Geopolitics 16 (2011), 211-220 (212-216); Mengzhu Zhang and Tianzuo Wen, 'The Rise of Chengdu Between Geopolitics and Geo-Economics: City-Regional Development Under the Belt and Road Initiative and Beyond', Transactions of the Institute of British Geographers 47 (2022), 971-989 (972).

40 Dennis Broeders, Fabio Cristiano and Monica Kaminska, 'In Search of Digital Sovereignty and Strategic Autonomy: Normative Power Europe to the Test of Its Geopolitical Ambitions', J. Common Mkt. Stud. 61 (2023), 1261-1280 (1264).

41 See, generally, Mark A. Pollack, 'International Relations Theory and European Integration', J. Common Mkt. Stud. 39 (2002), 221-244; Ben Rosamond, 'The Uniting of Europe and the Foundation of EU Studies: Revisiting the Neofunctionalism of Ernst B. Haas', Journal of European Public Policy 12 (2005), 237-254; Saurugger (n. 6); Francesco Nicoli, 'Neofunctionalism Revisited: Integration Theory and Varieties of Outcomes in the Eurocrisis', Journal of European Integration 42 (2020), 897-916; Schmidt (n. 6).

42 Schmidt (n. 6), 3350.

43 Pollack (n. 41), 222-225.

44 Pollack (n. 41), 225.

45 Pollack (n. 41), 225.

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bargaining processes in the Council.[46] Even liberal intergovernmentalism minimised the role of geopolitics in deepening integration, as it emphasised how Member State bargaining in the Council was primarily a result of differing socio-economic interests and not of differing geopolitical imperatives and worldviews.[47] At best, geopolitical considerations played a secondary role.[48] Failure to account for the Union's 'geopolitical awakening', however, makes it exceedingly difficult to explain certain recent developments in EU External Relations (especially trade and investment policy), chief among them the use of geoeconomic tools for strategic and geopolitical purposes.

This is not to say that awareness of geopolitical developments and their impact on integration turns the Union into a polity that displays decision-making patterns primarily guided by geopolitical considerations. While the reaction to Russia's invasion of Ukraine, for instance, may display such patterns, external action, even in the security and defence policy towards the immediate neighbouring region, is still 'rooted in the longstanding EU's foreign policy ethos based on universalist, de-spatialised norms, values, standards and functionalist principles'.[49] This explains why the operationalisation of the OSA doctrine, discussed in more detail below, entails the pursuit of a synthesis between openness and strategic autonomy.

Turning to 'geoeconomics', the concept has a strong connection to a geopolitical understanding of the world but does not identify with the latter. Geoeconomics refers to the use of market tools (e. g., economic sanctions,

46 Schmidt (n. 6), 3351-3352. For a more recent account, focused on the war in Ukraine, see Ulrich Krotz, Danilo Di Mauro and Jonas J. Driedger, 'War as External Cause: Russia's Invasion of Ukraine, the Theorising of European Integration and EU Politics, and the EU's Arduous Formation in Foreign and Security Policy', Journal of European Public Policy 2025, 1-29.

47 For instance, see Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', J. Common Mkt. Stud. 31 (1993), 473-524. For a critique, see Schmidt (n. 6), 3354-3355.

48 Andrew Moravcsik, '"Is Something Rotten in the State of Denmark?" Constructivism and European Integration', Journal of European Public Policy 6 (1999), 669-681 (674).

49 Elisabeth Johansson-Nogués and Francesca Leso, 'Geopolitical EU? The EU's Wartime Assistance to Ukraine', J. Common Mkt. Stud. 63 (2024), 127-142 (138 f.); But see Carsten Nickel, 'A Certain Idea of Space: France, Germany, and the Question of Geopolitics in Europe', Journal of European Integration 46 (2024), 1039-1059 (1049-1054) (discussing Franco and German geopolitical traditions and how there have been signs of a possible synthesis at EU level between the two, especially as a reaction to Sino-American competition and Russia's invasion of Ukraine); Calle Håkansson, 'The Ukraine War and the Emergence of the European Commission as a Geopolitical Actor', Journal of European Integration 46 (2024), 25-45 (especially 38 f.) (although not making explicit the underlying definition of 'geopolitics' and neither theorising the role of territory in the transition to a more geopolitically informed policymaking and concluding that, despite the Commission's increased geopolitical awareness, integration in the security and defence areas still depends heavily on the Member States' political will).

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investment screening mechanisms, trade defence instruments such as redressive measures against market-distorting foreign subsidies) for ulterior geopolitical, or strategic, purposes.[50] Geoeconomic tools can be leveraged because of the relationships of interdependence that have come to characterise the global economy.[51] The risks of such interdependence include supply chain disruptions or trade coercion.[52] At the same time, the weaponisation of interdependence, coupled with the features of a global economy increasingly ordered through unilateral,[53] bilateral, and plurilateral arrangements,[54] and not through multilateral initiatives,[55] have created a paradox. States still engage in transnational economic frameworks, but the climate of distrust created by the weaponisation of interdependence has led to both offensive and defensive forms of geoeconomic engagement with other states and transnational actors.[56] Such developments ultimately give rise to a feedback loop. The increasing weaponisation of interdependence leads to a process of securitisation in international economic affairs, which determines the widespread

50 Clara Weinhardt, Karsten Mau and Jens Hillebrand Pohl, 'The EU as a Geoeconomic Actor? A Review of Recent European Trade and Investment Policies' in: Milas Babić, Adam D. Dixon and Imogen T. Liu (eds), *The Political Economy of Geoeconomics: Europe in a Changing World* (Springer 2022), 107-136 (107 f.); Bauerle Danzman and Meunier (n. 1), 1097. But see Pierre Haroche, 'Geoeconomic Power Europe: When Global Power Competition Drives EU Integration', J. Common Mkt. Stud. 62 (2024), 938-954 (939) (for a more nuanced approach to geoeconomics that emphasises 'the involvement of "relative gains" considerations').

51 Axel Anlauf and Stefan Schmalz, 'The Grand Delusions of Globalization', Critical Sociology 51 (2025), 679-693 (682 f.); Guilherme Schneider Rasador and André Moreira Cunha, 'The New Security Grey Zone: Export Controls, Emerging Technologies and US-China Technological Rivalry', The Pacific Review 38 (2025), 1020-1048 (1022-1025).

52 Czapnik and Mercurio (n. 22).

53 Ferdi de Ville, Simon Happersberger and Harri Kalimo, 'The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments', European Foreign Affairs Review 28 (2023), 15-34; Geraldo Vidigal, 'The Unilateralization of Trade Governance: Constructive, Reconstructive, and Deconstructive Unilateralism', Legal Issues of Economic Integration 50 (2023), 1-12; Sophie Bohnert, 'The Shift to Unilateralism in the European Union's Trade Policy: An Exercise in Taxonomy', CML Rev. 62 (2025), 1057-1088.

54 Georgios Dimitropoulos and Richard C. Chen, Julien Chaisse, 'Plurilateralism', Journal of World Investment & Trade 26 (2025), 1-30; Weihan Zhou and Victor Crochet, 'Confronting Fragmentation: A Quest for a Plurilateral Appellate Mechanism under the WTO', Journal of World Investment & Trade 26 (2025), 275-300 (278).

55 Weinhardt, Mau and Pohl (n. 50), 108; David Collins, 'Plurilateralism and the New Geoeconomics of International Law', Journal of World Investment & Trade 26 (2025), 54-81 (55 f.); Bernard M. Hoekman and Petros C. Mavroidis, 'Plurilateral Agreements, Multilateralism and Economic Development', Journal of World Investment & Trade 26 (2025), 31-53 (36); Leonard August Schuette, 'IO Survival Politics: International Organisations Amid the Crisis of Multilateralism', Journal of European Public Policy 31 (2024), 3812-3838 (3812 f.).

56 For instance, see Haroche (n. 50), 948 (suggesting a typology that differentiates between defensive and offensive geoeconomic measures. The former entails goals such as deterrence and protection, while the latter involves coercion and backlash reduction).

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adoption of unilateral solutions designed to respond to such risks.[57] The global economy, thus, increasingly reflects patterns of a zero-sum game viewed through realist lenses.[58] Great power politics are increasingly shaping the global economy.[59]

In turn, this has led to the adoption and refinement of the concept of *economic security*, following securitisation processes that identify the exploitation of economic interdependence arising from the networked global economy as a security threat.[60]

Finally, the OSA is a doctrine that empowers the Union to act autonomously within such an interdependent global economy and to address the security risks which arise from this interdependence.[61] It explains how the Union seeks to harmonise those goals with its principles, rules, and values.[62] Ultimately, the doctrine represents an attempt at reconciling the EU's openness with more defensive measures, something also conceived as necessary to maintain a liberal, rules-based, global order in the increasingly securitised global economy.[63] Nonetheless, the vagueness of OSA also permits its leveraging in different contexts, to appease different stakeholders.[64] That can sometimes make it difficult to translate it into operational policies – or legislative instruments. Given the various, sometimes conflicting,[65] goals that can be sought through the leveraging of the doctrine, it has been suggested that OSA ultimately represents an attempt to rally political capital and legitimacy for what can be described as 'qualified openness'.[66] For present purposes, the

57 Bohnert (n. 53), 1059; Michael Mastanduno, 'Hegemony and Fear: The National Security Determinants of Weaponized Interdependence' in: Daniel W. Drezner, Henry Farrell and Abraham L. Newman (eds), *Weaponized Interdependence: How Global Economic Networks Shape State Coercion* (Brookings Institution Press 2021), 67-83 (68).

58 David A. Baldwin, *Power and International Relations* (Princeton University Press 2016), 66-68; Pierre E. Caquet, *The Invention of Realpolitik, 1848-1871* (Palgrave Macmillan 2024), 8, 214.

59 Geoffrey Gertz and Miles M. Evers, 'Geoeconomic Competition: Will State Capitalism Win?', The Washington Quarterly 43 (2020) 117-136 (119).

60 See, for instance, Andreas Dür, Gemma Mateo and Lorane Visart, 'Geopolitics Meets Business Interests: The EU and European Economic Security', Journal of European Public Policy 32 (2025), 1-28.

61 For instance, see Jing Huang, 'China's Role in the EU's Search for Strategic Autonomy: Nonhegemonic Power Relations During World Order Transition', China International Strategy Review 6 (2024), 254-284 (264).

62 Armin Steinbach, 'The EU's Turn to "Strategic Autonomy": Leeway for Policy Action and Points of Conflict', EJIL 34 (2023), 973-1006 (978 f.).

63 Joan Miró, 'Responding to the Global Disorder: the EU's Quest for Open Strategic Autonomy', Global Society 37 (2023), 315-335 (330).

64 Steinbach (n. 62), 977-979.

65 Steinbach (n. 62), 1000-1004.

66 Schmitz and Seidl (n. 21), 837-839.

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article focuses mostly on the use of OSA as a doctrine to justify (economic) security-oriented measures and policies.[67] This ranges from the EU's ability to protect its own critical infrastructure to access to critical resources and minerals needed, among others, to guarantee security of energy supply or as essential inputs in the green energy transition.[68] At the same time, this also marks a departure from an understanding of security as entailing solely a defence and military nexus, which has a structural impact on decision-making processes in the Union, an aspect to which this article now turns.

III. The (New) Security Continuum. From CFSP/CSDP to the CCP

This section shows how the (institutional) evolution of security in the Union has developed. Starting from the orthodox position of a military-focused security intimately linked to – and strictly controlled by – the Member States under the CFSP/CSDP realm, a gradual transition is observed towards an amalgam of trade and security considerations operating under the CCP and influenced by a new geoeconomic logic.

1. The CFSP/CSDP: Highest Autonomy Level in the Most Geopolitically Charged Area

The Common Security and Defence Policy (former European Security and Defence Policy) is less than a quarter of a century old.[69] The Heads of State and Governments at the Cologne European Council, reacting to the Kosovo crisis, decided to add a security and defence component to the Common Foreign and Security Policy, which had been introduced only some years earlier with the Treaty of Maastricht. The CSDP was enshrined into primary law with the Treaty of Nice, the first CSDP military operations being already underway in Bosnia and Herzegovina. Subsequently, the Lisbon Treaty characterised the CFSP as an EU competence.[70] The CFSP/CSDP is characterised by considerable flexibility that should be viewed through the lens of

67 Steinbach, (n. 62), 992-1000.

68 Olimpia Fontana, Simone Vannuccini, 'How to Institutionalise European Industrial Policy (for Strategic Autonomy and the Green Transition)', Journal of Industry, Competition and Trade 24 (2024), 1-30, 20 (26 f.).

69 Cologne European Council, Conclusions of the Presidency (2-4 June 1999), Annex III: Presidency Report on Strengthening of the common European policy on security and defence.

70 Art. 24(1) TEU and Art. 2(4) TFEU.

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deference to the Member States, which have extremely broad latitude in this area. Flexibility differentiates CFSP/CSDP from other adjacent areas in the Union's constitutional structure.[71] A primary example of this flexibility can be seen with security opt-outs. A testament to the respect for Member States' choices in an area that lies at the heart of their sovereignty is Art. 42(2) Treaty on European Union (TEU).[72] The latter, accompanied by Declaration 13,[73] and Declaration 14,[74] annexed to the Lisbon Treaty confirm that national security considerations and fundamental choices are respected and are not second-guessed by the Common Security and Defence Policy of the EU. The opt-out for Denmark serves as an excellent example.[75] When the Maastricht

71 Panos Koutrakos, 'Foreign Policy Between Opt-Outs and Closer Cooperation' in: Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017), 405-424 (405 f.).

72 'The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements. The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.'

73 'The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations. The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.'

74 'In addition to the specific rules and procedures referred to in paragraph 1 of Article 24 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations. The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament. The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.'

75 Opt-outs can serve different purposes, including responses to Euroscepticism. See, for instance, Martin Moland, 'Opting Out of an EU Identity? The Effects of Differentiated Integration on European Identity', Journal of European Public Policy 31 (2024), 2515-2538 (2521 f.). This article only focuses on opt-outs that support the construction of a flexible CFSP/CSDP.

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Treaty established the EU and the CFSP was introduced as a formal part of its constitutional structure, Denmark rejected the Maastricht Treaty by referendum and was granted an express opt-out through a Decision of the Heads of Government and State adopted in Edinburgh in December 1992. The Protocol which formalised the Danish opt-out has been retained in every amendment of the Union's primary rules, although in 2022 Danish citizens voted in a referendum to abolish the opt-out.[76]

Indeed, Denmark had not taken part in the incremental institutionalisation of security and defence at the EU level, had stayed clear of military operations conducted under the CSDP umbrella, and had abstained from taking part in intergovernmental decision-making and implementation in the CSDP area.[77] In addition to the general opt-out of Denmark, EU law contains an *ad hoc* opt-out mechanism for Member States to facilitate the decision-making process.[78]

Flexibility supplements the bastion of Member State autonomy in the area of security and defence, which is the unanimity rule pursuant to Article 31(1) first subparagraph TEU:

> 'Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

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76 The Danish opt-out read as follows: 'With regard to measures adopted by the Council pursuant to Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously. For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.' (Art. 5, Protocol 22 on the Position of Denmark OJ C 326/1.). On the referendum to abolish the opt-out, see The Danish Parliament, 'The Danish Opt-Outs from EU Cooperation', <https://www.thedanishparliament.dk/en/eu-information-centre/the-danish-opt-outs-from-eu-cooperation>, last access 25 February 2026. See, also, Christos Karetsos and Alexandros Bakos, 'When Strategic Autonomy Meets the Common Foreign and Security Policy – Irreconcilable (Institutional) Paradigms or Untapped Synergies?' in: Narin Idriz, Eva Kassoti and Joris Larik (eds), *The Legal Implications of the EU's Geopolitical Awakening* (Centre for the Law of EU External Relations Papers 2025/1), 132-133.

77 Carolyn Moser, 'The War in Ukraine and Its Repercussions on Europe's "Security and Defence Constitution"', <https://constitutionnet.org/news/war-in-ukraine-repercussions-europe>, last access 25 February 2026.

78 Koutrakos (n. 71).

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This provision is a testament to the Member State autonomy in this area, which lies at the heart of the countries' sovereignty. The second subparagraph introduces the concept of constructive abstention[79] as an effort to ensure decision-making is not rendered ineffective by one or a small minority of countries.[80] However, its significance is extremely limited, since it has only been used rarely.[81] The same rule, of course, applies to the CSDP,[82] as the common security and defence policy is an integral part of the common foreign and security policy.[83]'

2. Integration in Security and Defence: Falling Short of Supranationalism

The Treaty of Lisbon approaches foreign, security and defence policy on the basis of a bifurcated approach.[84] On the one hand, the CFSP remains integrated within the EU External Action realm as a set of principles and objectives set out in Art. 21 TEU and applying both to the CFSP and to all other areas of EU external action (for instance, trade). On the other hand, numerous provisions highlight the distinct nature of the policy. Art. 40 TEU highlights the distinct position of the CFSP vis-à-vis other primary law rules, with the CFSP rules not being situated in the Treaty on the Functioning of the European Union (TFEU) together with other external action provisions, but in the TEU together with CSDP. In the same vein, Article 24(1) TEU states that the CFSP is subject to 'specific rules and procedures'.[85]

This reflects a quasi-intergovernmental paradigm in security and defence. On the one hand, Member States 'support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity'.[86] Further-

79 'When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted.' (Art. 31(1) second subpara. TEU).

80 Ana E. Juncos, Marianna Lovato and Karolina Pomorska, 'Coordinative Europeanization and Russia's War of Aggression: How Crises Shape Europeanization Dynamics in EU Foreign Policy', Comparative European Politics 23 (2024), 118-138 (127).

81 Koutrakos (n. 71), 408.

82 Art. 42(4) TEU.

83 Art. 42(1) TEU.

84 Koutrakos (n. 71), 410.

85 Panos Koutrakos, *The EU Common and Security Policy* (Oxford University Press 2013), 25-35.

86 Art. 24(3) TEU.

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more, pursuant to the mutual assistance clause,[87] there is even a duty of mutual aid and assistance in case of an armed attack. Yet, this should not diminish the fact that the duty of loyalty does not constitute a high threshold, capable of changing the status of the *quasi*-intergovernmental paradigm in security and defence. Ultimately, because of those considerations, and especially because of the decision-making process which renders the Member States the ultimate decision-makers, security and defence in the EU could be best framed within a quasi-intergovernmental paradigm rather than a supranational one.

3. Security Creep Through the 'Backdoor': Geoeconomic Thinking in a Supranational Context

Unlike the CFSP (and the CSDP), the CCP decision-making process follows different patterns. Qualified majority voting is the rule in this area.[88] Furthermore, the Union's exclusive competence over the CCP[89] (with limited exceptions, such as investor-state dispute settlement[90]) turns this policy area into a perfect breeding ground for technocratic policymaking driven by the Commission.[91] This comes across as an example of supranational integration that can contrast with the more politicised, slower, and often incomplete intergovernmental decision-making process characterising the CFSP/CSDP.[92]

Apart from their common status as essential to the EU's External Action, the CFSP/CDSP and the CCP apparently do not share many common elements. One deals with 'hardcore' state sovereign interests, often referred to as 'high politics'.[93] Geostrategic considerations that often amount to a realist vision of international relations drive such developments.[94] The other

87 Art. 42(7) TEU.

88 Melo Araujo (n. 16), 59; Ovádek and Raina (n. 16), 493; Freudlsperger (n. 16), 1655.

89 Art. 3(1)(e) TFEU.

90 ECJ, *Free Trade Agreement between the European Union and the Republic of Singapore*, opinion of 16 May 2017, case no. 2/15, ECLI:EU:C:2017:376, para. 293.

91 Pierre Haroche, 'A "Geopolitical" Commission: Supranationalism Meets Global Power Competition', J. Common Mkt. Stud. 61 (2022), 970-987; Verellen (n. 11), 1135-1137; Juncos and Vanhoonacker (n. 28), 960, 962 f.

92 Julian Bergmann and Patrick Müller, 'Failing Forward in the EU's Common Security and Defense Policy: The Integration of EU Crisis Management', Journal of European Public Policy 28 (2021), 1669-1687 (1670).

93 Panos Koutrakos, The European Union's Common Foreign and Security Policy After the Treaty of Lisbon (May 2017). Swedish Institute for European Policy Studies Report No. 3, available at: <https://sieps.se/media/cycixsce/the-european-union-s-common-foreign-and-security-policy-after-the-treaty-of-lisbon-2017_3.pdf>, 6, 52.

94 Ulrich Krotz and Richard Maher, 'International Relations Theory and the Rise of European Foreign and Security Policy', Wld. Pol. 63 (2011), 548-579 (548, 550, 557-561). Nonetheless, the author also discusses the impact of institutionalist and social constructivist accounts to explain developments in European Foreign and Security Policy.

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one deals with commercial relations, and engages aspects such as the pursuit of free trade, investment, supply chain diversification etc.[95] The apparently limited interaction between these two external relations areas makes it difficult, if not apparently impossible, to leverage one's instruments to achieve goals characteristic of the other. Yet, this is exactly the consequence of the OSA's malleability. The focus behind the concept has been on the bloc's ability to choose its own path, in accordance with its own values, and projecting those values externally through leadership while at the same time shielding itself from coercion and geopolitical threats.[96] This newfound strategic direction has led to common EU responses to external threats that have created the context for further integration. Such developments involved the leveraging of supranational decision-making processes to dynamically pursue goals traditionally reserved for Member State-level action. This was arguably the case with the Anti-Coercion instrument, a feature of the CCP but designed to respond to the dynamics of 'power-based trade relations'.[97]

EU policymakers such as the Commission increasingly act pursuant to a premise that the liberal international paradigm underlying global trade and investment flows does not reflect reality anymore.[98] In particular, neoliberal principles based on efficiencies resulting from free trade, comparative advantage, minimal regulation, and a rules-based multilateral order that have structured global markets are being replaced by a securitised awareness of the interdependencies created by such a networked global economy.[99] It is precisely this interdependence and openness to it that allow other geopolitical rivals to take measures that do not simply affect the EU's economic interests,

95 Thomas Cottier, 'Towards a Common External Economic Policy in the European Union' in: Marc Bungenberg and Christoph Hermann (eds), *Common Commercial Policy After Lisbon* (Springer 2013), 3-15 (14).

96 Frank Hoffmeister, 'Strategic Autonomy in the European Union's External Relations Law', CML Rev. 60 (2023), 667-700 (670).

97 Ljiljana Bukovic, 'The Lithuania-China Row: The European Union's Search for a Strategy and Instruments to Deal with China', Legal Issues of Economic Integration 50 (2023), 391-414 (401, 403-412); Ming Du, 'International Economic Law in the Era of Great Power Rivalry', Vand. J. Transnat'l L. 57 (2024), 723-794 (775); Freudlsperger and Meunier (n. 16), 1075 f.; Lukas Schaupp, 'Decoding the Intersection of Trade and Security in the EU's Anti-Coercion Instrument', European Foreign Affairs Review 29 (2024), 133-158.

98 Sjorre Couvreur, 'Inside the European Union's Trade Machinery: Institutional Changes in an Age of Geoeconomics', J. Common Mkt. Stud. 63 (2025), 284-301 (289-292).

99 Henry Farrell and Abraham L. Newman, 'Weaponized Interdependence. How Global Economic Networks Shape State Coercion', International Security 44 (2019), 42-79; Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment', JIEL 22 (2019), 655- (656 f.); Herranz-Surraellés, Damro and Eckert (n. 7), 921 f.; Collins (n. 55), 57.

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but also its security (for instance, lack of access to critical materials may affect energy security, or investors from hostile states may seek access to strategic infrastructure).[100] In turn, this determined the EU to develop the concept of OSA and to leverage its trade and investment policies to safeguard – among others – its economic interests by increasingly qualifying its openness in an interdependent world economy.[101]

To be clear, the argument made here does not assume a radical transformation in the EU's trade and investment policy.[102] In fact, as mentioned earlier, the EU's geoeconomic turn would ideally strike a balance between openness, multilateralism, and international cooperation, on the one hand, and autonomy, on the other.[103] As the Commission's 2023 Economic Security Strategy shows, no major U-turn in the Union's values has occurred.[104] This was further reiterated by the Commission in 2024, when it proposed five new initiatives to further improve the Union's economic security resilience (those include outbound Foreign Direct Investment (FDI) screening and export controls on dual-use technologies that affect the EU's security).[105] Institutionally (for instance, within the Commission's Directorate-General (DG) Trade), there remains a culture that embraces neoliberal thinking and open-

100 See, for instance, Fontana and Vannuccini (n. 68).

101 See Section II.

102 See also, Couvreur (n. 98), 284.

103 Gesa Kübek and Isabella Mancini, 'EU Trade Policy Between Constitutional Openness and Strategic Autonomy', Eu Const. L. Rev. 19 (2023), 518-547 (546) (concluding that the Treaties leave ample space to policymakers to balance openness and the pursuit of values such as security); Schmitz and Seidl (n. 21), 845; Steinbach (n. 62), 1001 f.

104 'The EU is one of the most attractive destinations for global companies and for investment. Our economies thrive on open and rules-based trade and investment, on secure cross-border connectivity and collaboration on research and innovation. These elements will remain critical drivers of European competitiveness and resilience as we speed up the twin green and digital transitions. We need to rely on trade and on the Single Market to spur competition and ensure that we have access to the raw materials, technologies, and other inputs which are crucial for boosting our competitiveness, resilience and for sustaining current and future employment and growth. Similarly, we want our partners around the world to continue to benefit from access to the European markets, capital and technologies for their transition to a clean and resilient economy. Getting this balance right is essential and can ensure that our economic and security interests reinforce each other. Achieving this will depend on the following three priorities: (1) promoting our own competitiveness; (2) protecting ourselves from economic security risks; and (3) partnering with the broadest possible range of countries who share our concerns or interests on economic security' (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, European Council and the Council on 'European Economic Security Strategy', JOIN(2023) 20 final).

105 Communication from the Commission to the European Parliament and the Council, 'Advancing European Economic Security: An Introduction to Five New Initiatives', COM (2024) 22 final, 1-2, 4.

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ness in trade policy.[106] Thus, even as the geoeconomic turn unearths a changed approach to external economic relations it requires a balancing act between sometimes competing sets of interests.[107] Guaranteeing the bloc's (economic) security interests through the implementation of geoeconomic instruments requires a departure from a total adherence to a rules-based multilateral order, based on free trade and open borders. Such instruments enable the EU, for instance, to react to supply chain disruptions,[108] the use of foreign investment to gain control or, at least, entry to strategic assets of EU Member States,[109] or to secure access to critical raw materials.[110]

Ultimately, what those developments mean, however, is that the EU's almost blind adherence to a liberal international order is over, with the rules of the game having changed. The EU now pursues a more assertive trade policy. It can make use of market tools both to further free trade goals and to protect itself from (economic) coercion. As an example of the former, it may negotiate market access commitments with countries such as Viet Nam.[111] At the same time, the Union might scrutinise foreign actors looking to acquire access to strategic assets in the internal market. It can do this, for example, via

106 Ferdi de Ville and Jan Orbie, 'The European Commission's Neoliberal Trade Discourse Since the Crisis: Legitimizing Continuity Through Subtle Discursive Change', The British Journal of Politics and International Relations 16 (2014), 149-167; Schmitz and Seidl (n. 21), 839-841; Couvreur (n. 98), 291. But see Martin Guzman and Joseph E. Stiglitz, 'Post-Neoliberal Globalization: International Trade Rules for Global Prosperity', Oxford Review of Economic Policy 40 (2024), 282-306 (294) (discussing industrial policymaking in the EU and, by reference to the Commission's published strategies, showing how since 2012 the Commission's approach to intervening in the economy has changed). On the role of industrial policy in the EU's geoeconomic turn, see Jan Ruck, 'A Geoeconomic Fix? European Industrial Policy on Semiconductors Amidst Global Competition', J. Common Mkt. Stud. 64 (2024), 742-761 (748-756) (focusing on the semiconductor supply chain); Daniel Fiott, 'From Liberalisation to Industrial Policy: Towards a Geoeconomic Turn in the European Defence Market?', J. Common Mkt. Stud. 62 (2024), 1012-1027 (1014-1016) (focusing on defence industrial policy); Sergio Mariotti, '"Open Strategic Autonomy" as an Industrial Policy Compass for the EU Competitiveness and Growth: The Good, the Bad, or the Ugly?', Journal of Industrial and Business Economics 52 (2025), 1-26. On the increasing inter-connection between trade and industrial policies, see Scott Lavery, 'Rebuilding the Fortress? Europe in a Changing World Economy', Review of International Political Economy 31 (2024), 330-353 (331, 346-349).

107 Schmitz and Seidl (n. 21), 845; Juncos and Vanhoonacker (n. 28), 962 f., 966; Laia Comerma, 'China as a Catalyst to the European Union's Trade Defence Instruments', J. Common Mkt. Stud. 64 (2025), 693-719 (694 f., 709).

108 Schmitz and Timo Seidl (n. 21), 846.

109 Rosen and Meunier (n. 8).

110 For instance, see John Seaman, 'Critical Raw Materials, Economic Statecraft and Europe's Dependence on China', The International Spectator 60 (2025), 20-37.

111 For instance, Arts 8.4 and 8.10 of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (signed 30 June 2019; entered into force 1 August 2020).

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the screening of inbound FDI. It can also act by investigating foreign subsidies (and eventually imposing remedies) given to an EU company controlled by a third-state party.[112]

While commendable in terms of awareness of the changing nature of the global order, the EU's geopolitical awakening raises legitimacy issues. These stem from the fact that the Union's institutional structure finds its legitimacy in two sources: the European Parliament (as a representative of the citizens), and the Member States.[113] As such, Union action must always follow the limits set by the Member States. This results primarily from the principle of conferral and the division of competences as set out in the treaties.[114] However, the dividing line between Union and Member State competence is not always clear. That means that legitimacy issues can arise from exploiting the unclear separation of competences in those situations in which the existing balance between EU and Member State action is upended. The leveraging of tools once conceived as purely market-oriented for geopolitical and strategic purposes represent an instance of unclear separation between the sphere of Union action and the reserved (policy) space of Member States.[115] For example, the legal bases for the adoption of the Foreign Subsidies Regulation are Arts 114 (internal market) and 207 (CCP) TFEU. Yet few would doubt the geoeconomic and strategic relevance of the FSR.[116] It arose in the context of an increasingly contested World Trade Organization,[117] especially as the Subsidies and Countervailing Measures Agreement only applies to subsidies

112 Foreign Subsidies Regulation (n. 24).

113 Amichai Magen and Laurent Pech, 'The Rule of Law and the European Union' in: Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar 2018), 235-256 (252-253).

114 ECJ, *EU-Canada CET Agreement*, opinion of 30 April 2019, opinion no. 1/17, ECLI:EU:C:2019:341, para. 110; Luke Dimitrios Spieker, 'Was Grimm Wrong? Putting the Over-Constitutionalization of EU Law to the Test', GLJ 25 (2025), 416-448 (441 f.).

115 This is not to say that EU trade policy has never been influenced by politics or used as a tool to achieve political goals. However, with the rise of the EU's Open Strategic Autonomy paradigm, there has been a metamorphosis from a possible understanding of global trade that can be influenced by external events to an actual acknowledgement that trade can play a major geopolitical and geostrategic role (but see, for a more nuanced assessment, Milan Babic, 'State Capital in a Geoeconomic World: Mapping State-Led Foreign Investment in the Global Political Economy', Review of International Political Economy 30 (2023), 201-228 (206-209)). It is this change in narratives/paradigms that drive the reconceptualisation of trade and especially the – sometimes competing – values that underpin policymaking in this area. See, for instance, Christou and Damro (n. 19), 1091 f.

116 Thomas Verellen and Alexandra Hofer, 'The Unilateral Turn in EU Trade and Investment Policy', European Foreign Affairs Review 28 (2023), 1-14 (9); Hoffmeister (n. 96), 679 f.

117 But see, for a more nuanced assessment, Gabrielle Marceau, Jian Ling Teo and Sean Rappa, 'Navigating the New Frontiers in International Trade: The World Trade Organization as a Global Governance Forum', Journal of World Investment & Trade 26 (2025), 333-374.

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for goods and not services or investments.[118] The adoption of the FSR was also driven by the global competition for subsidisation,[119] where industrial powers such as China or the United States heavily subsidise their domestic champions, which eventually compete with European firms – either in global markets or in the Union's Single Market.[120] Other tools, such as the Anti-Coercion Instrument, also connect the trade sphere with the Union's security interests (the exploitation of economic interdependence can create security risks).[121]

Although, as it stands right now, the use of market tools and CCP instruments to attain security objectives may pose legitimacy problems, this is not necessarily wrong legally and institutionally.[122] For instance, Article 206 TFEU, which sets the main goals of the CCP, provides that 'the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. Focusing exclusively on this treaty provision might lead one to believe that using trade and investment instruments for ulterior strategic purposes defeats the purposes and limits of the CCP. However, the CCP forms part of the EU's External Action and needs to be developed in a way that also accounts for its broader objectives.[123] Certain general objectives, found in Art. 21(2) TEU, allow the EU to pursue strategic goals (in response to geopolitical events and developments) as part of its external action. Whether this applies or not to the CCP, however, remains debatable. Commentators have argued that those parts of Art. 21(2) that focus on purely strategic, defence, and security issues can only be pursued via CFSP mechanisms.[124] Nonetheless, conflation between policy objectives may still occur.[125]

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118 Nerina Boschiero and Stefano Silingardi, 'The EU Trade Agenda – Rules on State Intervention in the Market', GLJ 24 (2024), 151-178 (160 f., 166); Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO', CML Rev. 60 (2023), 925-958 (926, 939).

119 Herranz-Surraellés, Damro and Eckert (n. 7), 932.

120 Simon J. Evenett, 'Economic Statecraft: Is There a Sub-National Dimension? Evidence from the United State-China Rivalry', World Trade Review 20 (2021), 220-237 (220-222); Boschiero and Silingardi (n. 118), 152; Frank, (n. 118), 948, 956; Verellen and Hofer, (n. 116), 4 f.

121 Bukovic (n. 97), 401, 403-12; Du (n. 97), 775; Freudlsperger and Meunier (n. 16), 1075 f.; Schaupp (n. 97).

122 Jiří Přibáň, 'European Constitutional Imaginaries: A Socio-Legal Perspective', European Law Open 4 (2025), 387-401 (400).

123 Art. 207(1) TFEU; Hoffmeister, (n. 96), 673.

124 Lonardo (n. 26), 65 f.

125 Lonardo (n. 26), 66.

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It has also been argued that the goals found in Art. 21(2)(a) TEU (which also includes the pursuit of security in general) should be assigned to the CFSP.[126] The differentiation between economic and social objectives, on the one hand, and the foreign policy and security ones, on the other – with the latter coming under the ambit of the CFSP and entailing specific processes and decision-making patterns, has also been suggested.[127] Yet, with the relative novelty of the concept of economic security,[128] any clear settlement of such debates might not be forthcoming. As safeguarding the resilience of the European economy has become a major strategic goal that contributes to reinforcing European sovereignty,[129] the use of economic instruments to react to geopolitical developments has increased.[130] Tools such as the Anti-Coercion Instrument, for instance, enable reactions to economic coercion.[131] An example can be seen with the Chinese trade embargo on Lithuania, an EU Member State, for its willingness to develop relations with Taiwan by opening a representative office on the latter's territory.[132] Other tools, such as the Chips Act, seek to address structural independencies that can lead to exploitation in the semiconductor supply chain, as Europe accounts for only 9 % of the global semiconductor production.[133]

IV. The Commission's Balancing Act

Before the Commission can navigate the changing global economic order and leverage the OSA doctrine to address security risks, it needs to garner support from stakeholders who are impacted by such processes, particularly the Member States. This is especially the case when considering the *shadow* integration processes that accompany the geoeconomic turn. One way through which such support can be obtained is through narrative-building and issue framing.[134] If

126 Peter van Elsuwege, 'EU External Action aAfter the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency', CML Rev. 47 (2010), 987-1019 (1006).

127 Panos Koutrakos, *EU International Relations Law* (Hart 2013), 420.

128 The EU's geoeconomic turn and the turn to the pursuit of economic security and open strategic autonomy seems to have picked up mostly after 2017. See, for instance, Hoffmeister (n. 96).

129 Juncos and Vanhoonacker (n. 28), 968.

130 European Commission (n. 20), 7-11.

131 Anti-Coercion Instrument (n. 4).

132 Szép (n. 4), 132 f.

133 Dür, Mateo and Visart (n. 60), 16-20.

134 Christou and Damro (n. 19), 1082-1084; Anna Kyriazi, 'Framing the EU Polity: How Commission Presidents Address Crises and Shape the Union', Journal of European Integration 48 (2026), 23-43 (26). See, also, Andrea Capati, 'The Discursive Framing of European Integration in EU-Wide Media: Actors, Narratives and Policies Following the Russian Invasion of Ukraine', Comparative European Politics 23 (2025), 271-299.

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successful, a narrative-building exercise can translate to ideational power that ultimately persuades stakeholders of the salience of a risk and reinforces the central role of the actor benefitting from such leverage in addressing that risk.[135] Put differently, an effective framing exercise can even shape reality and its perception by the addressees of that framing act.[136] This is not too different to the securitisation processes characteristic of the transition from a defence-military conception of security to a more open one, which includes economic security.[137]

At the same time, the Commission needs to engage with various stakeholders, who sometimes have diverging interests. This explains why geopolitical threats and security risks will not always feature in the Commission's portrayal of Union integration and its causes. For instance, the Legal Service's Book focuses less on geopolitical developments, with only the occasional mentioning of how such events determine changes in EU policies, decision-making patterns, or institutional and constitutional developments. Outside of several references to aspects such as the war in Ukraine,[138] or to the need to secure 'strategic reserves' of energy supplies,[139] no comprehensive account of how geopolitics impact EU integration can be found. The Book mostly presents a neofunctionalist view of integration, focusing on the citizen as the central stakeholder in EU governance.[140] Such a view also assumes that law itself has been the driving tool of European integration,[141] minimising the relevance of political interests or other contingencies. This also likely explains why there are only two dedicated

135 Juncos and Vanhoonacker (n. 28), 957 f.

136 Kathleen R. McNamara, *The Politics of Everyday Europe: Constructing Authority in the European Union* (Oxford University Press 2015), 16, 150-154; Kyriazi (n. 134), 4-5, 16.

137 For more details on how securitisation processes involve a speech act that seeks to persuade an audience of the salience and urgency of a (perceived) threat, see Korkea-aho and Lonardo (n. 8), 7. Similarly, but focusing on the leveraging of crises to deepen integration, see Kyriazi (n. 134), 25-27.

138 For instance, see Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law', in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023) ('[T]he comprehensive set of economic sanctions on Russia and the procurement of arms for Ukraine have pushed the common foreign and security policy into new territory').

139 Dimitrios Triantafyllou and Luigi Malferrari, 'The European Commission: The Clock Master of the European Union Internal Market' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 311-334 (320).

140 Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (17).

141 Calleja and Rusche (n. 140), 17.

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chapters to the Union's External Relations,[142] otherwise there being only limited references dispersed throughout chapters that have a different focus. There are only a few mentions of the CFSP and defence interests, and even those are structured in terms of strengthening cooperation in this area, without the analysis delving into patterns of change in the underlying paradigms.[143] References to the CCP are indeed more widespread,[144] but it still represents an exercise in cherry-picking those developments that support the narrative of a liberal and values-oriented Union acting on the external scene, especially to promote human rights and sustainability.[145] Mentions of geoeconomic determinants of Union action, however, are inexistent. Furthermore, there has only been a brief reference to 'Strategic Autonomy', in respect of the development of the Union's own satellite navigation system, Galileo – although this was discussed in the context of an overview of the historical development of EU law.[146]

It is true that the Legal Service's Book does admit at one point that geopolitical developments may have an impact on European integration. However, it does this by acknowledging geopolitics as a *challenge* to integration and not as an actual driver of integration:

> '[A]s European integration tries to progress in the face of major economic, geopolitical, public health and technological challenges, it is much more important that the Commission ensures that the clock in its own clock tower is functioning

142 A recurring pattern with both chapters is that they both show how the Union is leveraging its (market) power to ensure global respect for two of its fundamental values: human rights and environmental protection. While the focus of those chapters on aspects of fundamental importance for the Union's External Action is commendable, those do not entail major security and strategic considerations, and they do not focus on geopolitical dynamics. See Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission (ed.), *70 Years of EU Law: A Union for its Citizens* (2nd edn, Publications Office of the European Union 2023), 76-94. See, also, James Flett, 'The European Union Carbon Border Adjustment Mechanism and Its Consistency with World Trade Organization Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023) 272-294.

143 Calleja and Ladenburger (n. 138), 388-390.

144 There are only two mentions of the CCP in the book (besides a reference to it in respect of historical legal developments), both in the context of leveraging the Union's market power to promote universal respect for human rights. See Liberati, Ramopoulos and Bianchi (n. 142), 89. There are, however, multiple references to aspects involving trade policy.

145 As others have shown (for instance, see Henri de Waele, 'Beyond the Posture, Beyond the Pale – Assessing the EU's Real Record as An International Human Rights Actor', HJIL 86 (2026), 245-260, the Legal Service also engages in cherry-picking exercises when promoting an impeccable human rights record.

146 Calleja and Rusche (n. 140), 22.

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well and that the clocks of the other churches in the town are in sync with it, in order to effectively pursue the same public objectives.'[147]

Nonetheless, by reading between the lines one may conclude that the Legal Service is, even if in a brief and fragmentary fashion, acknowledging the impact that geopolitical developments may have on European integration. The reference to 'public objectives' and pursuing them in the context of geopolitical contingencies, ensuring a calibration between the functioning of the Commission's 'clock tower' and those of 'other churches' suggests that such contingencies are sometimes the actual catalyst to further integration.

At the same time, deeper engagement with the geopolitical context would have provided a more elaborate conceptualisation and theoretical understanding of European integration. It would have meant going beyond a neofunctionalist view and understanding that European integration can sometimes occur not because of a spillover from prior integration,[148] but because of external threats.[149]

A valid question that arises at this point, however, is whether the Legal Service should have engaged in any form of analysis or discussion of integration driven by geopolitical developments when the goal was apparently much narrower – simply to emphasise the role of law in European integration, which is undeniable. While valid, such a question would fail to properly contextualise the often-dichotomous nature of geopolitics and law. Each has often been presented as a counterweight to theoretical accounts that overly-emphasise the role of the other in European integration.[150] Thus, failure to at least acknowledge the role that geopolitics plays in EU integration risks distorting the importance of law. Furthermore, focusing on geopolitical developments can also explain why integration has sometimes not been achieved despite the existence of otherwise favourable conditions because of prior integration in adjacent areas. One example is energy security, the energy mix, and the choice of suppliers, where geopolitical imperatives guide na-

147 Triantafyllou and Malferrari (n. 139), 311.

148 Ernst B. Haas, *The Uniting of Europe. Political, Social, and Economic Forces 1950-1957* (University of Notre Dame Press 2004), xiv-xvii; Sophie Meunier, 'Integration by Stealth: How the European Union Gained Competence Over Foreign Direct Investment', J. Common Mkt. Stud. 55 (2017), 593-610 (594); Schmidt (n. 6), 3350, 3352 f.

149 See, for instance: Niklas Helwig, The EU's Accidental Geopolitics: Europe's Geopolitical Adaptations and Limitations (May 2024). Finish Institute of International Affairs (FIIA) Working Paper No. 138, available at: <https://www.fiia.fi/wp-content/uploads/2024/05/wp138_the-eus-accidental-geopolitics.pdf>.

150 Schmidt (n. 6), 33.

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tional interests and prevent a cohesive approach at Union level.[151] While Russia's invasion of Ukraine has led to a diversification of energy suppliers and a decrease in dependence on Russian gas,[152] it is too early to tell if this will have long-term structural effects on European integration or it remains an isolated response to a crisis.[153]

At the same time, different contexts may entail different approaches to narrative building. As already mentioned, when President von der Leyen, prior to the start of her first mandate, presented the College of Commissioners before the EU Parliament, she explicitly acknowledged the fact that this Commission would act within a geopolitically volatile world.[154] Thus, the Commission balances between explicitly acknowledging geopolitical threats (and the way it pursues decision-making in response to them) and focusing on other causes of European integration and on other drivers of European values, such as an adherence to a liberal-based order, turning on transparency and openness. While understandable, this approach may risk keeping artificially separate areas which mutually influence each other (such as CFSP and CCP). Another instance of the Commission (or its representatives) acting in a geopolitically aware manner can be seen with former Commission President Juncker's State of the Union address in 2015 – explicitly linking deeper integration to respond to geopolitical developments such as Russia's annexation of Crimea in 2014.[155] Furthermore, the Commission may selectively address geopolitical threats, especially when they expose the

151 Oriol Costa and Esther Barbé, 'A Moving Target. EU Actorness and the Russian Invasion of Ukraine', Journal of European Integration 45 (2023), 431-446 (434); Leigh Hancher and Adrien De Hauteclocque, 'Strategic Autonomy. REPowerEU and the Internal Energy Market: Untying the Guardian Knot', CML Rev. 61 (2024), 55-92 (56 f., 72 f.); Aline Bartenstein, 'Beyond Crisis: The Temporal Dynamics of Solidarity in EU Energy Governance', Journal of European Integration 47 (2025), 1-21 (2 f.).

152 Tomasz Jerzyniak and Anna Herranz-Surrallés, 'EU Geoeconomic Power in the Clean Energy Transition', J. Common Mkt. Stud. 62 (2024), 1028-1045 (1035).

153 This is not to say that the context for deeper integration in the energy sector that would eventually extend to aspects such as the energy mix and choice of suppliers is lacking. For instance, the increasing calls for a Union industrial policy would also involve addressing considerations such as security of energy supply and the development of an industrial base that would facilitate the green energy transition. See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A New Industrial Strategy for Europe. COM (2020) 102 final, 3, 8. There also was an update to the Industrial Strategy in 2021. See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe's Recovery. COM(2021) 350 final, 4, 11.

154 European Commission (n. 17).

155 Juncker (n. 31).

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limits of Union action. This was the case, for example, with concealing both the Union's failure to contain Russia's aggression since the 2000s (for instance, the invasion of Georgia) or the high degree of dependence on the US to address Moscow's invasion of Ukraine.[156]

V. Conclusion

External threats have led to a geopolitical and geoeconomic awakening in the Union. Adapting to such challenges, the EU is becoming more pragmatic, and this pragmatism is reflected in its new *dogma*. The OSA doctrine facilitates the Union's geoeconomic pivot through the leveraging of market tools to attain security goals outside the traditional intergovernmental frameworks where they naturally belong to, opting for supranational structures. Bringing security considerations under more flexible frameworks (such as the qualified majority umbrella of the CCP in terms of decision-making), bypassing the CFSP constraints (including unanimity voting) can trigger legitimacy issues. Deploying constructively vague terminology (such as 'Open Strategic Autonomy') that can accommodate such policies, which are, nonetheless, informed by geopolitical and geoeconomic necessity, also entails similar risks. 'Traditionalism' is abandoned in the security paradigm as a whole. The bloc is moving from a traditional – and until recently prevailing – closed understanding of security, which is military and defence-oriented, to a more open one. This latter paradigm revolves around *economic security*, which encompasses a wider array of factors and considerations, becoming increasingly harder to distinguish itself from purely economic interests.

These developments cannot continue to be seen as separate and unconnected episodes. They demand a more rigorous theoretical conceptualisation. They must be seen as a continuum which influences the integration process, even inadvertently. Ultimately, geopolitics can drive integration. This is precisely the perspective that the Commission's book overlooks. Although the dust has not settled yet, it is already evident that the analysis of the EU's geoeconomic pivot cannot and should not be restricted by looking at it as just another EU policy. It must be seen as a paradigm shift with far-reaching consequences. Failure to consider the implications of such developments can potentially have incalculable consequences not only for integration *per se* but for the European project as a whole, even more so in a (geo)politically fragile continent.

156 Kyriazi (n. 134), 36.

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Is It Enough to Say 'Common Values' When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order

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Abstract

The contribution critically examines the idea that the common values from Art. 2 of the Treaty on European Union (TEU) constitute the identity of the European Union (EU) legal order. This idea, formulated by the Court of Justice in the rule of law conditionality decisions, has been endorsed by many lawyers and scholars, including Julio Baquero Cruz and Jean-Paul Keppenne in their chapter in the book on 70 Years of EU Law. The contribution engages with the fundamental normative claims behind the conception of EU common values as identity. First, it argues that, based on the EU constitutional discourse, any conception of the EU legal order's identity or essence cannot easily exclude the Treaty aims of pursuing peace and the socio-economic well-being of European peoples. Second, the paper submits that, despite the scholarly praise of 'identity based on commonality', the concept

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of identity suggested by the Court does not essentially differ from other constitutional concepts insofar as it conceals inevitable political disagreements, tensions, and choices. It is essentially particularistic due to its interpretative contestability, as well as its selective legislative enhancement and institutional implementation.

Keywords

EU Common Values – Article 3 TEU – Identity of the EU Legal Order – European Integration

I. Introduction

This contribution critically analyses the Court of Justice's (the Court) framing of the common values from Art. 2 TEU as the identity of the EU legal order.[1] In particular, the analysis enters into dialogue with Julio Baquero Cruz and Jean-Paul Keppenne from the Legal Service of the European Commission,[2] who comment on the Rule of Law Conditionality Regulation (the Conditionality Regulation)[3] and on the judgements of the Court of Justice confirming the legality of this Regulation.[4] Neither the judgements, nor their account elaborate on the conception of identity, for example, regarding the criteria for deciding what falls under the label of identity, or whether or not the latter should capture more than the common values from Art. 2 TEU. This contribution challenges the two fundamental normative premises of the chapter, which, as will be shown, have broader resonance in the EU legal scholarship. These premises, concerning the understanding of rule of law in the EU, can be summarised as follows:

1 Some arguments in this contribution partly develop and build on fragments of Chapter 4 of my doctoral dissertation, titled 'The Intellectual Sources of the European Union's Response to the Rule of Law Crisis in the Member States' (European University Institute 2024, unpublished).

2 Julio Baquero Cruz and Jean-Paul Keppenne, 'Fundamental Values, Constitutional Identity and the Protection of the European Union Budget Against Breaches of the Rule of Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 54-71.

3 Regulation 2020/2092/EU/Euratom of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L 433I.

4 ECJ, *Hungary v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98.

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1) The Court of Justice's way of framing of the common values from Art. 2 TEU in the conditionality decisions is laudable as 'a strong restatement of the essence of European integration'[5] and of the 'constitutional identity' of the EU'[6];
2) This conception of identity by its very nature differs from the formulations of constitutional identity articulated by some national courts. Because the EU's conception of identity is based on the common values from Art. 2 TEU, it is 'an identity based on commonality, that is what binds us together as Europeans, and not on what separates the peoples of the EU or their legal orders'.[7] Unlike national versions, this notion of identity is not particularistic, exclusive or aggressive.

Common sense suggests that the conception of identity, if pronounced from a supranational point of view, will be naturally more inclusive and peaceful than its national versions. The adaptation of the notion of constitutional identity by the Court of Justice has been welcomed by many scholars as the EU response to illiberal identitarian claims made by national authorities.[8] This chapter attempts to critically reflect on this conceptual choice.

Section II provides the argument that a conception of the identity of the EU legal order focusing only on the common values from Art. 2 TEU without a conceptual justification for this focus is inevitably reductive and vulnerable to criticism for arbitrariness. As stems from the content of Treaty provisions, their relevant historical contexts, as well as scholarly commentaries, the pursuit of peace and of the socio-economic well-being of European peoples may not be easily excluded from any conception of identity or essence of the EU. Next, the contingency of the use of the notion of identity is illustrated. For this purpose, the focus is put on the case *RT France*, in which the General Court relied on the Treaty aim of the pursuit of peace to confirm prohibitive measures against an outlet spreading war propaganda. In remains unclear why the protection and promotion of peace have not received the label of identity, in contrast to the protection of common values.

Section III restates how Baquero Cruz and Keppenne understand the notion of identity of the EU legal order as a version of constitutional identity which is inclusive, coherent, holistic, and non-particularistic. The section challenges this understanding by drawing on the broadly conceived political

5 Baquero Cruz and Keppenne (n. 2), 69.
6 Baquero Cruz and Keppenne (n. 2), 69.
7 Baquero Cruz and Keppenne (n. 2), 69.
8 An example of early positive reaction to the judgements, celebrating '"constitutional identity" in EU terms', can be found in: Pietro Faraguna and Tímea Drinóczi, 'Constitutional Identity in and on EU Terms', Verfassungsblog, 21 February 2022, doi: 10.17176/20220222-001059-0.

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constitutional theory. From this perspective, constitutional notions such as the concept of identity constructed by the Court are essentially particularistic because of their interpretative contestability, as well as their selective legislative enhancement and institutional implementation. The seemingly universal and inclusive notion of EU constitutional identity conceals inevitable political disagreements, tensions, and choices to be made. This argument is further developed in a brief critical engagement with the scholarly call – advanced by Jürgen Bast and Armin von Bogdandy – for a principled constitutional transformation of the EU legal order in line with its normative core. The section is followed by concluding remarks.

II. Common Values and Beyond

1. Common values … and Some Other Important Issues

The text of Baquero Cruz and Keppenne is a distinct chapter of the book on 70 years of EU law, prepared by the Legal Service of the European Commission ('the Book'). On the one hand, it belongs to the first part of the book, which discusses the very 'fundamentals' of the EU legal order, along with the chapter on the general issues of common values,[9] and the chapter on the EU as a promoter of human rights in the world.[10] That part precedes more specific analyses of various areas and topics of EU law. On the other hand, the chapter is a commentary on the concrete and recent judgements, that confirmed the validity of the mechanism of horizontal conditionality for the protection of the EU budget and introduced the notion of common values as the identity of the EU legal order. In fact, the paradoxes and tensions between the universal and the particular, the comprehensive and the fragmentary, the primordial and the nascent, permeate the conception of identity as introduced by the Court and endorsed by the chapter's authors.

In their chapter, Baquero Cruz and Keppenne go as far as to claim that by stressing the need to promote and defend common values as the EU's identity, the Court restated 'the essence of European integration'.[11] While common values from Art. 2 TEU are central to the political project of the European

9 Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 34-57.

10 Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 76-94.

11 Baquero Cruz and Keppenne (n. 2), 69.

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Union, the question remains, however, whether they normatively exhaust the scope of what one may legitimately call the identity of the EU legal order and of the essence of European integration. After all, in its conditionality judgements, the Court stated that common values 'are an integral *part of* [emphasis added] the very identity of the European Union as a common legal order'.[12] This wording could suggest that the Court's conception of identity of the EU legal order might be expanded beyond common values from Art. 2 TEU.

From a historical point of view, as is well known, European integration had centred around the values and aims beyond the content of today's Art. 2 TEU, including peace, economic integration, and prosperity of the European people. The sustenance of peace as the aim of the EU has philosophical underpinnings, sometimes being linked, for example, to Immanuel Kant's project of perpetual peace.[13] This broader normative foundations of the EU have already been noted in EU constitutional scholarship,[14] and are evident from the wording of the preamble and the first provisions of the very Treaty of Paris, celebrated by the book.[15] Indeed, the book's introductory chapters underline both the historical and the contemporary relevance of European integration's aims of peace, prosperity, and solidarity.[16] Noteworthily, in another context, also Julio Baquero Cruz stressed the continuing relevance of the preservation of peace in the post-Maastricht Union, maintaining that '[e]ven today, integration can only be properly understood as a conscious self-limitation and safeguard against the recurrent tragedies and lawlessness of war, i. e. as a means to secure peace'.[17]

In addition to these historical considerations, the present Treaty wording seems to suggest that those who wish to search for 'the essence of European

12 ECJ, *Republic of Poland* (n. 4), para. 264.

13 See Immanuel Kant, *Perpetual Peace: A Philosophical Proposal*, translated by Helen O'Brien, with an introduction by Jessie H. Buckland (Sweet & Maxwell 1927), in particular 29-32. For a critical account of analogies between Kant's theory and the EU, see Garrett Wallace Brown, 'The European Union and Kant's Idea of Cosmopolitan Right: Why the EU Is Not Cosmopolitan', European Journal of International Relations 20 (2013), 671-693.

14 Joseph H. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay' in: Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012), 137-158.

15 Preamble, Arts 1-2 of Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951). See also for that matter: The Schuman Declaration (Paris, 9 May 1950).

16 Roberta Metsola, 'Guest Contribution "Rights"' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 8-10; Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 11-28 (15 f.).

17 Julio Baquero Cruz, What's Left of the Law of Integration? Decay and Resistance in European Union Law (Oxford University Press 2018), 23.

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integration', should also look beyond the values of Art. 2. The next Treaty provision, Art. 3 para. 1 TEU, contains common values along with peace and 'the well-being of its [the EU's] peoples' as the goods to be promoted by the EU. The promotion of these goods amounts to '[t]he Union's aim'. The remainder of the text of Art. 3 TEU includes more specific 'policy-area related objectives',[18] concerning the area of freedom, security and justice, internal market and sustainable development, and the economic and monetary union.[19] In addition, the aims of the promotion of values, peace and the well-being of its peoples shall guide the EU's relations with neighbouring countries.[20]

The wording of Art. 3 para. 1 TEU thus sets common values, peace, and the well-being of the Union's peoples as the three equal component parts of the EU's teleology. It is true that 'peace' and 'the well-being of European peoples' are general, relatively little-specified terms, also in comparison to the recently developing Court's case law on the rule of law as a common EU value. Art. 3 para. 1 TEU however could gain more practical relevance both through EU legislative process and through the interpretation of EU legislation. The mainstreaming of EU aims beyond common values would then be subject to concrete political choices. Treaty law certainly allows for such political process, and does not determine the prioritisation of the promotion of common values over the promotion of peace and the well-being of European peoples.

Even if the aims from Art. 3 para. 1 TEU could not be independently and directly enforceable,[21] the Court and other institutions could concretise their meaning and implications in connection to specific Treaty obligations.[22]

18 Marcus Klamert, 'Art. 3 TEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019), 33 (paras 8 f.).

19 Art. 3 paras 2-5 TEU.

20 Dimitry Kochenov, 'Art. 8 TEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019), 102 (para. 8).

21 See Klamert (n. 18), paras 3-4. Klamert understands Art. 3 TEU as only programmatic, but indicates Karl-Peter Sommermann's comments on Article 3 TEU as representing 'a different perspective' on the binding character of this provision. The latter perspective certainly entails a more direct role for the provision in the interpretation of EU law both by EU institutions and by the Member States. See Klamert (n. 18), para. 3. See. Karl-Peter Sommermann, 'Art. 3 [The Objectives of the European Union]' in: Hermann-Josef Blanke, Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer-Verlag 2013), 158-168 (paras 1-23).

22 For a sceptical discussion of the 'the direct and autonomous enforceability of Article 2 TEU in infringement actions', following the recent Commission's action in CJEU, *Commission v. Hungary*, Case C-769/22 after a series of CJEU's decisions linking Article 2 TEU to other provisions, see: Matteo Bonelli and Monica Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary', Maastricht J. Eur. & Comp. L. 30 (2023), 3-14.

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Hence as Karl-Peter Sommermann claims, all EU organs shall interpret EU law in conformity with the objectives included in Art. 3 TEU.[23] For Sommermann, these objectives, '[a]longside with the other policy goals and values, set out in the Preamble, in Art. 2 TEU, in **cross-sectional clauses** [bold in the original] such as Arts 8-13 of the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights, constitute a sophisticated framework of guiding principles which determine *the identity of the Union* [emphasis added] and promote a unity of action'.[24]

This interpretation of 'the identity of the Union' is particularly broad and it would make the judicial operability of the notion of identity even more contestable. However, if one wants to seek 'the identity' or 'the essence' of the EU legal order, the wording of the Treaties leaves no reason to favour the values from Art. 2 TEU over the two other component parts of Art. 3 para. 1 TEU. The aim of the promotion of peace and well-being is in fact in many respects historically more typical to European integration than the values from Art. 2 and, as Sommermann notes, even to constitutionalism in general.[25]

Indicating Art. 2 as the expression of the identity or essence of the EU legal order is therefore highly contingent. This conceptual choice should be at least justified by a specific theory of (constitutional) identity, explaining why one should emphasise only the *values* on which *the Union is founded*, rather than more generally *the Union's aim*, which is to promote these values, together with peace and the well-being of European peoples. No version of such theory has been provided either in the Court's judgements on conditionality, or in the chapter by Baquero Cruz and Keppenne.

Finally, it should not escape our attention how the official constitutional discourse of European integration has explicitly linked this broader normative foundation to the notion of European identity. Let us start by discussing the aim of the promotion of peace. Even though European integration is inextricably linked to the experience of World War II, the Preamble to the Treaty on European Union retains peace as the central objective of the Union. In particular, the experience and memory of the Cold War and the

23 Sommermann (n. 21), paras 6 f.

24 Sommermann (n. 21), para. 4.

25 Sommermann argues that in Art. 3 TEU, 'classical "goals" of a well-ordered political community as they have already been proclaimed by the doctrine of natural law and the political thinkers of the Enlightenment: external and internal security and care for the well-being of the people(s) […] are combined with achievements of liberal democracies'. See Sommermann (n. 21), para. 20.

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Iron Curtain have clear normative relevance for understanding the Treaty's *telos*. The Preamble indicates the recent context of 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe'.[26] It also actually links peace to the very notion of European identity in an explicit way.[27] Namely, the objective of 'common foreign and security policy including the progressive framing of a common defence policy' is to reinforce 'the European identity and its independence in order to promote peace, security and progress in Europe and in the world'.[28] Abstract and open-ended as it is, the phrasing of this recital suggests the promotion of peace as a component part of European identity.

The recent invasion of one EU neighbouring country by another, of course, adds a particular context to the relevance of peace to the EU. In fact, Daniel Calleja and Tim Maxian Rusche argue in the introduction to the Book, that 'both topics – the pursuit of peace, made necessary by Russia's war of aggression against Ukraine, and the rule of law – remain at the centre of the European project 70 years after the first meeting of the High Authority'.[29] The context of the Russian war on Ukraine will be elaborated on in the next sub-section. Here it should be emphasised that the very text of the TEU makes a link between the EU's aim of the promotion of peace and the notion of identity.

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26 Recital 3 of the Preamble TEU. Note in this regard that the Schuman Declaration had envisioned 'a wider and deeper community between countries long opposed to one another by sanguinary divisions': The Schuman Declaration (n. 13). As Sommermann observes, the aim of the promotion of peace entails the obligation to actively preserve and create multi-dimensional peaceful relations between states and peoples: Sommermann (n. 21), para. 21. Such positive relations-building may be understood as the obligation opposite to the historical divisions of Europe.

27 Recital 11 of the Preamble TEU. For an argument supporting the development of the common system of European defence, made in connection to 'the political and legal DNA of European integration', see Weiler (n. 14), 156 f.

28 This 'progressive framing', as the Preamble states, 'might lead to a common defence in accordance with the provisions of Article 42'. See Recital 11 of the Preamble TEU. See also in this regard: Protocol (No. 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union. In addition, the Treaties explicitly refer to peace and peaceful relations in the provisions concerning the external relations and actions of the EU, including the relations with neighbouring countries, peace preservation, conflict prevention, the maintenance of international peace and security, as well as peace-keeping missions. See Art. 3 para. 5 TEU, Art. 8 para. 1 TEU, Art. 21 para. 2 lit. c TEU, Art. 42 para. 1 TEU, Art. 43 para. 1 TEU, Art. 347 TFEU; Protocol (No. 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union; Declaration concerning the common foreign and security policy.

29 Calleja and Rusche (n. 16), 12.

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Next, there is the aim of the promotion of the well-being of EU peoples, embodying the socio-economic aspects of the EU constitutional framework. Let us first look at the text of the TEU. For Sommermann, in Art. 3 para. 1 TEU 'well-being can be referred to the economic, social and ecological conditions of life'.[30] In this context it is worth noting that also the aforementioned second sentence of the very Art. 2 TEU has a socio-economic overtone, insofar as it indicates a society of 'pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men'. This sentence in a way expresses a vision of the multi-dimensional well-being of European peoples. But Art. 3 para. 1 TEU goes beyond the content of Art. 2 TEU, to imply that EU institutions should promote both common values and well-being on an equal footing.

Beyond the Treaties, one should recall a historical instance of a constitutional document that had linked common values from today's Art. 2 TEU to socio-economic aims under the umbrella notion of European identity. In December 1973, the then nine Member States of the European Communities issued their joint Declaration,[31] in which they explicitly defined the 'fundamental elements of the European Identity' in a following way:

> 'Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are fundamental elements of the European Identity.'[32]

As we can note, the rule of law, democracy, and respect for human rights (all three now included in Art. 2 TEU as EU common values) were mentioned on an equal footing with social justice. The latter has not been explicitly included in the subsequent codification of common values, but one may not easily exclude it from a conception of the EU's normative founda-

30 Sommermann (n. 21), para. 24. In his opinion in the case *Josemans*, Advocate General Bot defined the well-being from Art. 3 TEU in reference to the freedom to provide services and in the context of the limitations to the drug trade. In this regard, 'freedom to provide services must make it possible to improve the quality of life of the citizens of the Union, giving them the opportunity to access a choice of better quality, lower-cost goods and services […] in a society where economic and social progress which is balanced and sustainable is ensured.' See Opinion of Advocate General Bot delivered on 15 July 2010 in ECJ, *Marc Michel Josemans v. Burgemeester van Maastricht*, opinion of the advocate general of 15 July 2010, case C-137/09, ECLI:EU:C:2010:433, para. 92.

31 Declaration on European Identity, Bulletin of the European Communities, December 1973, No. 12. (Office of Publication of the European Communities).

32 Declaration on European Identity (n. 31).

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tions, especially in the light of the concept of well-being of European peoples in Art. 3 TEU.[33]

The above brief analysis of EU constitutional concepts deserves another occasion to be further developed. However, it suggests that a conception of identity or essence of the EU legal order (as framed by Baquero Cruz and Keppenne) should at least include justification for focusing on the common values from Art. 2 TEU at the expense of peace and well-being. The next section, by zooming in on a concrete judicial case and on Art. 3 TEU, will further demonstrate the contingency of the notion of common values as identity.

2. *RT France:* The Unlabelled Promotion and Protection of Peace

The EU's policies in reaction to the Russian aggression of Ukraine has been the recent context in which the EU's aim of the promotion of peace gained a practical and direct relevance. In *RT France v. Council of the European Union* of 27 July 2022,[34] the General Court dismissed the annulment action against a decision and a regulation combatting Russian propaganda, adopted by the Council in the week following the outbreak of the Russian invasion. These acts had temporarily prohibited broadcasting any content in any form for a number of media outlets spreading Russian propaganda. The ban had affected a French TV broadcaster, funded from the budget of the Russian State,[35] which initiated the action for annulment. In addition to bringing a number of specific implications and from raising controversies concerning among others EU competences and the limitations to the freedom of expression,[36] the judgement can be read as a significant

33 In his text exploring the 'European constitutional identity', prior to the establishment of the Treaty of Lisbon, Wojciech Sadurski listed values which in his opinion differentiate the constitutional culture of Europe from the other liberal constitutional traditions, especially the American one. Along the values such as: 'the protection of democracy against anti-democratic views and forces', minority rights, the secular state, and horizontal applicability of constitutional norms, Sadurski emphasises the positive, protective role of the state in European systems, manifesting in social rights and policies. See Wojciech Sadurski, European Constitutional Identity? (October 24, 2006). The University of Sydney, Sydney Law School, Legal Studies Research Paper No. 06/37, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939674, 8-20.

34 General Court, *RT France v. Council of the European Union*, e of 27 July 2022, case no. T-125/22, ECLI:EU:T:2022:483.

35 General Court, *RT France* (n. 34), para. 2.

36 Björnstjern Baade, 'EU Sanctions Against Propaganda for War – Reflections on the General Court's Judgment in Case T-125/22 (*RT France*)', HJIL 83 (2023), 257-282 (259); Gergely Ferenc Lendvai, 'Media in War: An Overview of the European Restrictions on Russian Media', European Papers 8 (2023), 1235-1245 (1243-1245); Viktor Szép and Ramses Wessel, 'Balancing Restrictive Measures and Media Freedom: *RT France v. Council*', CMLR 60 (2023), 1383-1396 (1396).

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normative contribution to the EU's conception of the preservation and promotion of peace in the time of war in a neighbouring country.

Notably, apart from referring to the more specific formulation of the EU's objectives in Art. 3 para. 5 TEU, the General Court also directly invoked Art. 3 para. 1 TEU, including the general aim of the promotion of peace.[37] The General Court confirmed that apart from protecting the EU's public order and security against propaganda, the legal acts in question pursue the objective of the promotion of and contribution to peace.[38] In this respect they aim to oppose the threats to 'the foundations of democratic societies' and to international peace.[39] According to the General Court, prohibitions imposed on media outlets belong to the means at the EU's disposal to put maximum pressure on the Russian authorities so that they bring an end to the invasion.[40]

The General Court's reasoning (including language) is at places much parallel to that of the Court in the rule of law conditionality decisions issued five months earlier, insofar as the latter tried to justify the use of the notion of identity with regard to the common values from Art. 2 TEU.[41] To start with, according to the General Court, the objective of a prohibitive measure affecting the broadcaster is not, as the applicant in the case argued, to directly achieve peace in Europe, which would allegedly render the prohibition of broadcasting a 'purely symbolic'[42] and inadequate 'political gesture'.[43] This is significant in the light of the potential claims that the aim of the promotion of peace is too elusive to serve as a basis for concrete EU actions. In line with the General Court's conclusions, the aim of the promotion of peace cannot be seen as a perfectionist, 'programmatic "desires" of the treaties',[44] to borrow the phrase from Baquero Cruz and Keppenne, who used it with regard to the Court's interpretation of common values as identity. Instead, the aim of the preservation and promotion of peace justifies concrete mea-

37 General Court, *RT France* (n. 34), para. 85.

38 General Court, *RT France* (n. 34), para. 161 f.

39 General Court, *RT France* (n. 34), paras 56, 162.

40 General Court, *RT France* (n. 34), paras 163 f.

41 See in a somewhat similar vein the argument by Loïc Azoulai, that the General Court's decision implies the need to defend the European society against an external threat, while echoing the conditionality judgements as regards the need to defend EU common values as identity. See Loïc Azoulai, 'The Law of European Society', CMLR 59 (2022), 203-214 (208-209). Azoulai also notes that '[i]n a time of catastrophe, the EU cannot content itself with ensuring the provision of transnational public goods (the internal market, the free movement area, the common currency, the common policies […]) and the protection of common values (those referred to in Article 2 TEU).' See Azoulai (n. 41), 207.

42 General Court, *RT France* (n. 34), para. 70.

43 General Court, *RT France* (n. 34), para. 118.

44 Baquero Cruz and Keppenne (n. 2), 65.

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sures belonging to a broad EU strategy. Similarly to the Court's conclusions in the conditionality rulings regarding common values,[45] the General Court stated that the abstractly formulated Treaty provisions are much more than the expression of general political guidelines, and as such may be operationalised by concrete sanctions.

In addition, in both cases the courts concluded that the EU institutions are justified to select measures which they consider as necessary to protect; respectively, common values and peace. The General Court confirmed that in order to pursue the aim of the protection of peace, institutions can choose specific, appropriate measures that are available to them to address concrete deficiencies – the strategy for which they 'cannot be criticised'.[46] Just as 'the European Union cannot be criticised for implementing, in defence of its identity, which includes the values contained in Article 2 TEU, the means necessary to protect'[47] its budget and financial interests.

Despite these resemblances in reasoning and language, only the conditionality rulings conveyed the notion of identity of the EU legal order. The preservation and promotion of peace has not been given an explicit identity label in *RT France*. The courts did not provide arguments on why we should emphasise that this identity includes the common values from Art. 2 TEU, and why the aims from Art. 3 TEU either do not belong to the notion of identity or do not deserve such direct identitarian acknowledgment. Baquero Cruz and Keppenne also did not offer an explanation of this kind in their chapter. Without such deeper conceptualisation, emphasising the common values of Art. 2 as the identity and essence of European integration, while neglecting the content of Art. 3, is reductive and vulnerable to allegations of arbitrariness. The next part of this contribution will focus on the allegedly distinct nature of the concept of identity of the EU legal order, as endorsed by the authors of the chapter.

III. A Concept of Identity Unlike Any Other?

1. The Ambition: Our Own Identity, But Not 'Aggressive, Particularistic or Apologetic'[48]

The Conditionality Regulation and the subsequent decisions of the Court develop the institutional and judicial understanding of common values. Baquero Cruz and Keppenne strongly assert that the conditionality judgements

45 See ECJ, *Hungary* (n. 4), para. 232; ECJ, *Republic of Poland* (n. 4), para. 264.
46 General Court, *RT France* (n. 34), para. 52.
47 ECJ, *Republic of Poland* (n. 4), para. 268.
48 Baquero Cruz and Keppenne (n. 2), 69.

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enhance the conception of EU common values as fully binding, interconnected, and coherent. They argue that the Court attested that common values amount to binding obligations, which the Member States need to respect at all times.[49] Moreover, they stress that according to the judgements 'the values permeate the EU legal order as a whole, ensuring its coherence', and as such they need to be implemented and protected by all EU institutions in all EU policies.[50] In addition, common values constitute 'a coherent system' and should be conceived of holistically.[51] In this regard, the Court confirmed that the first sentence of Art. 2 TEU, listing EU common values, is 'of equal importance' to the second sentence, which, in turn, states that these values characterise 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.[52]

Indeed, the Court stated that common values from Art. 2 TEU as such, and not only the rule of law, constitute the identity of the EU legal order.[53] The vision of the coherent axiological system of the EU legal order, comprising of the strongly interconnected component parts, brings Baquero Cruz and Keppenne to their second central normative argument mentioned at the beginning of the present contribution: that the Court's conception of identity essentially differs from the defensive identitarian claims made by national courts towards the EU legal order. While national constitutional identities are particularistic and promote national interests, in contrast the identity of the EU legal order is founded on the togetherness and commonality of European values.[54] In this sense, while national arguments from identity tend to be aggressive and self-centred, the Court underscores the defence of the normative foundation that is, in fact, shared by all Member States.

The next section will address this argument. It will argue that such utopian vision of common identity of the EU legal order is prone to criticism from within the broadly understood tradition of political constitutional thought. The Court's conception of common values as identity, applauded by Baquero Cruz and Keppenne, loses much of its universalistic allure if we look beyond the purely textual level, from the perspective of political preferences and disagreement over the priority of values. A comprehensive political constitutional critique of the Court's conception of identity deserves a separate study. Here it will be explained why we should be cautious in praising this conception for its seemingly exceptional universalism, coherence and inclusivity.

49 Baquero Cruz and Keppenne (n. 2), 69.
50 Baquero Cruz and Keppenne (n. 2), 69.
51 Baquero Cruz and Keppenne (n. 2), 69 f.
52 Baquero Cruz and Keppenne (n. 2), 69.
53 ECJ, *Hungary* (n. 4), para. 127. See Baquero Cruz and Keppenne (n. 2), 69.
54 Baquero Cruz and Keppenne (n. 2), 69.

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2. The Political Constitutional Approach: from Common Values to Particular Choices

The optimistic conception of the 'better, more universal and non-aggressive' identity based on common values is not immune from the critique originating from the politically oriented strands of constitutional theory. Political constitutional theory, in this broad understanding, extends beyond the usually invoked debate on whether parliaments or courts should be chief institutions deciding constitutional disputes.[55] Instead, it is to be understood as the study of constitutional law and institutions, which conceives of the interpretations of (very often conflicting) principles, rights, and constitutional values as inevitably being expressions of political disagreement and conflict.[56]

From this perspective, what makes constitutional claims particularistic is not so much that their textual expression and normative undertone lack universality. Rather, the understanding and implementation of these claims always emerge as the result of preferences of particular actors under particular political circumstances, or as the settlement of political disagreement over values and principles.[57] It will always be a specific decision of a concrete institution (in this case most relevantly the Court of Justice) that will give effect and practical meaning to the notion of identity of the EU legal order, stressing particular aspects while marginalising others. The Court will have to make choices to determine the concrete implications of the highly contestable notion.

An optimistic commentator could argue that the concept of identity based on common values is inclusive enough to not risk political bias in interpretation, since while interpreting common values, the Court should acknowledge 'differences in the ways the Member States organise themselves to ensure respect for the fundamental values of the EU'.[58] After all, according to the Court's construct, Member States bear the obligation to respect common values as to the result,[59] with leeway left for national specificities. Nevertheless, in the process

55 For an example of such broader interpretation of political constitutional theory, see Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism', King's Law Journal 30 (2019), 74-96.

56 See Goldoni and McCorkindale (n. 55), 77.

57 The actual consequences of rights and values are in tension with each other, since the axiological language of law disguises societal conflicts. See John A. G. Griffith, 'The Political Constitution', M. L. R. 42 (1979), 1-21 (12). In this sense we could apply to Art. 2 TEU the famous formulation by Griffith, used with regard to freedom of expression enshrined in the European Convention on Human Rights: it 'sounds like the statement of a political conflict pretending to be a resolution of it'. Griffith (n. 57), 14.

58 Baquero Cruz and Keppenne (n. 2), 70.

59 ECJ, *A. B. and Others v. Krajowa Rada Sądownictwa*, judgement of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153, para. 146; ECJ, *Hungary* (n. 4), paras 231-233. See also: Baquero Cruz and Keppenne (n. 2), 70.

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of interpretation, the Court always inevitably indicates 'what is to be the content or scope of shared "European" legal and political norms, and conversely what things will fall outside of this shared value system'.[60]

The universality of the language of common values as identity, even with a national identity clause included, will not, by itself, protect against the particularist interpretative preferences. For example, the obligation to respect the rule of law 'as to the result' may itself be the source of intense contestation among actors over whether a specific national arrangement regarding the judicial system satisfies this obligation. In addition, the protection of the rule of law in a Member State may become a highly complex and contestable process, where supranational political institutions, such as the European Commission, in fact play both a significant, and quite a controversial interpretative role with regard to common values. By way of example, in May 2024 the European Commission decided to discontinue the procedure under Article 7(1) of the Treaty on European Union against Poland, despite the largely unsettled and uncertain recovery from the rule of law deficiencies in that Member State.[61]

Beyond the interpretation of common values, political bias and preferences behind the seemingly universalistic conception of identity may concern also the institutional and legislative design. In this sense, some of the values from Art. 2 TEU are prioritised and enhanced over the others as a political choice of EU institutions. A good example is the conditionality mechanism discussed by Baquero Cruz and Keppenne. The very introduction of the rule of law conditionality provides a strong arm for the protection of this concrete value over the other elements of axiology from Art. 2 TEU. It is the rule of law, not the other values, that received material underpinning through the mechanism of budgetary penalties.[62] The link between the potential suspen-

60 Jessica C. Lawrence, 'Constitutional Pluralism's Unspoken Normative Core', Cambridge Yearbook of European Legal Studies 21 (2019), 24-40 (29).

61 Maciej Krogel, 'The Closure of the Article 7(1) TEU Procedure Against Poland: The Weight of Intentions and the Risk to Common Values in the Twilight of Illiberalism', Maastricht J. Eur. & Comp. L. 32 (2025), 315-325 (316-320).

62 Even though, as the Conditionality Regulation's definition of the rule of law is so broad as to include elements or refer to aspects of almost all the other common values from Art. 2 TEU: democracy (as regards the law-making process), equality and non-discrimination (before the law), pluralism (in the law-making process), (access to) justice and the protection of fundamental rights (through the effective judicial protection). See Regulation 2020/2092/EU/Euratom (n. 3), Recital 3 of the Preamble, Art. 2 lit. a. For a critical argument that the rule of law conditionality mechanism strengthens the EU's constitutional ideology of legalism by prioritising judicial independence and the rule of law over the equally legitimate protection of common values such as equality, social rights, and solidarity, see Pieter-Augustijn van Malleghem, 'Legalism and the European Union's Rule of Law Crisis', European Law Open 3 (2024), 50-89 (65, 67-68).

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sion of EU funds and the rule of law gives to the latter a particular gravity. The mechanism introduces sanctions that may in fact result in putting the achievement of some socio-economic EU policy objectives at risk, as the European Court of Auditors recently concluded in its report on the rule of law and conditionality.[63] As an indirect result of the conditionality mechanism, the nationals of a Member State, such as the Erasmus+ programme participants or beneficiaries of cohesion programmes, may bear the costs of the incompliance of their authorities with the rule of law.[64]

In this case, the establishment and implementation of conditionality may be framed as a set of decisions actualising the potential tension between the rule of law and the other axiological elements of Art. 2 TEU, such as equality, pluralism, and solidarity.[65] To protect the rule of law through the conditionality mechanism is a political choice[66] that gives this value prominence over the other values which do not enjoy the same financial and political safeguards. This becomes evident if we move beyond the textually universalistic dimension of common values as 'identity based on commonality',[67] and take the material perspective of the interplay of social, economic and institutional factors and power relations.[68] Despite 'the requirement to respect all EU values, and not just the rule of law',[69] the conditionality mechanism substantially enhances the protection of the latter through the socio-economic pressure, and prioritises it among the other constitutional objectives.[70] Not unlike

63 European Court of Auditors, Special Report: The Rule of Law in the EU: An Improved Framework to Protect the EU's Financial Interests, But Risks Remain, 03/2024, 22. On risks to the EU socio-economic objectives posed by the rule of law conditionality, see also Marco Fisicaro, 'Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation', Eu Const. L. Rev. 18(2) (2022), 334-356 (354).

64 European Court of Auditors, Special Report (n. 63), 22. On the potential negative consequences of the rule of law conditionality for academic freedom and the right to education, as protected by the Charter of Fundamental Rights of the European Union, see Olga Ceran and Ylenia Guerra, 'The Council's Conditionality Decision as a Violation of Academic Freedom?', Verfassungsblog, 28 March 2023, doi: 10.17176/20230328-195232-0.

65 For a criticism of the Commission's proposal for the rule of law conditionality mechanism, as embodying a reductive conception of solidarity in the EU, which entails 'disregarding the impact of such a mechanism on the citizens living in the State potentially affected', see: Marco Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values', European Papers 4 (2019), 695-722 (719).

66 See van Malleghem (n. 62), 66.

67 Baquero Cruz and Keppenne (n. 2), 69.

68 Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution', M.L.R. 81 (2018), 567-597 (573 f., 580-592), where the authors also (critically) comment on the relation between the narrowly understood political constitutional theory and the material constitutional theory, at 568-569; Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021), 280.

69 Baquero Cruz and Keppenne (n. 2), 69.

70 See Goldoni and Wilkinson (n. 68), 590-592.

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the other nationally-born conceptions, the identity of the EU legal order in fact conceals the inevitability of a number of political tensions, preferences, and decisions to be made. What exactly counts as identity will be subject to choices which are inclusive only to a limited extent.

3. Limits of the Search for the Normative Core of the EU Legal Order

Section II of this paper explained the contingency of understanding Art. 2 TEU as the identity of the EU legal order in the light of the other aims enshrined in Art. 3(1) TEU. Admittedly, there are scholars who take both provisions, add to them Art. 1 TEU,[71] and argue that altogether they form the normative core of the entire EU legal order, or even more generally, of European constitutional law.[72] Notably, Jürgen Bast and Armin von Bogdandy believe that these provisions, and in particular Art. 2 TEU, may serve as the basis for an interpretation of EU constitutional law that is both principled and transformative-progressive.[73] Taking stock of the recently developed case law on common values, these authors claim that the core provisions emanate normatively across the whole remit of EU law and policy. In consequence, the Court and EU institutions can interpret EU laws in compliance with the normative core and progressively realise the intention of the authors of the Treaties.[74] In this sense, for example, the normative content of Art. 2 TEU can rationally guide the transformation of the EU economic constitution in a principled way, oriented less on the free market principles and more on the protection of environment.[75]

This approach deserves recognition for noting the broad scope of the normative precepts of European integration, beyond the content of Art. 2 TEU.[76] However, Bast and von Bogdandy share with Baquero Cruz and Keppenne an understanding of common values which underestimates the inevitably conflict-generative and selective practice of their implementation. The assumption behind the view of Bast and von Bogdandy is that the core values from Art. 2 TEU radiate in a coherent and progressive way into the interpretations of EU constitutional rules in specific policies.

71 Concerning the establishment of the EU and its fundamental characteristics.

72 Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism', CMLR 61 (2024), 1471-1500 (1478). They also consider the first 19 articles to be 'the basic part of the Treaties.' See Bast and von Bogdandy (n. 72), 1477.

73 Bast and von Bogdandy (n. 72), 1496.

74 Bast and von Bogdandy (n. 72), 1496-1499

75 Bast and von Bogdandy (n. 72), 1497-1499.

76 Bast and von Bogdandy (n. 72), 1478 f.

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For instance, the authors argue that Art. 2 TEU as the normative foundation guides the transformative interpretation in 'the judgement in the horizontal conditionality cases brought by Poland and Hungary', where 'the Court links the spending power of the EU with rule of law and solidarity and provides for a new constitutional arrangement between EU values and EU money'.[77] According to Bast and von Bogdandy, Art. 2 TEU, together with the greater acknowledgment of the European society, led the Court to embrace a remarkably different approach to solidarity and conditionality compared to its earlier interpretations of the Economic and Monetary Union during the eurozone crisis.[78] This view however does not give due regard to the normative problems with the rule of law conditionality indicated above: the limited and conditional realisation of solidarity,[79] the potential tension between the rule of law and values such as solidarity and socio-economic rights, and between the promotion of the rule of law and of the other elements of Art. 3(1) TEU, such as the wellbeing of the EU's peoples.

Another example concerns the legal discourse of values in the construction and implementation of EU policies. Bast and von Bogdandy argue that the Court should not be the only agent running the project of the principled constitutional transformation in line with common values. Instead, they assign a significant role to jurists – legal scholars, legal services, litigators, and national judges – following the example of the grand projects and contributions from the earlier decades of European integration.[80] But the idea of such a progressive project encounters serious practical challenges when lawyers and EU actors are actually involved in a fundamentally different enterprise: justifying policies that weaken the protection of rights.

To illustrate these challenges, let us take a look at the EU standards of protection of the rights of asylum-seekers. As Bast and von Bogdandy indicate, common values are not yet fully realised or respected in EU policies, including the migration and asylum policy.[81] In other words, we should see 'EU constitutional law as a legally, and not only politically, unfinished project'.[82] As a response to the so-defined problem, the authors see Art. 2 TEU as the expression of the Union's aspiration.[83] Common values should

77 Bast and von Bogdandy (n. 72), 1498.

78 Bast and von Bogdandy (n. 72), 1498.

79 See Fisicaro (n. 65), 718, and the literature cited there.

80 Bast and von Bogdandy (n. 72), 1499 f. See also Armin von Bogdandy, *The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024), 6-13.

81 Bast and von Bogdandy (n. 72), 1497.

82 Bast and von Bogdandy (n. 72), 1497.

83 Bast and von Bogdandy (n. 72), 1497.

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steer the implementation and, if needed, the amendment process of the other, less fundamental EU constitutional provisions.[84]

Nonetheless, a significant hurdle occurs when common values are actually being explicitly operationalised by EU institutions, albeit in an internally inconsistent or even regressive way. The European Commission, one of the chief EU agents involved in countering the rule of law crisis in the Member States, recently suggested that the Member States bordering foreign regimes may derogate from the EU standards of the right to asylum, in order to defend EU common values against the 'weaponisation of migration'.[85] The Commission argued that protecting the values from Article 2 TEU may necessitate limiting certain components of those values (asylum rights), even adopting a regressive adjustment in the interpretation of international asylum law binding on the Member States.[86] The Commission's statement indicates more than the uneven or incomplete realisation of axiological foundations in EU law and policies. This is not only about balancing rights or limiting their exercise on the basis of the objectives of security and public order. Rather, the Commission explicitly instructed the Member States on the possibility of limiting the protection of the normative core of the Treaties (to borrow the language of Bast and von Bogdandy) in order to protect this very core against foreign abuse.[87] This illustrates that the legal discourse of common values accompanies specific policies and interests, even greenlighting regressive and problematic national practices. As such, it raises questions about the possibility of a progressive project of coherent transformation in line with common values, featuring legal scholars and other actors of EU law.

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84 Bast and von Bogdandy (n. 72), 1497.

85 European Commission, 'Communication from the Commission to the European Parliament and the Council on Countering Hybrid Threats from Weaponisation of Migration and Strengthening Security at the EU's External Borders', COM/2024/570 final, Brussels, 11 December 2024, 1-2. Such derogation, based on Art. 72 of the Treaty on the Functioning of the European Union, is highly controversial taking into account the existing case law of the Court of Justice. See for different views on the relevant legal issues Anja Radjenovic, 'Article 72 of the Treaty on the Functioning of the European Union', European Parliamentary Research Service, PE 775.867, July 2025, available at: <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2025)775867>, last access 21 January 2026; Marlene Stiller, 'How the EU Commission Backs up Pushbacks', Verfassungsblog, 7 January 2025, doi: 10.59704/0c39891676fe2392; Daniel Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU', EU Immigration and Asylum Law and Policy Blog, 10 January 2025, available at: <https://eumigrationlawblog.eu/does-the-commission-cross-the-rubicon-legalising-pushbacks-on-the-basis-of-article-72-tfeu/>, last access 21 January 2026.

86 Maciej Krogel, 'Interpretations of the Right to Asylum in the Era of "the Weaponisation of Migration": Common Values and Outdated Rules?', Asiel & Migrantenrecht 7 (2025), 319-323; Stiller (n. 85).

87 See European Commission (n. 85), 5-9.

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IV. Conclusion

The rule of law deficiencies in the Member States such as Hungary and Poland are so deep as to affect the very basic norms of the Treaties. Unsurprisingly, these deficiencies provoke reflections on the European Union in terms of the essence and foundations of its constitutional order. But the use of the notion of identity of the EU legal order needs critical reflection, taking account of the Treaty principles and aims other than the protection of the common values from Art. 2 TEU. The discourse of European integration has always centred on a broader range of fundamentals than those we today indicate as the Treaty catalogue of common values. If the ongoing crises were to destroy the EU, we would lose even more than this catalogue stipulates. For these reasons, any plausible conception of common values as identity should include the criteria for deciding what falls under this label, or at least acknowledge the limits of the definition. In any case, such a conception will inevitably remain contestable and actualisable only in the forms of particular interpretations, decisions and preferences of EU actors. Constitutional concepts share this quality, even when they are underpinned by the appeal to universal values and to the commonality of principles. Calls for a common-values-led transformation of EU law include a vision and a desire for the progressive completion of the constitutional order around the Treaties' normative core. However, the actual life of common values in EU legal discourse appears to more closely resemble a practice of particular, contentious uses that vary depending on specific policy areas. Further analysis of this discursive life of values is one of the tasks of legal scholarship.

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Beyond the Posture, Beyond the Pale – Assessing the EU's Real Record as An International Human Rights Actor

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Abstract

The recent portrayal of legal evolutions in the last 70-odd years by the Legal Service of the European Commission paints a remarkably rosy picture of the European Union's (EU) role as a promotor of the universality and indivisibility of human rights. With all due respect, an educated reader may easily come under the impression that it was conjured up in a lawyerly cloud-cuckoo land. The positivistic vantage point that the study relies upon comes across as particularly limited, overestimating the actual success of the policy, while neglecting to pay evidence-based attention to the status quo.

The present paper unpacks the premises of the analysis to offer a radically opposite view, highlighting defects in both the theory and the practice of the Union's human rights protection. Thereby, in order to pierce through the Commission's bubble, it illustrates how the construction shaped up as a patchwork, rather than a continuum that emanated from a single coherent vision, flagging moreover its mostly limited impact vis-à-vis the facts on the ground.

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In addition, the paper rehearses a series of blind spots and organisational path dependencies that have given rise to largely siloed initiatives, referring inter alia to the treatment of the Roma, rule of law backsliding, the functioning of the European Border and Coast Guard Agency (FRONTEX), and the establishment of the Human Rights Sanctions Regime.

Finally, it seeks to explain why the Legal Service ostensibly neglected to proffer a more moderate account, owning up to fallibility. The upshot is a considerably less panegyrical exposé of the Union's accomplishments, questioning why the powers-that-be appear to take greater comfort in talking the talk, instead of walking the walk.

Keywords

EU Law – EU External Relations Law – EU Human Rights Law – Public International Law – International Human Rights Law – Compliance

I. Ouverture

In his masterful work *Exercices de style*, the French writer Raymond Queneau demonstrated how one and the same story may be recounted 99 times in 99 different ways.[1] Whilst there would not seem to exist a single way to canvass the evolution of human rights in the EU either, myriad authors have embarked on that mission in the past decades, producing fine accounts that ultimately do not differ a giant lot from one another.[2] The volume *70 Years of EU Law – A Union for Its Citizens* (hereinafter: *70 Years of EU Law*) contains yet another essay on the theme to add to the burgeoning pile.[3] The chapter, not unlike the book as a whole, offers a rosy, optimistic portrayal of the European integration process. In the same vein, in the position paper that gave rise to the Heidelberg workshop that sowed the seeds for this

1 Raymond Queneau, *Exercices de style* (Gallimard 1947).

2 In English, see only Philip Alston and Joseph H. H. Weiler (eds), *The EU and Human Rights* (Oxford University Press 1999); Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004); Gráinne de Búrca, 'The Evolution of EU Human Rights Law', in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021), 480-505.

3 Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023).

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special issue, the organisers allege that the Legal Service of the European Commission has managed to deliver a 'robust and persuasive perspective'. Of course, the treatise is consciously limited from the outset, making clear that it focuses on the development of the law, which *ratione personae auctorum* makes perfect sense. By proceeding as it does though, it unwittingly throws up a quintessential query as to the general meaning of that notion. May exposés on the law limit themselves to engaging with the rules alone, staying strictly within that abstract and autopoietic universe?[4] Or rather, should law properly so-called comprise per definition an empirical element, i. e. what (if anything) actually comes of the rules as formulated, and what (if anything) do legal subjects turn out to do with them in reality?[5] Not for nothing, Oliver Wendell Holmes famously opined that 'the life of the law has not been logic, it has been experience'.[6] One must perhaps also consider here the traditional view on defining customary international law: To be done not just on the basis of an ideational normative component, the *opinio juris*, but equally by tracing the real-life behaviour, ordinarily labelled the *usus*. From this vantage point at least, the Commission's presentation is clearly incomplete.

The *70 Years of EU Law* chapter, indeed, strongly resembles previous assessments ubiquitously found in the common textbook repertoire. In chiefly descriptive fashion, it spells out the intricacies of Article 6 TEU, the main features of the Charter, the Union's international efforts, and the interactions with the European Court of Human Rights EC(t)HR. Notwithstanding the relative importance of the topic, the chapter spans but a modest 18 pages (of a grand total of almost 400 – less than 5 %). Apart from highlighting the internal emancipation trajectory, it claims that the Union 'vigorously exports [human rights] around the world', and that this 'has multiple positive effects'.[7] For sure, on paper, the commitments in this sphere are bold, ambitious and uncompromising, sincerely deserving our admiration. Precisely these qualities, however, have rendered their execution perennially difficult.

Without explicitly putting a finger on it, the *70 Years of EU Law* chapter lambasts other global players for their lack of dedication, but does not bother to seriously compare the Union's own record. Elsewhere, scholars have

4 The classic reference is Nathan Roscoe Pound, 'Law in Books and Law in Action', American Law Review 44 (1910), 12-36.

5 Merely one random example is Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi (eds), *The Impact of the Inter-American Human Rights System – Transformations on the Ground* (Oxford University Press 2024).

6 Oliver Wendell Holmes, *The Common Law* (Harvard University Press 1881), 1.

7 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 72.

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observed that the EU seems to possess a unique potential to hold firm, as well as to induce partners to hold firm, albeit that it is unlikely to turn the tide single-handedly.[8] The *70 Years of EU Law* chapter radiates indifference to the implementation dimension. Absolutely, there is no denying that in terms of official policy, we are dealing with a zealous promotor of the universality and indivisibility of human rights. Simultaneously, the underlying contention appears to be that the Union *makes good* on its promises – a thesis that not so easily survives evidence-based scrutiny. Worse still, in lieu of acting up to challenge negative tendencies across the globe, one may argue that due to its conduct, the EU itself *contributes* to the present unfavourable state of affairs – yet, the *70 Years of EU Law* chapter does not take any second to flag that dynamic either. Finally and contestably, it seems to set off from the idea that the policy developed in an agreeable path-dependent fashion, coalescing eventually into a coherent protection regime.

Unpacking the premises and not shying away from calling a spade a spade, the Commission could be gently reprimanded for painting an intrinsically distorted picture, based on select information, compounded by selective interpretation. It basically gives the impression of having been designed in a juridical vacuum or lawyerly cloud-cuckoo land. As it stands, the chapter deserves a more searching normative response that, in order to convey a holistic portrait of the status quo, is grounded on the supplementary facts that were curiously and unhelpfully left out (sections II and III). No less importantly, an answer is needed to the question why the authors involved, even when professionally constrained by their employment at the Legal Service, ostensibly neglected to come up with a more complete account, daring to own up to its own fallibility (section IV). Drawing the lines together, we will reflect on the decay that might ensue whenever powers-that-be remain confined to talking the talk, instead of readily admitting deficiencies in how they walk the walk, with which predictable criticisms could have been obviated (section V).

Methodologically, to avoid misunderstanding, the current paper does not pretend to carry out a meticulous counter-analysis rooted in empirical data. One should be mindful nonetheless that the EU, in its quest for universal respect of indivisible rights, is in the game to convince, stimulate and improve. Obviously, any success or progress in the attainment of the Union objectives would just as much require verification – an exercise for

8 Nicholas Hachez, 'Conclusion: Delivering on the EU's Commitment to Human Rights – Implementation, Effectiveness and Coherence' in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 589-611 (591).

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which it has so far shown little or no appetite. Moreover, in spite of a grand array of suitable indicators, the institutions have not deigned to apply these comprehensively and systematically.[9] While this may not immediately vindicate a kindred neglect when grilling the EU, it does underscore the difficulty of measuring any policy outcomes in exact detail, inviting follow-up research.

II. (Un)Original Sins

Let us begin at the beginning. On its opening page, the *70 Years of EU Law* chapter briefly asserts the Union started its life as an economic project, but that its nature 'was quickly reshaped'.[10] It goes on to outline how the 'constitutionalisation of human rights' took root.[11] Thereby, in a somewhat peculiar non-chronological order, the usual *loci classici* are addressed (*Stauder*, *Solange*, *Les Verts*, etc). In one terse paragraph, the chapter jumps from the 1960s to the end of the last century, touching on a swathe of newer landmarks (*Kadi*, *Åkerberg Fransson*, *Siragusa*).[12] It naturally describes how in 2009, the waxing momentum culminated in the entry into force of the Treaty of Lisbon, its cardinal amendments to Articles 2 and 6 Treaty on European Union (TEU), besides the binding nature assigned to the Charter. Further down the line, the role of international treaties is highlighted, the Union's zeal for ensuring the compliance with human rights in accession countries, alongside the export of values and extraterritorial protection, evident from inter alia *Schrems* and *Google Spain*.[13]

Substantively, throughout the chapter, the discussion is clear and straightforward. Hereby, as noted before, it remains consistently positivistic, taking its cue from the law in force. For instance, mention is made of Article 207 Treaty on the Functioning of the European Union (TFEU) in conjunction with Article 21 TEU to underline that the Common Commercial Policy is officially expected to be conducted in a wider context wherein human rights are duly lived up to – full stop, without explaining how this subsequently pans out through the instruments adopted, and what actual impact these turn

9 Manfred Nowak and Karolina Podstawa, 'The EU's (Strategic) Use of Human Rights Tools and Instruments' in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 542-568 (565).

10 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 72.

11 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 72-73.

12 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 76.

13 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 76-86.

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out to have.[14] Similarly, one may spot a quick wink to the Union's vow to guarantee adequate social protection encapsulated in Article 9 TFEU,[15] without divulging whether (and if so to which extent) this obligation is taken to heart, sidestepping the familiar debates on Europe's efficacy here.[16]

Whilst the intention was probably not to generate an exhaustive longitudinal overview of all that has happened in 1950-2020 period, the approach generally comes across as a bit scattered and wobbly, not flowing smoothly towards its conclusion with a wholly balanced coverage of the relevant subdimensions. One wonders why e. g. the emergence of the Fundamental Rights Agency, the Human Rights Sanctions Regime, human rights dialogues, or the European Pillar of Social Rights have been omitted. The eclectic modus operandi results in certain historical twists and turns being entirely glossed over – for example, the 1986 watershed of the preamble of the Single European Act, which contained the first reference to human rights ever at the level of primary law.[17]

As recognised in the aforementioned position paper, the *70 Years of EU Law* volume essentially presents the evolution of EU law as a progressive realisation of the founding fathers' forward-looking vision. In some respects, this appears slightly disingenuous; for the human rights field, it is even demonstrably untrue. It is common wisdom that the 1951 Treaty establishing the European Coal and Steel Community (ECSC Treaty) did not pronounce on the theme, nor did the 1957 Treaties of Rome establishing the European Economic Community or the European Atomic Energy Community. The European Political Community was originally meant to fill the void, yet its derailing in 1954 led it to spell out 'the road not taken'.[18]

In many eyes, a humbler admission of the scarcity in the early years could have been apposite, when the tasks were deliberately subdivided between the three supranational entities on the one hand, and the intergovernmental Council of Europe on the other. While human rights initially belonged to the exclusive domain of the latter, things changed over time, especially with the

14 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 85.

15 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 85.

16 See inter alia Marc De Vos (ed.), *European Union Internal Market and Labour Law: Friends or Foes?* (Intersentia, 2009); Catherine Barnard, 'Social Dumping or Dumping Socialism?', CLJ 67 (2008), 262-264; Bea Cantillon, Herwig Verschueren and Paula Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions Between Law and Policy* (Intersentia 2012); Koen Caminada and Kees Goudswaard, 'Combating Poverty in the European Union', in: Afshin Ellian and Raisa Blommestijn (eds), *Reflections on Democracy in the European Union* (Eleven International Publishing 2020), 3-26.

17 Single European Act [1987] OJ L169/1, recitals 3 and 5 of the preamble.

18 Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', AJIL 105 (2011), 649-693.

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blossoming of the economic integration project.[19] Stretching the vision of the *pères-fondateurs*, retroactively projecting things onto the foundational texts, has deservedly been equated to a strand of mythological thinking.[20] As regards the Union's outreach on the world scene, rhetoric aside, the Communities never managed to stand out: despite the rise of European Political Cooperation since 1969, they continued to play a negligible role in e. g. ending apartheid in South Africa, or halting the disintegration of the former Yugoslavia.[21] The *70 Years of EU Law* chapter could have admitted as much, clarifying that a truly significant global presence only emerged gradually.[22] It goes without saying that academic anthologies of this type rarely succeed in being all things to all people. Hurling a 'Swiss cheese' reproach has nevertheless been made a tad too easy here.

III. Core Fissures

By sticking to a classic positivistic approach, as remarked above, a number of supplementary facts have been left out of the chapter's central narrative. Consequently, readers might be inclined to believe in the EU's benign intentions and ascribe it a thick moral fibre. To arrive at an accurate, holistic perspective of the status quo, it is apt to engage with a series of discrepancies between the foundations sketched *de jure* and the policies *de facto*. These issues stretch beyond a simplistic juxtaposing of 'the law in the books' and 'the law in action', relating equally to ideological inconsistencies, failures of design, and half-hearted policy learnings on the side of the EU.

On the case law of the European Court of Justice as portrayed in the chapter, it must be said that there is little room for argument. Irrefutably, the judiciary has been a major driver, imparting a plethora of stimuli on its interlocutors. It could be doubted still whether the judicial avalanche of the 1970s and 1980s bore immediate and genuine fruit for the average citizen, verily ushering in a new dawn at the grassroots level.[23] Authors have understandably tagged the ECJ's activism as a 'quiet revolution', which arguably

19 de Búrca (n. 2), 486-490.

20 Stijn Smismans 'The European Union's Fundamental Rights Myth', JCMS 48 (2010), 45-66.

21 See e. g. David Allen, Reinhardt Rummel and Wolfgang Wessels, *European Political Cooperation: Towards a Foreign Policy for Western Europe* (Butterworth 1982); Simon J. Nutall, *European Political Cooperation* (Clarendon Press 1992).

22 Sebastian Santander, 'The EU and the Shifts of Power in the International Order: Challenges and Responses', European Foreign Affairs Review 19 (2014), 65-82.

23 Going back to the seminal publication of Jason Coppell and Aidan O'Neil, 'The European Court of Justice: Taking Rights Seriously?', LS 12 (1992), 227-245.

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did not become entrenched at the political and societal strata before the 1990s and 2000s – ergo, perhaps for the best part of 70 years, the supposed benefits did not trickle down meaningfully and measurably.[24] For now, this matter is best shelved, as it once again demands elaborate follow-up studies, adhering to validated empirical methodologies.

As has been abundantly rehearsed already, a crucial fissure resides in that the EU pretends to care a great deal about human rights and seeks to promote them aggressively, but way too often turns a blind eye or sits idly by in the face of manifest breaches by its Member States.[25] A first case in point is the conscious condoning of the appalling treatment of its largest ethnic minority. Despite a smorgasbord of anti-discrimination and inclusion efforts, the Roma are still the single most discriminated and excluded group on the continent, suffering supreme hardships in e. g. accessing housing, education services, and the labour market.[26] Over a decade ago, measures in France entailing to a crackdown and forced deportation of Roma communities to Romania and Bulgaria did not trigger an infringement procedure.[27] A comparable situation in Italy was rejected with the argument the Commission did not possess enough information to construct a solid enough case.[28] It is a badly kept secret that earlier, Poland, Lithuania and Romania ignominiously hosted 'black sites' run by the American Central Intelligence Agency (CIA) during the war on terror, where the latter indulged in unlawful interrogation techniques.[29] As known, a lot of ink has been spilled as well on the EU's broader reticence to stand up for the rule of law in its confrontation with 'backsliding' Member States, particularly Poland and Hungary.[30] At the moment, some visible and welcome steps are finally being taken, after endless warnings and

24 Joseph H. H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', Comparative Political Studies 26 (1994), 510-534.

25 See e. g. Williams (n. 2).

26 See the vast inventory of data available at <https://fra.europa.eu/nl/themes/roma>, last access 17 February 2026.

27 See e. g. Mark Dawson and Elise Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma', CML Rev. 48 (2011), 751-775.

28 Nowak and Podstawa (n. 9), 560.

29 PACE, Committee on Legal Affairs and Human Rights, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report', Strasbourg, 7 June 2007; ECtHR, *Abu Zubaydah v. Lithuania*, judgement of 31 May 2018, no. 46454/11.

30 See only András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017); Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', Cambridge Yearbook of European Legal Studies 19 (2017), 3-47; R. Daniel Kelemen, 'The European Union's Authoritarian Equilibrium', Journal of European Public Policy 27 (2020), 481-499.

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vapid threats.[31] Suffice to say that at the Union's highest level of governance, the ongoing reluctance to toggle paragraphs 2 and 3 of the iconic Article 7 TEU continues to stain its record.

The enduring asylum and refugee crisis, supporting the rise and reform of FRONTEX, neatly emblematises the culture of negligence existing on this front. Contraventions by domestic officials vary from unilateral border closures and detention under atrocious conditions, to overaggressive surveillances, pushbacks, and forced removals.[32] The agency mentioned started life as a late by-product of the Schengen regime, together with the Area of Freedom, Security and Justice trumpeted by the Treaty of Amsterdam. In 2016, subjected to a sudden re-appreciation, upgrading it to a veritable European Coastguard and Border Control Agency was regarded as the holy grail to enhance the EU's capability to cope with the external incursions and assist national civil servants, somewhat magically ameliorating the latter's human rights demeanour in the process. Its competences were expanded and operational capacities beefed up correspondingly.[33] Following a path-dependent logic however, FRONTEX has incrementally grown from being a (perceived) part of the solution to becoming a (perceived) part of the problem – testimony to which is the mushrooming of litigation on its accountability, accusing it of having become complicit in the deeds of the Member States.[34] European Commissioners have recently gone on record nonetheless maintaining everything is peachy keen.[35] The generic deficit observable on the supranational plane is a close corollary of the foregoing, with insiders

31 Council of the EU, 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion Given Only Partial Remedial Action by Hungary', 12 December 2022; Gavin Barrett, 'Rule of Law Chickens Coming Home to Roost', Verfassungsblog, 21 June 2024, doi: 10.59704/1d158aab48c749aa; 'EU to withhold €200 million from Hungary over asylum fine', *Deutsche Welle*, 18 September 2024.

32 See e. g. ECtHR, *Alkhatib and Others v. Greece*, judgement of 16 January 2024, no. 3566/16; Pavlos Eleftheriadis, 'Pushbacks and Lawlessnes', EJILTalk!, 25 March 2022, available at: <https://www.ejiltalk.org/20837-2/>; Annastiina Kallius, 'Rupture and Continuity: Positioning Hungarian Border Policy in the European Union', Intersections 2 (2016), 134-151.

33 Regulation 2016/1624/EU of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation 2016/399/EU of the European Parliament and of the Council and repealing Regulation 863/2007/EC of the European Parliament and of the Council, Council Regulation 2007/2004/EC and Council Decision 2005/267/EC, [2016] OJ L 251/1.

34 General Court of the EU, *WS and Others v. European Border and Coast Guard Agency* (Frontex), judgement of 6 September 2023, case no. T-600/21, ECLI:EU:T:2023:492; Mariana Gkliati, 'The Next Phase of The European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece', European Papers 7 (2022), 171-193.

35 Fernando Heller and Lucía Leal, 'EU's Johansson Dismisses Need to Reform Frontex', EurActiv.com, 12 March 2024, <https://www.euractiv.com/section/politics/news/eus-johansson-dismisses-need-to-reform-frontex/>, last access 18 February 2026.

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expressing bemusement about the protracted delays in disseminating and implementing the Charter there. Needed are, allegedly, an improved systemic awareness, combined with a proactive translation of commitments into obligations.[36]

Yet another major fissure between the image presented and the lived reality ties in with the oft-heard statement that the Union is more vigorous in its protection of human rights externally than it is internally.[37] To a large extent, even that old legend ought to be torn apart. The *70 Years of EU Law* chapter indeed gives rich illustrations of the Union's international activities, but oddly overlooks the instruments that have openly crossed over into the dark side. Characteristic is the deal from 2016, euphemistically titled the 'EU-Turkey Statement', which Amnesty International christened 'A blueprint for despair'.[38] Commentators qualify the deal as the epitome of incoherence between the official commitment to human rights on the one side and objectives in the migration domain on the other, by dumping thousands of third country nationals in squalid and dangerous living condition, sending many of them back in a rush without a chance to seek asylum or appeal against their return.[39] Resorting to specious and succinct inadmissibility arguments, the Court of Justice conveniently found that it did not have to look into the case's merits.[40] The embracing of a similar 'mass migration management tool' in relation to Tunisia, plus a recent agreement on parallel measures with the Egyptian authorities, suggest that it cannot be dismissed as

36 Nowak and Podstawa (n. 9), 559. On the aside, preferably a rethink on the artificial distinction between rights and principles in the Charter, which casts doubts on the 'indivisibility' principle; see Bruno de Witte, 'The Trajectory of Social Rights in the European Union' in: Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005), 153-168 (160).

37 See e. g. Philip Alston and Joseph H. H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', EJIL 9 (1998), 658-723. The argument can be made though that in making such claims, some risk to succumb to imaginative reconstructions of institutional limitations and legitimacy: see Kalypso Nicolaïdis and Robert Howse,'"This is my EUtopia …": Narrative as Power', JCMS 40 (2002), 767-792.

38 European Council, 'EU-Turkey Statement', 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement<, last access 18 February 2026; Amnesty International, 'EU: Human Rights Cost of Refugee Deal with Turkey Too High to Be Replicated Elsewhere', <https://www.amnesty.nl/actueel/eu-human-rights-cost-of-refugee-deal-with-turkey-too-high-to-be-replicated-elsewhere>, last access 18 February 2026.

39 See e. g. Maybritt Jill Alpes, Sevda Tunaboylu, and Ilse van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum', European University Institute/Robert Schuman Centre for Advanced Studies Policy Brief 29/2017.

40 GC, *NF v. European Council*, order of 28 February 2017, case no. T-192/16, ECLI:EU:T:2017:128; ECJ, *NF v. European Council*, order of 12 September 2018, cases no. C-208/17 P to C-210/17 P, ECLI:EU:C:2018:705.

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an incidental, meanwhile superseded affair – *au contraire*.[41] Far from exhibiting a rigorous dedication, the EU displays a Janus-face, requesting adherence to pledges it does not comply with itself.

In the *70 Years of EU Law* chapter, prominent through its absence is also the Union's 'Magnitsky Act' or Human Rights Sanctions Regime (HRSR). Launched in 2020, it is geared towards those responsible for grave abuses worldwide, introducing a fast-track method for slapping on individual travel bans and asset freezes.[42] The HRSR has streamlined procedures, facilitated the targeting of individuals, and reasserted the Union's devotion to universal values. Once again, path dependence in the historical trajectory of the EU's sanctions policy has brought us here, but the result is unfortunately underwhelming. While the propaganda that accompanied its inception could to lay audiences make it seem earth-shattering, in truth we are being sold old wine in new bottles. The setup of the Regime as such remains uncomfortably narrow, as inter alia acts of corruption have been excluded from its ambit. Moreover, since it was no less possible before to impose measures freezing the funds and economic resources of persons, entities, or bodies responsible for serious human rights violations, legally it is far from innovative. On top of that, most probably the targeted will (go on to) evade the practical consequences of being sanctioned, regardless of the technical means employed.[43] Examples of similar virtue-signalling platforms are the creation of a special representative for human rights in 2012, and a special envoy for the promotion of the freedom of religion in 2016.[44]

The chapter does discuss the popular use of 'essential elements' clauses in international treaties, repeatedly unmasked elsewhere as exercises in keeping

41 'Memorandum of Understanding on a Strategic and Global Partnership Between the European Union and Tunisia', Tunis, 16 July 2023, <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887>, last access 18 February 2026; European Commission, 'Joint Declaration on the Strategic and Comprehensive Partnership Between the Arab Republic of Egypt and the European Union', Brussels, 17 March 2024.

42 Council Regulation 2020/1998/EU of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, [2020] OJ L 410I/1; Council Decision 2020/1999/CFSP of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, [2020] OJ L 410I/13.

43 Clara Portela and Kim Olsen, 'Implementation and Monitoring of the EU Sanctions' Regimes, Including Recommendations to Reinforce the EU's Capacities to Implement and Monitor Sanctions', Study for the AFET Committee of the European Parliament, PE 702.603, October 2023.

44 Council of the EU, 'Stavros Lambrinidis Appointed First EU Special Representative for Human Rights', Brussels, 25 July 2012; European Commission, 'President Juncker Appoints the First Special Envoy for the Promotion of Freedom of Religion or Belief Outside the European Union', Vatican City, 6 May 2016.

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up appearances.[45] The key benchmarks are vaguely defined, leading to a piecemeal implementation, with the retaliatory mechanisms for when a third country does not stick to its side of the bargain being deployed harrowingly infrequently.[46] By the same token, the *70 Years of EU Law* chapter is actually prudent in not bringing up the human rights dialogues – the EU's laudable attempt to engage in permanent conversations with countries where the concomitant record is subject to improvement.[47] By now, these dialogues have been exposed as largely failed designs that further undermine the Union's reputation, inter alia as their agendas are often found to be woefully deficient.[48] At the end of the day, its glorious idea of conditionality boils down to a protean concept.

One last distressing point should be made on the EU's double standards, in that a blatant discrimination is noticeable in the treatment of third countries. It has not escaped the public attention that typically, those with notable power or in which the Union has vested interests invariably succeed in getting away with violations, whereas weaker ones or those finding themselves in a less strategic or commercially advantageous position will regularly meet the whip, stick, or be fed the carrot.[49] Of late, especially the accession trajectory has thrown up surprises here, with the importance attached to the human rights record varying markedly from one country to the next.[50] The unwillingness to rethink its relations with Middle East regimes in face of the massive eruptions during the Arab Spring of 2011 – of for that matter, to rethink its relations with Israel in light of the Gaza conflict –, reveals how the

45 Bruti Liberati, Ramopoulos and Bianchi (n. 3), 86; see e. g. Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Nijhoff 2003); Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the EU – A Legal Analysis* (Cambridge University Press 2009).

46 Nicholas Hachez and Axel Marx, 'EU Trade Policy and Human Rights', in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 365-385 (370-374).

47 European External Action Service, 'Annex Relex 2 B. Annex Revised EU Guidelines on Human Rights Dialogues with Partner/Third Countries', 6279/21 (2009).

48 In particular by ignoring the plight of individual human rights defenders and the protection of specific minorities, as e. g. experienced by dissidents in Saudi Arabia and the Uyghurs in China; see e. g. Balázs Majtényi, Lorena Sosa, and Alexandra Timmer, 'Human Rights Concepts in EU Human Rights Dialogues', FRAME Report 3.5, 2016, <https://www.fp7-frame.eu/wp-content/uploads/2016/11/Deliverable-3.5.pdf>, last access 18 February 2026.

49 Flying in the face of the EU's 'Guidelines on Non-Discrimination in External Action', 6337/19, Brussels, 18 March 2019, <https://data.consilium.europa.eu/doc/document/ST-6337-2019-INIT/en/pdf>, last access 18 February 2018.

50 See e. g. Beáta Huszka and Zsolt Körtvélyes, 'EU Enlargement Policy and Human Rights' in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 345-364.

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European Neighbourhood Policy has for too long favoured stability over the rule of law in the Union's own backyard.[51] Naturally, where quiet diplomacy might succeed better, an overt naming and shaming risks to be counterproductive. But it amounts to rank hypocrisy *tout court* when treaty partners are held to account while internally one shies away from letting barking be followed by biting, or even abstains from barking at all. Consistency is the unmistakeable victim on this altar. If the 'principled pragmatism' slogan of the EU's 2016 Global Strategy must be taken seriously, the emphasis undoubtedly lies on 'pragmatism'.[52]

IV. Causes and Effects

For sure, the above findings are hardly new. The EU's real record with regard to enforcing human rights, within or outwith its jurisdiction, nevertheless looks beyond the pale, with countless problems of coherence and implementation. As crude as it is likely to sound, a chapter that elects to brush these under the carpet does not tell the whole story, almost tantamount to a cover-up. Instead of leaving it there, the pretty posturing we encounter raises the issue why the Union disappoints so terribly. Previous researchers have done a wonderful job in retrieving the causal factors, which range from the historical and the cultural to the accidental and the technological.[53] Purely legally, blame is assigned to a shortage of adequate competences, hindering the EU to e. g. step up the game in the social field.[54] Organisational fragmentation, with policies and tasks carried out in distinct silos, enables institutions, services, agencies, directorates-general, and units to counteract, or even cancel out each other's output. Herein as well lies a cause of the identified malfunctioning, casting doubt on the viability of the 'mainstreaming' philos-

51 Niklas Bremberg, 'Making Sense of the EU's Response to the Arab Uprisings: Foreign Policy Practice at Times of Crisis', European Security 25 (2016), 423-441.

52 'Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union's Foreign And Security Policy', Brussels, 28 June 2016, <https://www.eeas.europa.eu/eeas/global-strategy-european-unions-foreign-and-security-policy_en>, last access 18 February 2026.

53 Eva Maria Lassen, 'Factors Enabling and Hindering the Promotion and Protection of Human Rights by the EU' in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 39-61.

54 Jan Wouters, 'From an Economic Community to a Community of Values – The Emergence of the EU's Commitment to Human Rights' in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 11-38 (37-38); see Article 153(5) TFEU.

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ophy.[55] The eternal elephant in the room, hampering too the success of the Council of Europe and the European Court of Human Rights, is the (non-) allocation of sufficient resources, entailing that choices need to be prioritised.[56] That element itself neither justifies nor explains e.g. the EU's double standards. Among its international partners, consequently, respect for human rights starts to resemble a shibboleth.

Of course, it is not difficult to take aim at the Union for failing to deliver while in many ways the Member States continue to be the puppet masters. The EU is a composite, not a monolithic structure, with the diversity of preference and opinion cherished by its 27 national components causing constant trouble for the realisation of a uniform human rights governance.[57] For instance, the case of the Roma, flagged in section III, testifies to domestic brutalities primarily, showing how principles codified in the Treaties are shared nominally until push comes to shove. The *acquis* could have been expanded a long time ago already with a horizontal equal treatment directive, stuck in the Council due to the Member States' intransigence.[58] At the United Nations (UN), the constant internal strife precludes the EU from demonstrating innovative leadership.[59] Scholars would be myopic to excoriate a Union for being a collection of countries, mistaking it for a separate self-standing entity, as the hybris and lack of sincerity run more deeply. Put differently, it would amount to attacking an empty throne, or a quixotic fight against windmills.

The million euro question arises, why did the Commission Legal Service choose to refrain from coming clean? Would it not have been thinkable for the book and its authors to sketch a holistic, less superficial portrait of the

55 Johannes Pollak and Sonja Puntscher Riekmann, 'European Administration: Centralisation and Fragmentation as Means of Polity-Building?', W. Eur. Pol. 31 (2008), 771-788; Sevasti Chatzopoulou, 'Resilience of the Silo Organizational Structure in the European Commission', JCMS 61 (2023), 545-562. See also Clair Gammage and Narin Idriz, 'Implementation mechanisms of the Human Rights Clause. Case studies on Ethiopia, Tunisia and Vietnam', <https://www.europarl.europa.eu/RegData/etudes/STUD/2024/754447/EXPO_STU(2024)754447_EN.pdf>, 85.

56 See e. g. Felipe Gómez Isa et al., 'Challenges to the Effectiveness of EU Human Rights and Democratisation Policies', FRAME Report 12.3, 2016, <https://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-12.3.pdf>, last access 18 February 2026.

57 See Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017).

58 European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

59 Anna-Luise Chané, 'The EU's Engagement with the United Nations on Human Rights' in: Jan Wouters, Manfred Nowak, Anna-Luise Chané and Nicolas Hachez (eds), *The European Union and Human Rights – Law and Policy* (Oxford University Press 2020), 171-189.

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status quo? A first possible answer is forgetfulness – which may quickly be discarded. The earlier-cited remark that EU policy 'has multiple positive effects' proves that the writers are aware the rules do not operate in a vacuum. Alternatively then, did the omissions occur because the supplementary facts discussed did not belong to the mission brief, for lying inevitably outside the scope of a legal study? Make no mistake, what the chapter says about the law is, in itself, absolutely not wrong. At the same time, it represents legalism at its ugliest, with lawyers absorbed in their private little continuum. Whilst the role of law in the integration process should not be disregarded or underrated, it should not be overappreciated either. As Wendell Holmes indeed reminded us, besides the normative sphere, our discipline encompasses at least part of the lived reality. One of his relatively obscure *bons mots*, relevant for our purposes, is that '[f]or the rational study of the law, the blackletter man may be the man of the present, but the man of the future is the man of statistics'.[60] Without the facts on the ground, accounts of how the law developed remain a plaything for intellectuals, utterly meaningless to the uninitiated. And if the discrepancy between codified principles on the one hand and the real world on the other grows big enough, things fall apart.

A possible third reason for the Legal Service's oversight might be plain embarrassment, a fourth administering of prior censorship (or maybe even a wholly voluntary *self*-censorship?). When all is said and done, the casual reader is left guessing how exactly the cards were dealt behind the scenes in the production of the volume. A combination of these last two explanations does not seem implausible however.

The *70 Years of EU Law* chapter being what it is, the potentially detrimental ramifications of the EU's posturing must anyhow be properly understood: with the spreading of a faux narrative, it only invites an extra harsh scholarly critique, simultaneously extending a license or alibi for Member States to persist in their obstructions. As e. g. happens at the UN, the latter then go on to function as roadblocks, in place of multipliers. All this erodes the Union's international clout and places strain on its supposed 'soft power'. In turn, multilateral partners intensify their resistance against its authority, creating a vicious circle of waning effectiveness.

60 Oliver Wendell Holmes, 'The Path of the Law', Harv. L. Rev. 10 (1897), 457-476 (469).

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V. Coda

As in Raymond Queneau's *Exercices de style*, there are surely several ways to recount how the protection of human rights was consolidated as an objective of Union action. Conversely, there are constraints on how it can be done most accurately. Historiography is ordinarily best left to historians, yet the Commission's Legal Service can be forgiven in this respect. The tackled theme is nevertheless too important to be left to lawyers, risking to sketch a haphazard, incomplete, ultimately distorted picture otherwise.

It could be contended that the gist of the foregoing analysis bears resemblance to the debate on whether the glass is half-full or half-empty, especially in light of the legal progress that was undeniably made since 1952. Even in that simile, the fissures identified above show the glass is nowhere near as filled-up as the *70 Years of EU Law* chapter makes it out to be. Whereas across the globe, few laws are executed with perfection, the contribution engages in an unhelpfully deceptive form of whitewashing by sidestepping the countless shortcomings and shadow-sides in their entirety. The *res publica* finds itself in manifest decline when the powers-that-be confine themselves to talking the talk, refusing to admit misalignments in walking the walk, with which predictable criticisms could have been averted.

Obviously, it is absurd to expect of any international human rights actor to be able to impose its views, and ensure that everybody else abides by its wishes. The seven continents are replete with sovereign states, intermittently either attuning to or diverging from European standards. Vice versa, the EU may well be labelled easy prey, certainly not constituting an outrageous exception in breaching the principles it vows to uphold. Arguably though, the EU finds itself in an extra vulnerable spot considering the claims it makes, in spite of the chasm between promise and delivery. While its insulation thereby increases, its comparative weight appears to diminish. By way of remedy, not before long the Union ought to start practicing what it preaches, and allow its biographers to move beyond symbolism.

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Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship

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Abstract

In its book on 70 Years of European Union (EU) Law, the Commission's Legal Service characterises EU citizenship as a status 'in the service of EU citizens' which, to a large extent, has been developed through European Court of Justice (ECJ) preliminary rulings. Such a narrow approach is unconvincing in several respects. This contribution therefore proposes three insights for an alternative assessment of EU citizenship which essentially rests on the idea that reducing EU citizenship to a catalogue of (free move-

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ment) rights, which individuals can invoke against the Member States, underestimates this status' true significance for the European Union's legal order.

Keywords

European Union – Member States – Nationality – EU Citizenship – Freedom of Movement

I. Introduction

In the fourth Chapter of its book titled *70 Years of EU Law*, the European Commission's Legal Service[1] examines the development of EU citizenship.[2] Its authors emphasise the important contribution of the European Court of Justice in developing the jurisprudence concerning the protection of the rights of the EU citizens. They specifically focus on the rights of family members of EU citizens and the rights of the EU citizen children.

The purpose of the current contribution is not so much to present a full analysis of EU citizenship in itself, but rather to engage with the views and opinions expressed by the Legal Service on this subject. It is therefore, essentially, a comment upon a comment. It will be argued that the views expressed by the Legal Service, and specifically, its narrow interpretation of EU citizenship as a catalogue of (free movement) rights to be enforced against the Member States, rest on a generally unconvincing understanding of EU citizenship and its central position in the Union's legal order. Certainly, a brief chapter such as that written by the Legal Service cannot be expected to hold a complete, in-depth analysis of all facets of EU citizenship. Still, the Legal Service has opted for a remarkably narrow perspective which leaves important aspects of EU citizenship out of sight. Moreover, it does not do full justice to the impact which the Commission (including its Legal Service) itself has had over the past decades. Together with the ECJ and other (institutional) actors, the Commission has indeed contributed significantly to the evolution of EU citizenship from a rather symbolic status, essentially tied to

1 Hereafter referred to as 'Legal Service'.

2 Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: in the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 96-114. This text is hereafter referred to as 'the Chapter'.

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the Member States' nationality legislation, to a vital component of the European Union's identity.

This contribution is structured as follows:

First, I will explain, through four points of criticism and the resulting disappointment, why I consider the Legal Service's perspective on EU citizenship unconvincing. More specifically, I will criticise the Legal Service's very narrow perspective on EU citizenship, its almost exclusive focus on the ECJ's preliminary rulings on EU citizens' free movement rights, its limited thematic choices, and its selective case analysis. Common to these criticisms is the overly narrow approach taken by the Legal Service. Unsurprisingly, the chapter culminates in a disappointingly narrow conclusion that fails to capture the true meaning of EU citizenship.

In a second step, I will therefore propose, still in close interaction with the views expressed by the Legal Service, three insights for an alternative assessment of EU citizenship. As I will explain, it is, in my view, more than a status developed through preliminary references, more than a rights catalogue that accommodates private interests, and more than a status that expresses the bond of nationality.

A brief conclusion will eventually summarise this contribution's findings.

II. The Legal Service's Understanding of the Significance of EU Citizenship: Four Criticisms and a Disappointment

Referring to several remarkable ECJ judgements, the Legal Service describes the evolution of the law with respect to certain selected aspects of EU citizenship.

As it is mentioned in its Introduction, the Chapter 'looks back at the development of EU citizenship with a view to considering some milestones in the Court of Justice's citizenship case-law and the Commission's contributions to this'.[3] This overview of pertinent legal developments, which are singled out by the Legal Service, is brief but accurate and rests on an interesting selection of major citizenship cases which sheds more light on EU citizens' free movement rights, including the limits and effects of these rights.

In my view, however, the Legal Service's approach suffers from several shortcomings, which inevitably result in an all-too-limited understanding of the significance of EU citizenship. Overall, its Chapter is characterised by an

3 Tomkin and Montaguti (n. 2), 96.

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excessively narrow approach. This can be concretised in the four criticisms which I will mention and explain hereafter.

1. The Legal Service's Very Narrow Perspective on EU Citizenship

A first and essential criticism is that the Legal Service adopts a very narrow perspective on EU citizenship, which does not allow the Chapter's readers to fully grasp the multidimensionality of this status. Its main focus is that of the right of free movement, which is rightly referred to as 'a cornerstone of European integration'.[4] As the Legal Service mentions, freedom of movement indeed has been at the very heart of the European project since its inception.[5] Undoubtedly, it deserves a central spot in any analysis of the significance of EU citizenship for the development of EU law and the Commission's contribution to it. Yet, the right to freedom of movement constitutes but one of several key characteristics of the status of EU citizenship. As evidenced by Article 20(2) Treaty on the Functioning of the European Union's (TFEU) non-exhaustive enumeration of rights (and duties) of EU citizens and their further development in Articles 21-24 TFEU, EU citizenship is a multidimensional status which is not limited to a free movement right, but *inter alia* includes active and passive voting rights in municipal and European elections (Article 22 TFEU) as well as a right to diplomatic protection (Article 23 TFEU). Moreover, as a result of the connection which the ECJ has made between the first sentence of Article 20(2) TFEU, according to which citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties, and Article 18 TFEU, the right not to be discriminated against on the grounds of nationality constitutes a crucial component of the EU citizenship as well.[6] As the ECJ considered in *Grzelczyk*, EU citizenship 'is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[7]

4 Tomkin and Montaguti (n. 2), 96.

5 Tomkin and Montaguti (n. 2), 97.

6 ECJ, *María Martínez Sala v. Freistaat Bayern*, judgement of 12 May 1998, case no. C-85/96, ECLI:EU:C:1998:217, para. 62.

7 ECJ, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, judgement of 20 September 2001, case no. C-184/99, ECLI:EU:C:2001:458, para. 31.

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One cannot but wonder about the Legal Service's choice to leave these other essential characteristics of EU citizenship unmentioned. And there's also the concept of EU citizenship itself: wouldn't it have been worthwhile for the Legal Service to reflect, and possibly interact with legal scholarship,[8] on the credibility or perhaps the ingenuity of EU law to have introduced citizenship status? After all, this notion has a long history in national constitutional law and does not fit that naturally within the legal order of an international organisation.

The Charter's Preamble declares that the Union, *inter alia* by establishing EU citizenship, 'places the individual at the heart of its activities'. In the concluding chapter of the Legal Service's book on 70 Years of EU Law, Calleja and Ladenburger more specifically consider that the Treaty of Lisbon has 'undoubtedly […] put the citizen at the heart of the democratic life of the Union'.[9] Along those lines, the book's subtitle – 'A Union for Its Citizens' – promises a similar key position for EU citizens in the Legal Service's narrative. Unfortunately, the Chapter does not live up to these expectations as the chosen approach fails to communicate to its readers the reasons why EU citizenship is significantly important for the Union's democracy and legal order. As is mentioned by other contributors to this special issue as well,[10] the Chapter sketches only an incomplete picture of this status which is stripped, to name only these, of its crucial political dimension, its major significance for EU non-discrimination law, and its often controversial impact on the reach and effects of EU integration.

2. The Legal Service's Almost Exclusive Focus on the ECJ's Preliminary Rulings on EU Citizens' Free Movement Rights

A second criticism concerns the almost exclusive attention which the Legal Service gives to the ECJ case-law on EU citizenship, and even more specifically to preliminary rulings in cases introduced by litigants claiming their free movement rights under EU law. As a result, other ECJ case-law (e. g. resulting from infringement actions) as well as important legal provisions and

8 See e. g., with further references, Lorin-Johannes Wagner, 'Member State Nationality Under EU Law – To Be or Not to Be a Union Citizen?', Maastricht J. Eur. & Comp. L. 28 (2021), 304-331 (312-314).

9 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 381-392 (381).

10 See Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408, and Päivi Leino-Sandberg, "'70 Years of EU Law" – The Politics of a Professional Language', HJIL 86 (2026), 59-83.

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policy developments remain out of sight. This lacuna affects the attention that could (or should) have been given to pertinent Treaty on European Union (TEU) and TFEU provisions on EU citizenship.[11] It also concerns important secondary EU law, even with respect to the right to free movement, such as Directive 2004/38.[12] Although some of these major sources of EU citizenship law, as well as pertinent provisions of the Charter of fundamental rights of the EU, are mentioned at times by the Legal Service, they are neither subjected to any thorough analysis nor put in a broader legal or policy context that would have shed more light on the importance and significance of EU citizenship more generally. Moreover, academic references which could have served that same purpose too remain absent.

Let me take Directive 2004/38 as an example: can one really explain the pertinence of EU citizenship for 70 Years of EU Law, and the Commission's contribution to it, without a proper, more systemic attention for this Directive which would stretch beyond those few aspects of the status of family members and children which the Chapter examines? In academic doctrine, the legal status of EU citizens has rightly been described as 'an ongoing process resulting from a joint evolving endeavour of the EU legislator, the Court of Justice of the European Union […] and EU scholarship'.[13] Unfortunately, this is not quite reflected in the Legal Service's Chapter.

According to the Legal Service, its approach allows better insight into the human side of the disputes concerned as the cases selected offer a glimpse in the life stories of litigants battling legal anomalies and thus seeking justice and a better life for themselves and their families.[14] It is true that such a personal perspective must not be ignored: the development of EU law, and EU citizenship status in particular, cannot really be understood without full appreciation for the huge personal and often also financial investment of those seeking justice through the enforcement of their rights under EU law. The approach chosen by the Legal Service, with its focus on a detailed description of what was stake in a handful of free movement cases before the ECJ, indeed sheds proper light on the human side of the law. Equally important is that it may allow its entire readership, which is not limited to

11 See in particular Article 9 TEU and Articles 20-25 TFEU.

12 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 1612/68/EEC and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158/77.

13 Ricardo García Antón, 'Rethinking the Social Contract in a Regional Integration Dimension (The European Union): A Response to the 2024 Montesquieu Lecture by Prof. Tsilly Dagan', *Tilburg Law Review* 29 (2024), 25-32 (27).

14 Tomkin and Montaguti (n. 2), 96.

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experts in EU law, to grasp what EU citizenship is really about. Undoubtedly, however, the book's readers would have gained a much broader understanding of what EU citizenship entails if the Legal Service would not have restricted its analysis to a brief overview of selected preliminary rulings.

And even insofar as the Chapter does examine the ECJ's preliminary rulings concerning EU citizenship, it would have profited from a broader reach of the subjects covered. It is not only so that the Legal Service examines only a few of the many questions which the right of free movement implies (see *infra* II. 3.). Also, the analysis of major recent cases on other pertinent issues would have facilitated a more complete understanding of EU citizenship rights. I may refer here to important ECJ judgements, which have often provoked intense academic debate,[15] on – to name a few themes – the interaction between EU citizenship and the Member States' nationality laws,[16] the voting rights of former EU citizens after Brexit,[17] or the protection against extradition to third States.[18] The inclusion of these judgements in its analysis

15 As regards the interaction between EU citizenship and the Member States' nationality laws, see *infra* III. 3. As regards the other themes mentioned, see *inter alia* (with further references): Niamh Nic Shuibhne, 'Protecting the Legal Heritage of Former Union Citizens: EP v. Préfet du Gers', CML Rev. 60 (2023), 475-516; Eleanor Spaventa, 'Brexit and the Free Movement of Persons: What Is EU Citizenship Really About?' in: Niamh Nic Shuibhne (ed.), Revisiting the Fundamentals of the Free Movement of Persons in EU Law (Oxford University Press 2023), 158-185; Stephen Coutts, 'From Union citizens to national subjects: *Pisciotti*', CML Rev. 56 (2019), 521-540; Stefano Maffei, 'The Decision on the Surrender/Extradition of Own Nationals, EU-Citizens and Persons Residing in the Executing State', EuCLR 12 (2022), 53-65 and, with regard to the two themes respectively, Niamh Nic Shuibhne, *EU Citizenship Law* (Oxford University Press 2023), 97-106 and 124-129.

16 ECJ, *Janko Rottman v. Freistaat Bayern*, judgement of 2 March 2010, case no. C-135/08, ECLI:EU:C:2010:104; ECJ, *M. G. Tjebbes and Others v. Minister van Buitenlandse Zaken*, judgement of 12 March 2019, case no. C-221/17, ECLI:EU:C:2019:189; ECJ, *JY v. Wiener Landesregierung*, judgement of 18 January 2022, case no. C-118/20, ECLI:EU:C:2022:34; ECJ, *X v. Udlændinge- og Integrationsministeriet*, judgement of 5 September 2023, case no. C-689/21, ECLI:EU:C:2023:626; ECJ, *S. Ö. v. Stadt Duisburg, M. Ö. v Stadt Wuppertal*, *M. S. and S. S. v. Stadt Krefeld*, judgement of 25 April 2024, joined cases C-684/22 to C-686/22, ECLI:EU:C:2024:345; ECJ, *European Commission v. Republic of Malta*, judgement of 29 April 2025, case no. C-181/23, ECLI:EU:C:2025:283.

17 ECJ, *EP v. Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)*, judgement of 9 June 2022, case no. C-673/20, ECLI:EU:C:2022:449; ECJ, *EP v. Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)*, judgement of 18 April 2024, case no. C-716/22, ECLI:EU:C:2024:339.

18 ECJ, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, judgement of 6 September 2016, case no. C-182/15, ECLI:EU:C:2016:630; ECJ, *Romano Pisciotti v. Bundesrepublik Deutschland*, judgement of 10 April 2018, case no. C-191/16, ECLI:EU:C:2018:222; ECJ, *Proceedings relating to the extradition of Denis Raugevicius*, judgement of 13 November 2018, case no. C-247/17, ECLI:EU:C:2018:898; ECJ, *Proceedings relating to the extradition of BY*, judgement of 17 December 2020, case no. C-398/19, ECLI:EU:C:2020:1032; ECJ, *Generalstaatsanwaltschaft München v. S. M.*, judgement of 22 December 2022, case no. C-237/21, ECLI:EU:C:2022:1017.

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would have allowed the Legal Service to share its views on those important new strands of case-law which now remain completely out of sight.

3. The Legal Service's Limited Thematic Choices

A third criticism concerns the particular thematic choices which the Legal Service has made when examining the ECJ case-law on the free movement rights connected with EU citizenship. Without justifying this selection in any way, the Chapter's introduction announces that it will focus on the rights of family members of EU citizens and those of EU citizen children.[19] It is true that this choice allows the Legal Service, as it announces,[20] to take a closer look at some milestones in the ECJ's case-law. But from a more substantive point of view, this choice is not particularly convincing.

First of all, as mentioned by the Legal Service,[21] family members enjoy derived free movement rights, and their legal status hence is dependent on that of the EU citizens concerned.[22] One cannot but wonder whether the very brief space specifically allotted to EU citizenship in the Commission's book would not have justified a direct emphasis on the position of the EU citizens themselves in order to clarify their precise legal status and its importance.

Further, where the position of EU citizen children is concerned, a pertinent question is whether the Legal Service's perspective should be reversed. EU law approaches these children first and foremost as EU citizens – who happen to be children. Categorising them first and foremost as children, as the Legal Service primarily does for the sake of its analysis, is unfortunate, as this particular perspective risks leaving out of sight important ECJ judgements which examined closely related questions of citizenship rights in cases which did not primarily involve children. Take, for example, (the recognition of) the names of EU citizens. The Legal Service examines the *Garcia Avello*[23] and *Grunkin and Paul*[24] cases, which both related to minor EU citizen children, but neglects that the ECJ interpreted the impact of EU citizenship law on names in other, equally important and relevant judge-

19 Tomkin and Montaguti (n. 2), 96.

20 Tomkin and Montaguti (n. 2), 96.

21 Tomkin and Montaguti (n. 2), 97.

22 For more details, see Nic Shuibhne, *EU Citizenship Law* (n. 15), 8 and 139 et seq.

23 ECJ, *Carlos Garcia Avello v. Belgian State*, judgement of 2 October 2003, case no. C-148/02, ECLI:EU:C:2003:539.

24 ECJ, *Stefan Grunkin and Dorothee Regina Paul*, judgement of 14 October 2008, case no. C-353/06, ECLI:EU:C:2008:559.

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ments as well.[25] Although these judgements for the most part did not cover children's rights under EU law, some of them included very interesting considerations by the ECJ on the interaction between EU citizenship and other topical subjects or provisions of EU law, such as fundamental rights protection, the protection of minorities and, in particular, the delicate tension between respect for the Member States' national identities and the private interests of the EU citizens concerned. I regret to note that the Legal Service did not integrate these judgements as well in its analysis, as it would have resulted in a more precise picture of (the significance of) EU citizenship as a legal status and, more specifically, the tension between the various interests at stake (see *infra* III. 2.).

Moreover, even if there are reasons to limit the analysis to family members and children, would it not have been worthwhile for the Legal Service to widen its scope? For instance, why not also pay attention to the ECJ case-law on the legal position of young persons who are not direct descendants but so-called 'other family members' of mobile EU citizens, with respect to the application of other Member State private law provisions than those on names? This would have led to interesting insights on the way in which EU law may oblige Member States, through the recognition of citizenship rights and their interaction with migration law, to openness to foreign legal concepts.[26]

4. The Legal Service's Selective Case Analysis

A fourth and final criticism concerns the points of interest identified by the Legal Service in its analysis of particular case-law, as these sometimes imply a rather awkward, unconvincing selection of pertinent issues. Its all-too-selective case-law analysis does not always lead the Chapter's readers to grasp the full significance of these judgements for the interpretation and development of EU citizenship rights.[27]

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25 ECJ, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgement of 22 December 2010, case no. C-208/09, ECLI:EU:C:2010:806; ECJ, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, judgement of 12 May 2011, case no. C-391/09, ECLI:EU:C:2011:291; ECJ, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, judgement of 2 June 2016, case no. C-438/14, ECLI:EU:C:2016:401; ECJ, *Proceedings brought by Mircea Florian Freitag*, judgement of 8 June 2017, case no. C-541/15, ECLI:EU:C:2017:432; ECJ, *Mirin*, judgement of 4 October 2024, case no. C-4/23, ECLI:EU:C:2024:845.

26 See in particular ECJ, *SM v. Entry Clearance Officer, UK Visa Section*, judgement of 26 March 2019, case no. C-129/18, ECLI:EU:C:2019:248.

27 Compare Jacob van de Beeten, 'Festschrift or Fiction? Omissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196, where he refers to the Legal Service's 'various gaps and omissions' on the ways in which EU law affects the lives of its citizens.

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Take for example the quite detailed analysis of the *Coman* case in the Chapter's part on family members.[28] According to the Legal Service, this case essentially raised the question whether the term 'spouse' in Directive 2004/38 must be understood as an autonomous, uniform concept under EU law.[29] Other aspects of the judgement are not or only superficially touched upon, although they would allow to understand why *Coman* indeed constitutes such an important judgement for EU citizenship law. The gender-neutral sense of the autonomous interpretation (which differs from earlier ECJ interpretations[30]) and its precise reach, the interpretation of Article 21(1) TFEU as including 'the right to lead a normal family life', the delimitation between the reach of EU law and the Member States' competences, the rejection of some Member States' reliance on national identity and public policy as public interest considerations justifying restrictions of the freedom of movement as well as the impact of fundamental rights protection. All these issues come to the fore in the ECJ's *Coman* judgement but remain largely unmentioned in the Legal Service's Chapter.[31] It cannot be doubted, however, that highlighting and examining the Court's considerations on these issues would have allowed the Chapter's readers to obtain greater insight in (the reach of) EU citizenship rights.

The same is true for the Legal Service's analysis of the judgements on the rights of EU citizen children. Its observation that the ECJ in the aforementioned *Garcia Avello* and *Grunkin and Paul* cases as well as in its more recent judgement in *V. M. A.*[32] underlined 'that national administrative rules must be able to take sufficient account of the situation of EU citizen children in free

28 ECJ, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, judgement of 5 June 2018, case no. C-673/16, ECLI:EU:C:2018:385.

29 Tomkin and Montaguti (n. 2), 101-103.

30 See in particular ECJ, *Lisa Jacqueline Grant v. South-West Trains Ltd*, judgement of 17 February 1998, case no. C-249/96, ECLI:EU:C:1998:63, paras 31-35 and ECJ, *D and Kingdom of Sweden v. Council of the European Union*, judgement of 31 May 2001, joined cases C-122/99 P and C-125/99 P, ECLI:EU:C:2001:304, para 34.

31 For more thorough discussions of *Coman*, see *inter alia*, with further references: Jean-Yves Carlier, 'Vers un ordre public européen des droits fondamentaux. L'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt *Coman*', RTDH 30 (2019), 203-227; Jacquelyn MacLennan and Angela Ward, 'The Constitutional Dimension of Case C-673/16 *Coman* on the Prohibition of Discrimination on the Basis of Sexual Orientation: The Role of Fundamental Rights in Interpreting EU Citizenship', Columbia Journal of European Law 26 (2020), 36-61; Jorrit J. Rijpma, 'You Gotta Let Love Move', Eu Const. L. Rev.15 (2019), 324-339; Jan Lukas Werner, 'Das Coman-Urteil des EuGH – Art. 21 Abs. 1 AEUV als Grundlage eines ordre public européen', ZEuP 27 (2019), 802-821.

32 ECJ, *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'*, judgement of 14 December 2021, case no. C-490/20, ECLI:EU:C:2021:1008.

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movement'[33] is a correct, but only very limited assessment of these judgements' importance. The Legal Service does not develop their significance for, *inter alia*, the great weight of party autonomy and mutual trust, the reach of Member State substantive family and civil status law versus that of free movement rights under EU law, fundamental rights protection and the room given to national identity and public policy as justification grounds for obstructions to the exercise of EU citizens' freedom of movement.[34] And while the Legal Service emphasises the importance of the ECJ's autonomous interpretation in *Coman*, it leaves unmentioned the autonomous interpretation which the ECJ adopted in *V. M. A.* as well as what its significance might be.[35]

5. An Inevitable Disappointment: The Legal Service's Narrow Approach Results in an Equally Narrow Conclusion

A common aspect of these four points of criticisms is that the Legal Service's Chapter on EU citizenship adopts in several regards an excessively narrow approach to its subject. Quite logically therefore, its conclusion is rather disappointing as well for those seeking a more complete insight into the significance and importance of EU citizenship and the Commission's contribution to it.

Nic Shuibhne recently described EU citizenship as 'an extraordinary, and ongoing, legal experiment […] a vector of European integration, collective personhood, and multi-layered identities that reflects the paradoxically inclusive and exclusive qualities of citizenship more generally'.[36] There is not much in the Chapter that would justify an equally enthusiastic assessment of the contribution of EU citizenship to 70 Years of EU Law. Rather, the Legal Service keeps away from drawing a similarly broad picture and consequently sticks to the specific perspective of (some aspects of) the right of free move-

33 Tomkin and Montaguti (n. 2), 106.

34 For more details, as well as further references, see *inter alia*: Johan Meeusen, 'Cross-Border Mobility of European Union Citizens and Continuity of Civil Status. Balancing National and Individual Identities in an Open European Society', Yearbook of Private International Law 22 (2020-2021), 1-33 (14-31); Silvia Pfeiff, *La portabilité du statut personnel dans l'espace européen* (Bruylant 2017) as well as the multiple contributions on 'Family Status, Identities and Private international Law' in Yearbook of Private International Law 25 (2023-2024), 105-274.

35 See for more details my comment on this judgement: <https://gedip-egpil.eu/fr/2022/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/>, last access 3 March 2026.

36 Nic Shuibhne, *EU Citizenship Law* (n. 15), 1.

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ment as interpreted by the ECJ. By way of conclusion, it points to the coherence of the Court's case law, which has enlarged the scope and expanded the autonomy of the free movement rights of third-country family members and also strengthened the autonomous free movement rights of EU citizen children.

The Legal Service's narrow approach thus results in an equally narrow conclusion. This will disappoint those who would have hoped for the Legal Service to place its findings against the horizon of a broader reflection on the position which EU citizenship occupies, or should occupy, in the Union's legal order. Isn't there more to say about EU citizenship?

III. There's More to EU Citizenship … Three Insights for an Alternative Assessment

In reaction to the disappointingly narrow approach by the Legal Service, I will propose, in the following pages, three insights which might be gained from an alternative look at some major recent developments regarding EU citizenship and which might complement or at least add some nuance to the Legal Service's view on this status. These three insights concern different aspects of the Legal Service's analysis. But they share the underlying idea that reducing EU citizenship to a catalogue of (free movement) rights which individuals can invoke against the Member States and which would therefore concern their private interests only, would underestimate this status' significance for the Union's legal order. In other words, there is more to EU citizenship than what the Legal Service exposes.

1. EU Citizenship Is More Than a Status Developed Through Preliminary References

The Legal Service's chapter on EU citizens almost entirely relies on the presentation of only a handful of preliminary rulings by the ECJ. Certainly, all cases presented are pertinent and serve as major stepping stones for the development of the Court's case law on this subject. As is observed in this special issue also with respect to other domains,[37] the Legal Service's empha-

37 See the criticism in this special issue by Christian Thönnes, 'Invisible Infringements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330 on the 'shortcomings' of the preliminary reference procedure in the area of freedom, security and justice.

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sis on the preliminary reference procedure does not necessarily capture all issues raised by EU citizenship.

It is true that the Court, mainly through preliminary rulings, has managed to gradually transform an initially rather vague notion into a concrete and very important legal concept.[38] Still, a complete picture of the status of EU citizenship in the 70 year development of EU law, specifically where the role of the Commission and its Legal Service is concerned, would require that attention be given to other cases, actions, and initiatives as well.

However, the Legal Service is remarkably reticent on the Commission's own contribution to the development of EU citizenship. Describing itself as 'a consistent and longstanding partner in the ongoing judicial dialogue on EU citizenship',[39] it appears to consider its own interventions in the preliminary reference procedure as the Commission's major contribution to that domain. But the role which the Commission has actually played in this field is far more varied and impactful.

Apart from its interventions in cases brought before the ECJ, in which it typically expresses a pro-integration interpretation of the citizenship rights involved, the Commission can also itself initiate judicial proceedings before the ECJ. The Legal Service's book rightly refers to the infringement action which the Commission can initiate on the basis of Article 258 TFEU as 'a key driver of the development of European Union law'.[40] Although this procedure has also been important for the actual enforcement of EU citizenship law and thus has contributed to its interpretation and development, this remains completely unnoticed in the Chapter. I regret this as, due to the discretion which it enjoys in this respect, the Commission's decision to initiate an Article 258 procedure provides an excellent indication of what aspects of EU citizenship it considers itself most important.

A look at recent examples of Commission action under this provision shows that, different from the specific freedom of movement angle from which the Legal Service examines EU citizenship, the Commission clearly holds the view that there is more to this status than (only) free movement

38 Koen Lenaerts, 'Union Citizenship and the Principle of Non-Discrimination on Grounds of Nationality' in: Nils Fenger, Karsten Hagel-Sørensen and Bo Vesterdorf (eds), Festskrift til Claus Gulmann (Thomson 2006), 289-309 (290).

39 Tomkin and Montaguti (n. 2), 96.

40 Karen Banks and Gregor von Rintelen, 'The Infringement Procedure: A Key Driver of the Development of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 296-310.

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and residence rights.[41] In *Commission v. Malta*, for instance, the Commission started infringement proceedings against Malta for reason of this Member State's 'transactional' nationality legislation which it considered to breach Articles 20 TFEU and 4(3) TEU.[42] In two other recent cases, *Commission v. Czech Republic* and *Commission v. Poland*, the Commission relied on Article 22 TFEU to challenge these Member States' restrictions on certain political rights of foreign EU citizens.[43]

Even apart from their precise subject-matter, the infringement actions by the Commission demonstrate that, contrary to what the Legal Service suggests, the development of EU citizenship is not only the result of action undertaken by EU citizens and their lawyers, but follows as well from institutional action against Member States which are unwilling to abide by the pertinent requirements of EU law. It is beyond doubt, therefore, that citizenship status under EU law does not only concern the private interests of the Member State nationals concerned, but inevitably also affects the interaction between the specific interests and concerns of Member States and the general interest of the Union which the European Commission must promote according to Article 17(1) TEU.

Furthermore, the Commission is also a political actor, which has contributed to the development of EU citizenship through various legislative and policy initiatives.

Of particular importance has been its initiative to propose a single legislative act 'with a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right',[44] which eventually led to the adoption by the European Parliament and the Council, of Directive 2004/38.[45] In its Chapter, the Legal Service refers to the ECJ's interpretation of the Directive, though without putting any spotlight on the latter specifically. Yet, more than twenty years on, this Directive has developed into a major piece of EU law which lays out

41 In the cases mentioned in footnotes 42 and 43, the ECJ rendered its judgement after the publication of the Legal Service's book but the Commission initiated the respective proceedings before that publication.

42 ECJ, *Commission v. Malta* (n. 16).

43 ECJ, *European Commission v. Czech Republic*, judgement of 19 November 2024, case no. C-808/21, ECLI:EU:C:2024:962, and ECJ, *European Commission v. Republic of Poland*, judgement of 19 November 2024, case no. C-814/21, ECLI:EU:C:2024:963.

44 Recital 4 of Directive 2004/38/EC.

45 See Nic Shuibhne, *EU Citizenship Law* (n. 15), 67-68, who observes with respect to the Commission's proposal for Directive 2004/38 that the Commission and the European Parliament specifically aimed at promoting the right to move and reside through the prism of EU citizenship.

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the essentials of cross-border, intra-Union freedom of movement for EU citizens, including the multiple derived rights flowing from it.

On a very different note, and although its scope is not limited to EU citizenship and it does not rest on a related legal basis either, the Commission's recent legislative initiative on parenthood can be mentioned here as well. With its proposal, the Commission attempts to translate the steadily growing series of judgements on cross-border status recognition for EU citizens into a regulation to be adopted by the Council on basis of Article 81 (3) TFEU.[46] Certainly, the Commission's 'Parenthood Proposal' is quite controversial and success is far from certain.[47] Yet, the initiative testifies to the role which the Commission can play to enhance legal certainty for mobile EU citizens, who wish to benefit in all respects from their free movement rights. Further, it is important to note that the Commission thus attempts to develop the so-called 'area of freedom, security and justice' – the field which grants the legal basis to its 'Parenthood Proposal' and which does not limit its scope to EU citizens – on the basis of the 'acquis' of the ECJ's judgements on status recognition for EU citizens. In other words, the (possible) adoption of the 'Parenthood Proposal' would to a large degree extend the rights which EU citizens currently enjoy on basis of Article 21 TFEU (intra-Union freedom of movement) to all those who, irrespective of their nationality, wish to maintain and ensure their parenthood status in a cross-border situation. Hence, the Commission strives at extending the ECJ's case-law on citizenship, at least in the sphere of cross-border parenthood,[48] into a more general recognition of free movement rights and status continuity as an important component of the Union's area of freedom, security and justice (see Article 3 (2) TEU).

46 Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022) 695 final; the 'Parenthood Proposal').

47 See *inter alia* the critical reception of the 'Parenthood Proposal' by GEDIP ('Observations on the Proposal for a Council Regulation in matters of Parenthood', Milan meeting, 2023; <https://gedip-egpil.eu>, last acces 3 March 2026 and the Marburg Group, <https://www.marburg-group.de>, last access 3 March 2026.

48 With respect to the pros and cons of a further extension of this approach to other fields, see Johan Meeusen, 'Lessons Drawn from the Commission's Parenthood Proposal for Further EU Initiatives on Personal Identity and Status Continuity', Yearbook of Private International Law 25 (2023-2024), 169-215.

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2. EU Citizenship Is More Than a Rights Catalogue Accommodating Private Interests

The Legal Service's (implicit) characterisation of EU citizenship as a rights catalogue, with free movement rights as its core, corresponds to a familiar perspective in legal scholarship which interprets the evolution of EU citizenship as entailing, first and foremost, a rights-based approach.[49] The pertinent Treaty provisions, and in particular Articles 20-24 TFEU which list in a non-exhaustive way the rights which this Treaty grants to EU citizens, indeed point in such a direction. Yet, this is only part of the story. In that respect, I do not so much refer to possible duties imposed on EU citizens, which the TFEU does not concretise. Nevertheless, it is important to clarify that EU citizenship status cannot be reduced to a one-sided rights catalogue from which the nationals of the Member States can pick and choose the rights which they wish to enforce against the Member States without other interests being at stake. While EU citizenship obviously incorporates the private interests of the individuals concerned, this status also affects pertinent public interests.

The ECJ's many preliminary rulings in this domain, rendered after references by national courts which must decide on lawsuits filed by individuals who wish to enforce their rights under EU law, inevitably put the spotlight on EU citizenship as a source of rights under EU law for the nationals of the Member States. These rights, as conferred to the EU citizens by Articles 20-24 TFEU, today constitute a major component of the Union's legal order.

Initially, European integration mainly benefited those who were economically active within the common or internal market, as primary free movement rights were granted exclusively to these market actors. Through its introduction of the status of EU citizenship, which entailed free movement rights as well, the Maastricht Treaty extended the right to intra-EU mobility to all nationals of the Member States who were defined as EU citizens, irrespective of their economic activities.[50] Today, the free movement of persons not only constitutes a core ingredient of the internal market (Article 3(3) TEU), but also of the area of freedom, security and justice (Article 3(2) TEU). According to Article 20(2)(a) TFEU, EU citizens have the right to move and reside freely within the territory of the Member States, which is further detailed in Article 21 TFEU. This right is confirmed in identical terms, and even raised to the status of a fundamental right, in Article 45(1)

49 See e. g. Annette Schrauwen, 'Citizenship of the Union' in: Pieter Jan Kuijper et al. (eds.), The Law of the European Union (5th edn, Kluwer Law International 2018), 611-638 (617).

50 See (then) Articles 8 and 8 a of the Treaty establishing the European Community (1992).

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Charter. Moreover, and systematically from the early *Martinez Sala* case onwards,[51] the ECJ has given true substance to EU citizenship through its large interpretation of the pertinent Treaty provisions – in particular Articles 18, 20 and 21 TFEU.[52]

It is with reason, therefore, that the subtitle of the Legal Service's book aptly refers to the EU as 'a Union for its citizens' and one can easily understand the book's focus on the citizens' rights, and the right of free movement specifically. In De Witte's colourful language, the free movement provisions operate as a type of trampoline which allows the EU citizens to escape limitations imposed by their Member States' laws in order to pursue their individual, cross-border aspirations.[53]

Yet, contrary to what the Chapter suggests, this is not all what there is to say on this status. It would be wrong indeed to ignore that EU citizenship has fundamentally transformed the nature and the impact of the Union's integration process as well and hence affects both private and public (Member State and EU) interests. The generalisation of free movement rights, to the benefit of the Member States' nationals, is very important and a gamechanger in itself. Further, and much more than is the case for the typical internal market cases, the reliance by the EU citizens on their non-discrimination and freedom of movement rights often concerns politically sensitive areas for which the Member States have typically maintained exclusive legislative competence. When EU citizens are successful in enforcing their rights on these domains, the impact of EU law increases significantly in the absence of any transfer of Member States' powers. In the Chapter, this important evolution comes to the fore only indirectly, through the Legal Service's presentation of the cases on issues of immigration policy and status and family law which the Legal Service highlights from the perspective of the rights of family members and children. It is only in the Chapter's brief final paragraph that the Legal Service, actually without really developing this, refers to the tension that characterises many of the cases brought before the ECJ and which therefore marks the underlying debate. The promotion of a citizen-friendly, pro-integration interpretation of the citizens' rights indeed is easily perceived by

51 ECJ, *Martínez Sala* (n. 6).

52 See however also van de Beeten's critical remarks (with further references), 'questioning the centrality of EU citizens within EU law' (n. 27).

53 Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law', CML Rev. 50 (2013), 1545-1578 (1554-1555). On basis of her analysis of the ECJ's internal market and EU citizenship case-law, Spaventa developed an even broader interpretation of the ECJ's role as a guarantor of individual rights, 'protecting the citizen *qua citizen*, rather than simply *qua mover*' against national regulations (Eleanor Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution', CML Rev. 41 (2004), 743-773 (774 and 772-773)).

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the Member States as an attempt to maximise, if not overstretch, the Union's powers. According to the Legal Service however, it is apparent from the cases examined in its Chapter that the ECJ has striven to ensure that national competences are limited only to the extent necessary to safeguard the effectiveness of the rights conferred directly on EU citizens by the Treaties.[54]

This last sentence essentially rephrases the classic consideration, as affirmed by the ECJ in many judgements, that its interpretation of EU law, *in casu* the Treaty provisions with respect to citizenship rights, does not encroach upon the Member States' remaining competences, but only affects the way this competence is exercised in order to avoid a violation of EU law.[55] Yet, such considerations often beg the question, to say the least. The extent of the effects attributed to EU citizenship rights, and their impact on the Member States' remaining competences, is a major issue which goes to the core of the debate on (the limits of) European integration. Insofar as EU citizenship is concerned, this debate is often extremely sensitive because of the nature of the Member States' competences (possibly) affected. This obviously is the case for migration and integration, which is a hot topic in today's political debate that also concerns the free movement rights in the Union and its Member States. But this is true as well for other issues. Where the ECJ's recent, much discussed case-law on the interaction between EU citizenship and the Member States' legislation on nationality or on personal and family status is concerned, a vital concern is where to draw the line between the policy margin left to the Member States and the uniformising impact of EU law. While this tension runs as a familiar red thread through 70 Years of EU Law, this debate has been particularly sharp with respect to fields as nationality and family law which together with tax and social security law are among those which affect most the core of remaining Member State sovereignty and which are more and more affected by the ECJ's case-law on citizenship rights. Although the Legal Service discusses pertinent ECJ judgements, such as *Coman* and *V. M. A.* which provoke much debated questions on (the compulsory recognition of) same-sex marriage and same-sex parenthood,[56] it is particularly disappointing that it confines itself to a mere confirmation of the Court's classic consideration, without further substantiation nor references to the ongoing (academic and political) discussions on these issues.

The crucial question is where the ECJ finds the balance between the exercise of mobile EU citizens' rights and the protection of Member State interests. Certainly, an approach such as that of the Legal Service which

54 Tomkin and Montaguti (n. 2), 114.

55 See e. g. ECJ, *Coman* (n. 28), paras 37-38; ECJ, *V. M. A.* (n. 32), para. 52.

56 See *infra* for more details on these cases.

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mainly understands EU citizenship as a one-sided rights catalogue which implements the citizens' private interests and mostly ignores the possible impact of countervailing public interests, cannot convince.

Already many years ago, AG Szpunar characterised EU citizenship, and in particular the freedom of movement which it implies, as an essential part of a European identity.[57] Article 45 Charter has even 'upgraded' the EU citizens' free movement right to the status of a fundamental right, and has meanwhile been prominently relied upon by the ECJ in a case on an EU citizen's status recognition.[58] Hence, EU free movement law grants particular weight to the private interests involved, although they are not without either counterbalance or limitation. This is not only the case for the rights of market actors, who are encouraged to profit from the Union's economic integration process, but applies more generally to all mobile EU citizens, and all the more so where these citizens' fundamental rights, such as those laid down in Articles 7 or 24 Charter for instance, are involved as well.[59]

Let us take another look, against that background, to some of the cases examined by the Legal Service.

Referring specifically to the Court's autonomous interpretation of the concept of 'spouse', the Legal Service gives ample attention to the famous *Coman* case, on the recognition in Romania of a Romanian-American same-sex marriage concluded in Belgium, which it calls a milestone in the Court's case law regarding family members.[60] In its chapter on EU citizen children, the Legal Service gives specific attention as well to *Garcia Avello*, *Grunkin and Paul* and *V. M.A*. In all those cases, the ECJ sided with the EU citizens involved, who relied on their free movement or non-discrimination rights under EU law against reticent Member States which initially refused to disapply their national legislation. More recently, after the publication of the Commission's book, the ECJ confirmed and even strengthened its interpretation of the mobile EU citizens' rights in the *Mirin* and *Wojewoda Mazowiecki* cases on the recognition of a change of first name and gender identity and of a same-sex marriage respectively.[61] Although the Legal Service does

57 Opinions of AG Szpunar in *Sean Ambrose McCarthy and Others v. Secretary of State for the Home Department*, C-202/13; ECLI:EU:C:2014:345, para. 40 and in *Alfredo Rendón Marín v. Administración del Estado and Secretary of State for the Home Department v. CS*, C-165/14 and C-304/14; ECLI:EU:C:2016:75, para. 108.

58 ECJ, *Mirin* (n. 25), paras 58, 68 and 71.

59 See, specifically with regard to the EU citizens' freedom of movement as opposed to the protection of the Member States' national identities: Meeusen, 'Cross-Border Mobility' (n. 34), 20-23.

60 Tomkin and Montaguti (n. 2), 101.

61 ECJ, *Mirin* (n. 25), para. 71; ECJ, *Jakub Cupriak-Trojan and Mateusz Trojan v. Wojewoda Mazowiecki*, judgement of 25 November 2025, case no. C-713/23, ECLI:EU:C:2025:917.

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not emphasise this in so many words, these judgements characterise status continuity in cross-border cases as an important component of effective EU citizenship. In its recent judgement in *Wojewoda Mazowiecki*, the ECJ explicitly considered in that sense that the effectiveness [*effet utile*] of the rights which EU citizens derive from Article 21(1) TFEU requires them to have the certainty of status recognition (*in casu*, to be able to pursue in their Member State of origin the family life that they have created or strengthened in the host Member State, in particular by virtue of their marriage).[62]

At the same time, these cases also confirm that the free movement rights of EU citizens are not necessarily limitless, or at least must not be taken for granted. In *Coman* and *V. M. A.*, for example, as well as recently in *Wojewoda Mazowiecki*, the ECJ respectively rejected the reliance by Romania, Bulgaria, and Poland on Article 4(2) TEU (respect for national identity) and public policy as justification grounds for the refusal of the recognition of a status unknown in their respective legal system. The ECJ minimised the impact of such recognition on the respective host States, particularly because it did not require them to provide in their national law for same-sex marriage or parenthood and was confined to the obligation to guarantee such recognition for the purpose of enabling the EU citizens concerned to exercise the rights they enjoy under EU law.[63] But while the Legal Service heavily relies on *Coman* and *V. M. A.* to make its point on the Court's interpretation of the free movement rights of EU citizens, it does not in any way refer to these national identity concerns or the Court's precise response in both judgements to the Member States' explicit reliance on Article 4(2) TEU. And while it does mention the unsuccessful reliance by Bulgaria on public policy as a justification ground in *V. M. A.*, it does so only very swiftly and without any further elaboration of this argument.[64]

Freedom of movement obviously concerns in the first place the private interests of the EU citizens involved. Yet, the Treaties explicitly recognise the pertinent Member States' interests as well, e. g. in the provisions on duly respecting and valuing diversity. Article 3(3) TEU obliges the Union to respect 'its rich cultural and linguistic diversity' which is echoed with respect to cultural diversity in Article 167(4) TFEU. Article 4(2) TEU obliges the Union to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional […]'. According to Article 22 Charter, the EU 'shall respect cultural, religious and linguistic diver-

62 ECJ, *Wojewoda Mazowiecki* (n. 61), para 46.

63 ECJ, *Coman* (n. 28), paras 43-46; ECJ, *V. M. A.* (n. 32), paras 54-57; *Wojewoda Mazowiecki* (n. 61), paras 58-62.

64 Tomkin and Montaguti (n. 2), 107.

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sity'. The Charter's preamble refers to the Union's respect for the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.

The questions raised in that respect do not merely involve the rather classic juxtaposition, well-known from the EU's internal market law, of free movement rights and legitimate Member State interests but essentially concern a much more fundamental issue: How much room does EU law leave to the Member States to fully model their societies according to their political and societal choices in a delicate field such as status and family law?[65] The cases on status recognition thus testify of the potentially far-reaching effects of EU citizenship, and the free movement rights specifically, but also of the balance, if any, which is struck in that respect by the ECJ.

The Union's obligation to respect the national identity of the Member States has steadily gained more attention since the introduction of Article 4 (2) by the Treaty of Lisbon. The precise significance and reach of this obligation has not only been the subject of much doctrinal debate,[66] but has also been explicitly discussed before the ECJ. And whereas national identity concerns were relied upon unsuccessfully in *Coman*, *V. M. A.* and *Wojewoda Mazowiecki* (*supra*), the ECJ has been more receptive to it in other cases. One cannot but regret that the Legal Service does not refer to these other cases, in spite of their great pertinence for the understanding of EU citizenship rights.

In *Sayn-Wittgenstein*, the ECJ held that Article 21 TFEU does not preclude the authorities of a Member State from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility not permitted under the first Member State's constitutional law, provided that those authorities' measures are justified on public policy grounds. With respect to that justification, the ECJ referred to Article 20 Charter (principle of equal treatment)[67] and Article 4(2) TEU (respect for the national identities of the Member States, which according to the ECJ includes the status of the State as a Republic).[68] In *Runevič-Vardyn*,

65 A similar debate concerns the interaction between EU law and the Member States' immigration law and policies. Due to space restrictions, however, my analysis is limited to status and family law.

66 See e. g., with further references, the many contributions in the special issue of European Public Law 27 (2021), no. 3, 411-628, edited by Diane Fromage and Bruno de Witte, on national constitutional identity.

67 Charter of Fundamental Rights of the European Union.

68 ECJ, *Sayn-Wittgenstein* (n. 25), paras 81-95.

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the ECJ held that Article 21 TFEU did not preclude the refusal by the Lithuanian authorities of the amendment according to the Polish spelling rules of a Lithuanian woman's names on the birth and marriage certificates and of the diacritical marks of her Polish husband's forenames on the marriage certificate. As regards the refusal to amend the marriage certificate in order that the joint surname of husband and wife be entered uniformly and in accordance with the Polish spelling rules, the ECJ left it to the national court to decide whether this was liable to cause serious inconvenience, in which case it would be a restriction on the freedoms conferred by Article 21 TFEU. Referring to Articles 3(3) and 4(2) TEU and Articles 7 and 22 Charter, the ECJ held that Lithuania's concern for the protection of its official national language constitutes a legitimate objective capable of justifying free movement restrictions, subject however to the requirement of proportionality.[69] The ECJ left it to the national court to decide whether the refusal to amend the civil status certificates reflected a fair balance between the spouses' right to respect for their private and family life and the legitimate protection by Lithuania of its official national language and its traditions.[70]

In *Bogendorff von Wolffersdorff*, the ECJ held that Article 21 TFEU does not oblige a Member State to recognise the name of one of its citizens who also holds the nationality of another Member State in which he has acquired that name which he has chosen freely and which contains a number of tokens of nobility, which are not accepted by the law of the first Member State, provided that it is established that the refusal of recognition is justified on public policy grounds, i. e., it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law. With respect to this justification ground, the ECJ explicitly characterised Germany's constitutional choice to abolish privileges and inequalities and to prohibit the bearing of titles of nobility as an element of its national identity in the sense of Article 4(2) TEU.[71]

As these last cases make clear, the reliance on EU citizenship rights to ensure cross-border status recognition typically affects those domains for which the Member States have not only retained competence – personal status and family law – but typically also adopt legislation which has a public order or even constitutional character and is considered to express important societal values. Such cases therefore concern very sensitive conflicts between the private interests of mobile EU citizens, inspired by deeply held aspira-

69 This judgement of the ECJ's Second Chamber has been confirmed on this point more recently by the ECJ's Grand Chamber in *Boriss Cilevičs and Others*, judgement of 7 September 2022, case no. C-391/20, ECLI:EU:C:2022:638, paras 65-87.

70 ECJ, *Runevič-Vardyn* (n. 25), paras 66-94.

71 ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 61-84.

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tions relating to their personal or family status, and the public interests of Member States, which these typically consider particularly affected when their own nationals (and people closely connected with them) are involved. Member States have therefore often tried to characterise their justifications of restricting free movement as considerations of a public policy character, which have also been linked to the need to protect their national or constitutional identity or fundamental, constitutional values or principles.[72]

The ECJ has in that context specifically referred to Article 4(2) TEU, though not very consistently. Most often, this provision has been mentioned as an additional, though not strictly necessary argument which lends additional strength to the justification relied upon, mostly public policy.[73] When the proportionality of a restrictive Member State measure is examined, such reference can help to tip the balance in favour of that Member State's interest.[74] Public policy constitutes in its own right a justification ground which allows Member States to protect their public interests or (constitutional) values. The ECJ accepts in that regard, though subject to the proportionality principle,[75] a certain degree of Member State diversity, also on basis of their moral or cultural views.[76] It has repeatedly considered that the

72 See e. g. the justification arguments mentioned in ECJ, *Sayn-Wittgenstein* (n. 25), paras 73-79; ECJ, *Runevič-Vardyn* (n. 25), para. 84; ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 61-63; ECJ, *Coman* (n. 28), para. 42; ECJ, *V. M. A.* (n. 32), para. 53; *Wojewoda Mazowiecki* (n. 61), para. 57.

73 ECJ, *Sayn-Wittgenstein* (n. 25), paras 89-94; ECJ, *Runevič-Vardyn* (n. 25), paras 85-87; ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 64-66. See in this respect also Matteo Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', European Public Law 27 (2021), 537-558 (556) ('national identity could serve to broaden the scope of existing derogations and other means to protect diversity, expanding it to areas that might not be otherwise covered by other standard derogations') and François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way', European Public Law 27 (2021), 571-596 (582-583). In *Coman* ((n. 28), paras 43-46), *V. M. A.* ((n. 32), paras 54-57) and *Wojewoda Mazowiecki* ((n. 61), paras 58-62), the ECJ appeared somewhat more willing to consider respect for a Member State's national identity a separate justification ground at the same level as public policy, though without really further developing this nor eventually accepting such claim.

74 See Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty', CML Rev. 48 (2011), 1417-1454 (1441-1443) and Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy', Fordham Int'l L. J., 36 (2013), 1302-1371 (1330-1331). See in particular ECJ, *Sayn-Wittgenstein* (n. 25), paras 92-94.

75 See on the substantive and, specifically, procedural tests of proportionality for the interaction between EU law and Member State law which expresses particular moral, ethical of cultural values: de Witte (n. 53), 1565-1577.

76 See e. g. ECJ, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, judgement of 14 October 2004, case no. C-36/02, ECLI:EU:C:2004:614, para. 37; ECJ, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, judgement of 14 February 2008, case no. C-244/06, ECLI:EU:C:2008:85, para. 44.

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specific circumstances which justify recourse to public policy may vary from one Member State to another and from one era to another and that the national authorities must be allowed a margin of discretion within the limits imposed by the Treaty.[77]

Overviewing the totality of the ECJ's case law in this domain, and taking into account the variety of interests and concerns which are at play, it appears that especially in those areas for which the Member States have retained the legislative competence, such as family and status law, the ECJ is more open to the Member States' reliance on countervailing public interests. This is especially the case for the respect due to their national identity, and the diversity which this entails.[78] This is no general rule, however. It appears to be the case particularly, in line with the dynamic character of the national identity,[79] where the situation is, to a certain extent, reversed, meaning that the Member State's objectives are considered not only compatible with EU law, but even to be aimed at the observance of a general principle of EU law or a fundamental right.[80]

The ECJ's judgement in *Sayn-Wittgenstein* is very explicit about this. There, the ECJ, when examining the public policy justification invoked by Austria to justify its constitutional choice to abolish titles of nobility, refers to equal treatment as a general principle of EU law which is also enshrined in Article 20 Charter and adds that, in accordance with Article 4(2) TEU, the EU is to respect the national identities of its Member States, which include the status of the State as a Republic.[81] As a next step, the ECJ itself then decided that Austria thus acted in accordance with the principle of proportionality.[82]

The ECJ's reasoning in *Bogendorff von Wolffersdorff* goes in the same sense. Although the ECJ leaves it for the referring court to make a concrete proportionality analysis, it insists that the principle of equal treatment is compatible with EU law, in which respect it again refers to Article 20 Charter, and connects Germany's concern for the principle of equality before the law of all German citizens and its constitutional choice to abolish privi-

77 See e. g. ECJ, *Omega* (n. 76), para. 31 and ECJ, *Dynamic Medien* (n. 76), para. 44, as well as, with respect to the cases examined, ECJ, *Sayn-Wittgenstein* (n. 25), para. 87 and ECJ, *Bogendorff von Wolffersdorff* (n. 25), para. 68.

78 Bonelli (n. 73), 556.

79 Christian Walter and Markus Vordermayer, 'Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen', Jahrbuch des öffentlichen Rechts der Gegenwart 63 (2015), 129-166 (164-165).

80 See Nic Shuibhne, *EU Citizenship Law* (n. 15), 513.

81 ECJ, *Sayn-Wittgenstein* (n. 25), paras 89-92.

82 ECJ, *Sayn-Wittgenstein* (n. 25), para. 93.

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leges and inequalities and to prohibit the bearing of titles of nobility to public policy and the application of Article 4(2) TEU.[83]

In *Runevič-Vardyn* the ECJ considers, before confirming that the requirement of Article 4(2) TEU includes the protection of a State's official national language, that according to the fourth subparagraph of Article 3(3) TEU and Article 22 Charter, the Union must respect its rich cultural and linguistic diversity.[84] In this case, the ECJ left it to the referring court to make a proportionality analysis, instructing it to examine the 'fair balance between the interests in issue, that is to say, on the one hand, the right of the applicants in the main proceedings to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions'.[85]

But if all those concerns and interests are affected by EU citizens' free movement and non-discrimination rights, and come to the fore especially where their interaction with the Member States' status and family law is concerned, the question remains why the Legal Service in its Chapter almost completely ignores this debate, although it mentions and examines a series of pertinent ECJ judgements?

Legal scholarship has suggested that the EU institutions specifically push the development of free movement law (and so can be expected as well to emphasise it in public communication, such as the Legal Service's book) because freedom of movement is so symbolically significant for the idea of a unified Europe as it was conceived by the founders of European integration.[86] In other words, 70 Years of EU Law should, according to that view, logically focus on the abolition of restrictions, rather than on the remaining obstacles for free movement or the other concerns and interests which are at play. Nevertheless, the Legal Service's relative silence on this point, which almost resembles an attempt to sidestep the still ongoing debate on the possible limits to EU citizens' free movement rights, is bizarre. It inevitably results in a Chapter which only gives very partial insight in the concept of EU citizenship and what is at stake when the ECJ interprets the rights

83 ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 64-78.

84 ECJ, *Runevič-Vardyn* (n. 25), para. 86.

85 ECJ, *Runevič-Vardyn* (n. 25), para. 91. In a more recent case, the ECJ even considered that Member States 'enjoy broad discretion' to determine the measures it takes to achieve the objectives of their policy of protecting the official language 'since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU', but gave quite detailed instructions to the referring court as to the proportionality requirement (ECJ, *Cilevičs* (n. 69), paras 83-87).

86 Ségolène Barbou des Places, 'Is Free Movement (Law) Fully Emancipated from Migration (Law)?' in: Niamh Nic Shuibhne (ed.), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press 2023), 6-38 (34).

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involved. In particular, it sketches a quite one-sided picture of the entailing free movement rights.

To conclude, it must be admitted that, approached from the Legal Service's perspective, the Chapter's title adequately portrays EU citizenship as a status that in very practical terms comes 'to the service' of Member State nationals and their families when they pursue their claims before national courts.[87] However, there are more nuances and dimensions to the ECJ's case law in this domain, as the Court clearly does not consider the EU citizens' rights and the private interests involved limitless, as the Treaty provisions would not allow it to do anyway.

3. EU Citizenship Is More Than a Status Expressing the Bond of Nationality

A third lacuna in the Legal Service's approach to the development of EU citizenship is that, while it refers to the interaction between EU citizenship rights and the exercise of national competences and hence the relationship between these citizens and (their) Member States, it fails to examine the relationship between EU citizens and the EU itself. Admittedly, the latter has come to the fore more explicitly only in the ECJ's most recent case law, which grants more significance to EU citizenship than its reliance on, and expression of, a bond of nationality. As the Commission has been significantly involved in these cases, not only through its interventions before the Court but more importantly also through the introduction of infringement proceedings on basis of Article 258 TFEU well before the publication of its book on 70 Years of EU Law, the complete absence of this subject in the book is quite disappointing. Fundamental questions of a truly constitutional character, on the nature of the relationship between EU citizenship, which is acquired exclusively through the application of Member State nationality law, and the EU, to which EU citizenship hence appears at first sight to be only indirectly linked, remain missing. Further, one cannot but regret that the Legal Service, once more, fails to engage with legal scholarship in this respect.

As is well known, the EU Treaties define the nationality of a Member State as the sole access to the status of EU citizen. According to Articles 9 TEU and 20 TFEU, every national of a Member State shall be a citizen of the Union. As the Treaties have not granted any competence in the field of

87 Tomkin and Montaguti (n. 2), 96.

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nationality to the EU, the Member States have retained exclusive competence on this subject. According to its very nature as an essential bond between a State and the members of its polity, nationality must even be considered to pertain to the core of remaining Member State sovereignty. As Declaration No. 2 on nationality of a Member State, annexed to the TEU, as well as the European Council's 'Edinburgh Decision'[88] confirm, the question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

In line with this reference to the exclusive competence of the Member States, the Treaties do not hold any further provisions on the acquisition or loss of Member State nationality or EU citizenship. Still, it is well-established case law of the ECJ, in accordance with its approach in other domains as well, that Member States, when exercising their powers in the sphere of nationality, must have due regard to EU law.[89] This is the case where a loss of EU citizenship as a result of a loss of Member State nationality is concerned,[90] but also where the acquisition of EU citizenship, through the acquisition of a Member State's nationality, is concerned.

This last issue has recently been at the centre of the debate, due to the Commission's infringement action against the Republic of Malta in the famous 'golden passports' case. The Commission claimed that through its legislation which offers naturalisation in the absence of a genuine link of the applicants with the country in exchange for payments or investments, this Member State failed to fulfil its obligations under Articles 20 TFEU and 4(3) TEU. For our purposes, it is very interesting to juxtapose the Commission's plea in this case with the eventual judgement by the ECJ. While the ECJ indeed declared that Malta had failed to fulfil its obligations under the Treaty provisions invoked by the Commission, it based this on other arguments than invoked by the Commission.[91]

The Commission emphasised the shared concept of nationality of a Member State as 'the expression of a genuine link between a Member State and its nationals' and that 'the special relationship of solidarity and good faith between a Member State and its nationals and also the reciprocity of rights and duties form the bedrock of the bond of nationality'.[92] The absence of a 'genuine link' runs through the Commission's pleas as its essential reason for considering the Maltese nationality legislation in breach of Union law, *inter*

88 Denmark and the Treaty on European Union, OJ 1992 C 348/1.

89 See for example, with further references, ECJ, *Rottman* (n. 16), para. 45.

90 See the ECJ judgements in *Rottman* (n. 16), *Tjebbes* (n. 16), *Wiener Landesregierung* (n. 16), *X v Udlændinge- og Integrationsministeriet* (n. 16) and *Stadt Duisburg* (n. 16).

91 ECJ, *Commission v. Malta* (n. 16).

92 ECJ, *Commission v. Malta* (n. 16), para. 50.

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alia because it jeopardises the mutual trust that, according to the Commission, underpins EU citizenship.[93] Its emphasis on such 'genuine link' and its exchange of arguments with the Republic of Malta in this case put the accent on the relationship that must exist between a Member State and its nationals.[94] The Commission considers this requirement the premise for the mutual trust that must exist between the Member States, and which it links to the obligation of mutual recognition that according to the Commission can be deduced from the ECJ's judgement in *Micheletti*.[95]

In its judgement, however, the ECJ does not refer, at least not explicitly,[96] to such a 'genuine link'. Still, it does emphasise the ties that must exist between a Member State and its nationals, deducing from its settled case law that 'the bedrock of the bond of nationality of a Member State is formed by the special relationship of solidarity and good faith' between the Member State and its nationals.[97] It adds that in accordance with Article 20(1) TFEU, this special relationship forms the basis of the rights and obligations reserved to EU citizens by the Treaties,[98] and links this to the principle of mutual trust.[99]

A novel, and for our purposes very pertinent aspect of the *Commission v. Malta* judgement is that the ECJ goes further than the emphasis on the ties that must exist between a Member State and its nationals.[100] Of course, EU citizenship cannot be untied from the Member States' nationality laws. As the ECJ considered in *Préfet du Gers (I)*, the authors of the Treaties established through Articles 9 TEU and 20 TFEU 'an inseparable and exclusive link between possession of the nationality of a Member State and not only

93 See, apart from many other paragraphs referring to the requirement of a 'genuine link', ECJ, *Commission v. Malta* (n. 16), para. 53.

94 See however, for a more thorough understanding and contextualisation of the genuine link requirement, the study by Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds Without Belonging? The Genuine Link in International, Union and Nationality Law', YBEL 43 (2024), 56-94.

95 ECJ, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, judgement of 7 July 1992, case no. C-369/90, ECLI:EU:C:1992:295.

96 See Peter Hilpold, 'Unionsbürgerschaft in der EU-Werteunion: Malta wird Staatsbürgerschaftshandel untersagt', EuZW 36 (2025), 757-762 (759-761); Stefan Kadelbach, 'Der Erzherzog wird geprüft – Anmerkung zum Urteil des EuGH v. 29.4.2025, Rs. C-181/23 – Kommission/Malta ("Goldene Pässe")', EuR 60 (2025), 533-549 (541-542); Luke Dimitrios Spieker and Ferdinand Weber, 'Commission v. Malta (C-181/23): a "Miracle" of Union Citizenship?', E. L. Rev. 50 (2025), 487-501 (490-491).

97 ECJ, *Commission v. Malta* (n. 16), para. 96.

98 ECJ, *Commission v. Malta* (n. 16), para. 97.

99 ECJ, *Commission v. Malta* (n. 16), para. 101.

100 See Anastasia Iliopoulou-Penot, 'La citoyenneté de l'Union "telle qu'elle découle des traités". Brèves réflexions sur l'arrêt Commission/Malte (citoyenneté par investissement)', Revue des Droits et Libertés Fondamentaux (2025) chron. 48.

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the acquisition, but also the retention, of the status of citizen of the Union'.[101] Still, the ECJ's considerations in *Commission v. Malta* appear to put the spotlight rather on the relationship between the citizens and the Union itself, partly following up on the Commission's arguments in this case.

According to the Commission, EU citizenship has 'a strong civic component'.[102] The Commission further referred to 'the centrality of Union citizens in what is not only an economic Union but also a political Union'.[103] This understanding of EU citizenship is elevated to a higher level by the ECJ itself, when it not only insists on the importance of EU citizenship, but also emphasises its direct and important link with the Union's integration process. According to the Court, the provisions on EU citizenship are among the fundamental provisions of the Treaties and contribute to the implementation of the process of integration that is, as confirmed earlier in its famous Opinion 2/13,[104] the *raison d'être* of the European Union itself and thus form an integral part of its constitutional framework.[105] The ECJ considers EU citizenship 'one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration […] and which is an integral part of the identity of the European Union as a specific legal system, accepted by the Member States on a basis of reciprocity'.[106] According to the ECJ, 'Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise that power in a way that is manifestly incompatible with the very nature of Union citizenship'.[107]

The ECJ's interpretation in *Commission v. Malta* has been translated in terms of the development of EU citizenship from a liberal to a Republican,[108] or from a 'thin' to a 'thicker' approach to citizenship, based on the understanding of status, rights, and identity as the three main elements associated with citizenship.[109] The ECJ radically reinforces the status of EU citizenship and grants it a particular, substantive content. While the Commission's in-

101 ECJ, *Préfet du Gers (I)* (n. 17), para. 48.

102 ECJ, *Commission v. Malta* (n. 16), para. 43.

103 ECJ, *Commission v. Malta* (n. 16), para. 48.

104 ECJ, Opinion 2/13 of 18 December 2014, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, para. 172.

105 ECJ, *Commission v. Malta* (n. 16), para. 91.

106 ECJ, *Commission v. Malta* (n. 16), para. 93.

107 ECJ, *Commission v. Malta* (n. 16), para. 95.

108 Spieker and Weber (n. 96), 496.

109 Guillermo Arranz Sánchez, 'Is EU Citizenship for Sale – or for Keeps? A Critical Analysis of the CJEU's Golden Visa Ruling', <https://esthinktank.com/2025/07/02/is-eu-citizenship-for-sale-or-for-keeps-a-critical-analysis-of-the-cjeus-golden-visa-ruling/>, last access 3 March 2026.

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fringement action related to the commercialisation of the granting of the Maltese nationality, and hence the access to EU citizenship, the ECJ's judgement has a much wider resonance. EU citizenship is no longer a status which is only indirectly linked to the EU legal order through the nationality legislation of the Member States, but it is a concept that gives flesh to the principle of solidarity – a principle which actually has since long been associated with EU citizenship[110] – and is directly based on Article 2 TEU.[111] Hence, it must necessarily be considered an integral part of the very identity of the European Union as a common legal order.[112]

The significance of the *Commission v. Malta* judgement hence stretches much further than the Court's condemnation of the commodification of the granting of a Member State's nationality. The conditions for access to EU citizenship of course occupy a central position in the Court's judgement, but must be placed in the broader perspective of the relationship between the Member States and the EU. They contribute to the essence of European integration itself. It indeed appears that the ECJ's judgement in *Commission v. Malta* gives a strong impetus to the transformation from the EU into a true European polity, of which a truly European citizenship is a necessary component. As De Falco aptly summarised these different aspects of the ECJ's judgement in this case: it confirms that EU citizenship is more than a mere legal consequence of national citizenship, it is (also) a status that binds individuals to the Union polity and cannot be commodified.[113]

While legal scholarship still recently referred to a future evolution 'that eventually places the individual at the core of the Union as a genuine polity of its citizens',[114] *Commission v. Malta* may already be a watershed case in that respect. The ECJ essentially confirms that EU citizens are considered to form a European, value-based polity and it is in order to give substance to the latter that it considers EU law to impose particular requirements as to the

110 See Lenaerts, 'Union Citizenship' (n. 38), 290.

111 For the characterisation of, *inter alia*, the standard of solidarity as a legal principle, see Armin von Bogdandy, *The Emergence of European Society Through Public Law* (Oxford University Press 2024), 88-90.

112 See ECJ, *Hungary v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, paras 127 and 232 and *Republic of Poland v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. 157/21, paras 145 and 264. See for a further analysis of the 'identity' of the EU legal order, Maciej Krogel, 'Is It Enough to Say 'Common Values' When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244.

113 Emanuela De Falco, 'The End of Citizenship for Sale? A Legal Turning Point in Commission v. Malta (C-181/23)', <https://eulawlive.com/op-ed-the-end-of-citizenship-for-sale-a-legal-turning-point-in-commission-v-malta-c-181-23/>, last access 3 March 2026.

114 Wagner (n. 8), 314.

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ties which justify access to the citizenship status.[115] Contrary to what has been asserted in academic doctrine, the ECJ's interpretation, although not uncontroversial, does not appear to imply any European 'power-grab' as regards such access.[116] Certainly, it has nothing to do with any step towards some 'United States of Europe'[117] or 'a European nation'.[118] Neither does it imply a loosening of the ties between the Member States and their nationals, who (also) remain members of their respective national civic polities. As Dani wrote earlier, the national political communities 'are joined together in a collective transnational political undertaking'[119] to which Article 2 grants a 'societal' character defined by a set of values.

In this special issue, von Bogdandy refers to this additional societal layer in terms of 'a social totality whose political institutions are those of the European Union and all Member States'.[120] Internally, i. e. for its citizens, the Union thus constitutes 'a new kind of polity', as Hoeksma writes, but looked at from an external perspective the EU obviously remains an international organisation as well.[121] In his Opinion in *Commission v. Malta*, AG Collins also confirmed that a 'single polity' results from the creation of EU citizenship, although he disconnected this from any obligations for the Member States regarding access to this status.[122]

It is true of course that, as a result of the ECJ's judgement in this case, the Member States' formerly exclusive determination of access to EU citizenship, through their nationality legislation, has been significantly nuanced. As the Court indicates, the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order.[123] Hence, the ECJ appears to be driven by the desired *outcome*: in order to substantiate the common legal order that the EU aspires to become, there must also be some common understanding of who its citizens are. Therefore, EU citizenship

115 Iliopoulou-Penot (n. 100).

116 See Dimitry Kochenov, 'Never Mind the Law, Again: Commission v. Malta (C-181/23)', <https://eulawlive.com/op-ed-never-mind-the-law-again-commission-v-malta-c-181-23/>, last access 3 March 2026

117 Jaap Hoeksma, 'Moral high Ground and legal Analysis: on Commission v. Malta (C-181/23)', <https://eulawlive.com/op-ed-moral-high-ground-and-legal-analysis-on-commission-v-malta-c-181-23/>, last access 3 March 2026

118 von Bogdandy, 'Republican Thrust' (n. 10).

119 See Marco Dani, 'The Subjectification of the Citizen in European Public Law' in: Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds.), *Constructing the Person in EU Law* (Hart Publishing 2016), 55-88 (71).

120 von Bogdandy, 'Republican Thrust' (n. 10).

121 Hoeksma (n. 117).

122 Opinion of AG Collins in *Commission v. Malta* (n. 16), para. 40.

123 ECJ, *Commission v. Malta* (n. 16), para. 89.

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must be considered a necessary component for defining a particular European polity or, in broader terms which are inspired by Article 2 TEU, the European society. This polity is not so much the consequence of the political rights which EU citizens enjoy on basis of Article 22 TFEU or the right to diplomatic or consular protection granted by Article 23 TFEU, let alone of their free movement rights. Rather, the reverse is true: they enjoy those various rights because they are EU citizens, and through them the EU of which they are considered citizens, constitutes a civic polity.[124]

This interpretation rests on a very different concept of citizenship than that, referred to by Van de Beeten in his contribution to this special issue, of a status which in practice would only benefit certain elitist groups and leave out the majority of Europeans.[125] Understanding EU citizenship as a status which necessarily implies civic participation in a European polity is a far stretch from its interpretation as a status which is focused on cross-border mobility within 27 Member States, as the Legal Service appears to do in its Chapter. Such interpretation (and development) of EU citizenship may not only be incorrect and incomplete, but even endangering social cohesion.[126] As von Bogdandy affirms in his contribution to this special issue, the European polity (which he calls 'a republican Europe') 'is not just for people who take planes'.[127]

This citizenship concept has already been developed, or at least referred to, in earlier cases, to which the Commission has largely contributed or at least has been involved with to some extent. This makes the Legal Service's narrow approach, and its emphasis on EU citizenship as a catalogue of free movement rights which focuses on the relationship between the citizens and the Member States, all the more surprising.

Take the famous *Rottmann* case, for instance, in which AG Poiares Maduro already in 2009 referred to EU citizenship as 'a legal and political concept independent of that of nationality' and linked it to the construction of 'a new form of civic and political allegiance on a European scale'.[128] The

124 See in a similar sense Jules Lepoutre, 'La citoyenneté n'a pas de prix', RTDE 61 (2025), 395-412 (412) and Etienne Pataut, 'Selling Citizenship – A Challenge for Europe. A Commentary on the CJEU's Decision in *Commission v. Malta*, Yearbook of Private International Law 26 (2024-2025), 201-217 (217).

125 See van de Beeten (n. 27).

126 See Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans', European Papers 4 (2019), 675-694 (693) (but see also Loïc Azoulai's indignant reaction to Davies' contribution – Loïc Azoulai, 'On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' *Article*', European Papers 5 (2020), 279-282- and the subsequent response to Azoulai by Davies in European Papers 5 (2020), 283-286).

127 von Bogdandy, 'Republican Thrust' (n. 10).

128 Opinion of AG Poiares Maduro in *Rottmann* (n. 16), para. 23.

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AG even emphasised this particular political character of EU citizenship to contrast it with its conceptualisation as merely 'a body of rights which, in themselves, could be granted even to those who do not possess it'[129] – a notion which appears to be underlying to a certain extent the Legal Service's Chapter (see *supra* III. 2.).

More recently, at the end of 2021, the Commission launched infringement proceedings against Poland and the Czech Republic for denying foreign EU citizens who reside in those two States the right to become a member of a political party or political movement, which would constitute a breach of Article 22 TFEU. The ECJ ruled that both Member States had failed to fulfil their obligations under that provision. It did so by referring, as it did in earlier judgements as well,[130] to Article 2 TEU according to which, the principles of democracy and equality are values on which the EU is founded, and which, therefore, are an integral part of the very identity of the EU as a common legal order.[131] The ECJ further explains that it is apparent from the case law of the European Court of Human Rights that the right to freedom of association is one of the essential foundations of a democratic and pluralist society, in that it allows citizens to act collectively in areas of common interest and, in so doing, to contribute to the proper functioning of public life.[132] This means, not only, that the functioning of the EU is founded on representative democracy, as is mentioned in Article 10(1) TEU,[133] and that Article 22 contributes to the integration of the EU citizens in the society of the host Member State.[134] Equally important is that the ECJ confirms the direct involvement of EU citizens in a European society and the public life it entails. The reference by the ECJ to Article 2 is most pertinent in that respect, as this provision explicitly refers to 'a society', which legal scholarship has earlier interpreted as, indeed, a *European* society[135] and which Article 2 characterises as necessarily democratic.

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129 Opinion of AG Poiares Maduro in *Rottmann* (n. 16), para. 23.

130 ECJ, *Patrick Grégor Puppinck and Others v. European Commission*, judgement of 19 December 2019, case no. C-418/18 P, EU:C:2019:1113, para. 64, and ECJ, *Criminal proceedings against Oriol Junqueras Vies*, judgement of 19 December 2019, case no. C-502/19, EU:C:2019:1115, para. 63.

131 ECJ, *Commission v. Czech Republic* (n. 43), paras 114 and 159-162; ECJ, *Commission v. Poland* (n. 43), paras 112 and 156-159.

132 ECJ, *Commission v. Czech Republic* (n. 43), para. 119; ECJ, *Commission v. Poland* (n. 43), para. 117.

133 ECJ, *Commission v. Czech Republic* (n. 43), para. 121; ECJ, *Commission v. Poland* (n. 43), para. 119.

134 ECJ, *Commission v. Czech Republic* (n. 43), paras 125-126; ECJ, *Commission v. Poland* (n. 43), paras 123-124.

135 See in particular von Bogdandy, *Emergence* (n. 111), 3 et seq, as well as his contribution to this special issue (n. 10).

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Although Article 22 TFEU belongs to the TFEU's part on EU citizenship and has been drafted primarily as a non-discrimination provision, its interpretation by the ECJ in the two cases mentioned turns it into an essential component of European society, which hence has a democratic identity.[136] This connection between EU citizenship and the democratic character of European society finds its basis in the Treaties itself, and not only in the specific content of Article 22 TFEU. Article 9 TEU, the core provision on the definition of EU citizenship, is the first provision in the TEU's Title on 'democratic principles'; Article 10 TEU further details the Union's democratic character, and recognises the citizens' prominent role in that respect. The Treaties hence base the democratic character of the EU (partly) on the existence of EU citizenship and the rights pertaining to it.[137]

As has been mentioned in the previous paragraphs, this major upgrading of the concept of EU citizenship is necessarily linked to the upgrading of the EU and its definition as a polity in itself. Possibly, the ECJ will take a further step in that direction in the still pending *Commission v. Hungary* case in which the Commission claims as a self-standing plea that this Member State has breached Article 2 TEU.[138] In her Opinion of 5 June 2025, AG Ćapeta considered that this provision expresses *the choice* of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union. In her view, it expresses a vision of what '*a good society*' is 'in the EU constitution': '*a constitutional democracy that respects human rights*', which 'represents the *very identity* of the European Union'.[139] This Opinion thus rests on a substantive understanding of a European society of a particular nature which is essentially characterised by the values mentioned in Article 2.[140] The latter provision indeed mentions that the values upon which the Union is founded are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

136 Nora Vissers, 'Join the (Political) Party: the CJEU's Emerging Role as a Guardian of Democracy in Cases C-808/21 and C-814/21', Maastricht J. Eur. & Comp. L. 32 (2025), 613-627 (627).

137 See von Bogdandy, *Emergence* (n. 111), 137-138.

138 ECJ, *European Commission v. Hungary (Valeurs de l'Union)*, case no. C-769/22.

139 Opinion of AG Ćapeta in *Commission v. Hungary* (n. 138), paras 155-158 (italics used by the AG).

140 See the Legal Service's characterisation of the two sentences of Article 2 TEU as a single corpus of values of the EU: Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 34-57 (38).

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In *Commission v. Malta*, the ECJ specifically pointed to Article 2 as well and considered EU citizenship to be based on the common values contained in Article 2, with a particular reference to solidarity, and on the mutual trust between the Member States.[141] This way, the ECJ has drawn a sharp line between those who are EU citizens and all 'others',[142] not so much by the requirements imposed on the Member States' nationality legislation but even more so by its substantive approach to EU citizenship which is essentially connected to the values of Article 2 (and solidarity in particular) and to mutual trust. These foundations for EU citizenship are of vital importance for the EU. The ECJ considers that these values define the very identity of the EU as a common legal order (*supra*), and interprets mutual trust as a principle which specifically characterises the relations between the Member States and therefore cannot as such be transposed to relations between the Union and a non-Member State.[143] There can be no doubt therefore that EU citizens truly belong to the European society to which Article 2 TEU refers, described by AG Ćapeta as the 'good society' which the Member States wish to create together within the framework of the EU.[144] But if both that society and EU citizenship are fundamentally based on the values of Article 2 TEU, and the latter moreover also rests on mutual trust, isn't there a risk that EU citizenship eventually turns into an exclusionary status which reflects a sharp divide made by the EU between 'us', citizens, and 'them', the others?[145]

No such conclusion can be drawn however from the ECJ's interpretation of EU citizenship and the conditions upon which acquisition of this status must rest. According to the ECJ, the special relationship between each Member State and its nationals also forms the basis of the rights and obligations reserved to EU citizens by the Treaties.[146] A red line has been drawn only where commercialisation is at stake.[147] Within those marginal contours, the Member States retain the competence and the responsibility to define access to EU citizenship, thus concretising that 'special relationship of solidarity and good faith' in their own way in order to grant that status to those whom they consider fit to become members of that particular European

141 ECJ, *Commission v. Malta* (n. 16), paras 93 and 95.

142 See Ruairi O'Neill, 'A Stitch in Time? Mutual Trust as the EU's Fix-All in Case C-181/23 *Commission v. Malta*', European Papers 10 (2025), 463-487 (471).

143 ECJ, Opinion 1/17 of 30 April 2019, *EU-Canada CET Agreement*, ECLI:EU:C:2019:341, para. 129; ECJ, *Alchaster I*, judgement of 29 July 2024, case no. C-202/24, ECLI:EU:C:2024:649, paras 55-71.

144 Opinion of AG Ćapeta in *Commission v. Hungary* (n. 138), para. 157.

145 See Anja Bossow, 'What Is Citizenship For?', Verfassungsblog, 6 May 2025, https://verfassungsblog.de/what-is-citizenship-for/.

146 ECJ, *Commission v. Malta* (n. 16), para. 97.

147 Hilpold (n. 96), 762; Kadelbach (n. 96), 547; Spieker and Weber (n. 96), 496.

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polity.[148] Of course, as with any group, a division between, *in casu*, citizens and non-citizens is inevitable. But, according to the ECJ, the Member States continue to enjoy 'a broad discretion in the choice of the criteria to be applied'.[149] As Spieker and Weber have explained, this means that it is up to the Member States to define the European commitment needed, which can be expressed in many forms from residence in a Member State to particular achievements.[150] In other words, the Member States, by granting their nationality under these conditions, signal the existence of a particular bond both with them and the EU which is characterised by solidarity and good faith, and which hence serves, first and foremost, an inclusionary purpose.[151] It is a fortunate paradox that, while nationality remains the essential criterion to become an EU citizen, the EU aspires to become an ever-closer, post-national polity integrating those who, on basis of a diversity of reasons determined by its Member States, can be expected to be committed to the values expressed in Article 2 and to the elaboration on their basis of a common, European society.[152]

Of course, it's complicated, as Nic Shuibhne warns us: the bottom line remains that EU citizenship aims to foster attachment to the EU as a supranational polity, but exclusively through a Member State's nationality.[153] But then, can there be a better example of the 'mutually reinforcing relationship' which is said to characterise the European Union's multilevel system of governance?[154]

IV. Conclusion

In the fourth Chapter of its book on *70 Years of EU Law*, the Legal Service characterises EU citizenship as a status 'in the service of EU citizens' which to a large extent has been developed by the ECJ through preliminary rulings strengthening these citizens' free movement rights. Yet, as Lenaerts and Gutiérrez-Fons wrote some time ago, EU citizenship is not only about rights and courts but must be connected with the governance of the EU in order to

148 See Merijn Chamon, 'Commission v Malta (C-181/23) and the Trilemma of EU Citizenship', E. L. Rev. 50 (2025), 475-486 (484).

149 ECJ, *Commission v. Malta* (n. 16), para. 98.

150 Spieker and Weber (n. 96), 496.

151 See in that respect Bossow (n. 145).

152 See also Chamon (n. 148), 485-486.

153 Nic Shuibhne, *EU Citizenship Law* (n. 15), 1.

154 See in this respect, explaining EU democracy, Koen Lenaerts and José A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in: Dimitry Kochenov (ed.), EU Citizenship and Federalism (Cambridge University Press 2017), 751-781 (756).

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fully deploy its potential.[155] To a large extent, however, this perspective is absent from the Legal Service's approach.

Let there be no doubt that the Commission has greatly contributed to the development of EU citizenship, much more actually than can be deduced from the Legal Service's Chapter.

The Chapter examines EU citizenship from a very narrow perspective, which is limited to the ECJ's interpretation of some aspects of the right to freedom of movement and hence appears to approach EU citizenship essentially as a catalogue of rights which these citizens can invoke and enforce against the Member States. But, as I have attempted to make clear through an alternative assessment based on three insights, there's so much more to EU citizenship!

The lack of a broader view on the many dimensions of EU citizenship is unfortunate, all the more so because the Commission's book – whose subtitle prominently refers to the Union's citizens – does not contain any other chapter that is specifically devoted to EU citizenship as a status. Undoubtedly, size limitations compelled the Legal Service to make choices and the Chapter could not have been expected to provide a full overview of the nature and characteristics of EU citizenship and all (legal) consequences which this concept entails. Nevertheless, its analysis would have benefited from a broader approach to this status, which has developed, in the first place as a result of the efforts of the EU legislature, the Commission and the ECJ, often in interaction with critical legal scholarship, into a vital component of the identity of the European Union.

155 Lenaerts and Gutiérrez-Fons (n. 154), 753.

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Invisible Infringements: On the AFSJ's Under-Constitutionalisation

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Abstract

Reading the Legal Service's book on '70 Years of EU Law', one could almost have the impression that the EU is not in the business of combating crime and upholding public safety. In this contribution, I argue that this narrative choice is no coincidence. Much rather, it reflects a trend that permeates the Area of Freedom, Security and Justice (AFSJ).

There is an increasing discrepancy between the image the European Union (EU) and its Member States project to the outside – one of public safety as a domain reserved to sovereign nation states – and the AFSJ's institutional reality which is characterised by creeping supranationalisation. Perhaps counterintuitively, it is precisely this structural attachment to the limitation of the EU's competencies that has enabled its AFSJ-related powers to grow while often evading judicial scrutiny. The AFSJ, because it operates in ways to which EU law is not fully structurally committed, is not matched by

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effective constitutional safeguards of accountability, judicial review, and rights protection. It remains under-constitutionalised. EU security law renders invisible those infringements it produces and remains curiously removed from the Union's dedication to its citizens.

I defend this argument in three steps. First, I illustrate how EU security law drives fundamental paradigm shifts. Second, I show how the AFSJ's composite administration, due to its commitment to the paradigm of Kooperationsverwaltungsrecht and the principle of double exclusivity, remains under-constitutionalised. Third, I demonstrate how these problems manifest in legal practice by pointing to the activities of Europol and Frontex, as well as the Act on the Processing of Passenger Name Record (PNR) Directive. I conclude with suggestions for reform.

Keywords

AFSJ – Europol – Frontex – Composite Administration – Preliminary Reference Procedure – Rule of Law – Security – PNR – Legal Automation – Legal Remedies

The European Commission's Legal Service has published a book on '70 Years of EU Law' which assembles 'reflections on the principles and foundations of EU law'[1]. Reading the book, however, one could almost have the impression that the European Union is not in the business of combatting crime and upholding public safety. In a book spanning over 402 pages, the AFSJ is only ever mentioned once[2] in passing.

This omission can be explained with the Legal Service's narrative choice to describe the Union as a decisive force in expanding fundamental rights. Part 2 of the book narrates how 'the EU legislator has introduced increasing numbers of concrete rights for EU citizens […].'[3].Indeed, not only through its substantial legal protections but also by transforming each national judge into a judge of EU law,[4] the Union has established itself as a remarkably effective liberalising force. The EU has proven these credentials time and time again: One needs to look no further than the Court of Justice's jurisprudence on

1 'Acknowledgements' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 7.

2 Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (21).

3 Calleja and Rusche (n. 2), 27.

4 Calleja and Rusche (n. 2), 17.

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mass data retention[5] or on Member States' rule of law breaches[6]. The Legal Service's narrative choice therefore, in itself, undoubtedly reflects an important truth. What it obscures, however, is almost more remarkable: The increasing role of the Union as an entity which, through both its legislative and executive, *infringes* on fundamental rights.[7]

In this contribution, I will argue that the Legal Service's narrative choice is no coincidence. Much rather, it reflects a trend that permeates the AFSJ. The EU is increasingly growing into a role of a facilitator of public security. Naturally, it infringes on subjective rights in the course of doing so. Due to the AFSJ's structural attachment to intergovernmental composite administration and related judicial sub-principles, however, EU administrative law is currently underequipped to tackle such infringements. As a result, there is an increasing discrepancy between the institutional image the EU and its Member States project to the outside – one of public safety as a domain reserved to sovereign Member States[8] – and the AFSJ's institutional reality. This not only obscures important policy choices. In practice, this discrepancy also curtails judicial remedies and the binding force of the law, thus undermining EU security law's legitimacy and rendering invisible those individuals whose rights are affected. EU Security law, because it pursues legal aims, that the EU is not fully structurally committed to, remains partially under-constitu-

5 ECJ, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others, judgement of 8 April 2014, case nos C-293/12 and C-594/12, ECLI:EU:C:2014:238; ECJ, Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others, judgement of 21 December 2016, case nos C-2013/15 and C-698/15, ECLI:EU:C:2016:970; ECJ, La Quadrature du Net and Others v. Premier ministre and Ministère de la Culture, judgement of 6 October 2020, case nos C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791; ECJ, Bundesrepublik Deutschland v. SpaceNet AG and Telekom Deutschland GmbH, judgement of 20 September 2022, case nos C-793/19 and C-794/19, ECLI:EU:C:2022:702. These standards have recently been partly walked back in ECJ, La Quadrature du Net and Others v. Premier ministre and Ministère de la Culture II, judgement of 30 April 2024, case no. C-470/21, ECLI:EU:C:2024:370.

6 ECJ, *Hungary v. Parliament and Council,* judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97; ECJ, *Poland v. Parliament and Council*, judgement of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98; see also Julio Baquero Cruz and Jean-Paul Keppenne, 'Fundamental Values, Constitutional Identity and the Protection of the European Union Budget against Breaches of the Rule of Law' in: European Commission Legal Service (ed.), *70 Years of EU Law– A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 58-75. For a critical perspective see Maciej Krogel, 'Is It Enough to Say "Common Values" When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244.

7 For an illustration see Jacob van de Beeten, 'Festschrift or Fiction? Ommissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

8 See Art. 4 para. 2 sentence 3 TEU and Art. 72 TFEU.

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tionalised. By under-constitutionalisation, I mean that the EU's supranational security-related activities have *de facto* acquired a substantive weight and breadth that, in constitutional practice, are not matched by effective constitutional safeguards of accountability, judicial review, and rights protection.

I will lay out this thesis by first illustrating how, within the AFSJ, the EU drives forward some of the most fundamental paradigm shifts in European law (I.). Then, I will argue that, due to its commitment to intergovernmental composite administration, EU security law[9] is structurally underequipped to ensure adequate judicial review, thus undermining the binding force of the law in the AFSJ (II.). In a third step, I will demonstrate how these abstract problems manifest in legal and institutional practice (III.). I conclude with some suggestions for reform (IV.).

I. The AFSJ as a Driver of Paradigm Shifts Within European Law

It is no secret that many European policy-makers perceive terrorism and migration as two of the major challenges facing the EU. The Legal Service's book itself considers 'the refugee crisis following the war in Syria' to be one of the 'three major crises'[10] confronting the Union after the Treaty of Lisbon. Jolted by a series of terrorist attacks in the mid-2010s, the Juncker Commission heralded in the 'European Security Union'[11]. It was in this political context, that the EU established – and continues to produce – a wide range of security instruments and institutional reforms. AFSJ policy has thus become one of the main fields within which EU law is currently undergoing sweeping paradigmatic changes.

In what follows, I will identify two major paradigm shifts within the AFSJ: First, the AFSJ is driving a preventive turn toward big data and legal automation fuelled by large databases that are rendered interoperable and searchable through modern and potentially self-learning technologies (1). These developments, secondly, are propelling a creeping supranationalisation of security governance (2). Both of these paradigm shifts are interlinked and mutually reinforcing. Each has institutional as well as substantive dimensions.

9 I will primarily focus on security law which is aimed at upholding internal security. This means that questions of *criminal justice* as such – and that includes questions pertaining to the European Arrest Warrant and the European Public Prosecutor's Office – will be out of scope. This is not to say that the observations made here do not have some nontrivial connections to the field of criminal justice.

10 Both quotes are from Calleja and Rusche (n. 2), 22.

11 For an overview see: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/european-security-union_en>, last access 28 January 2026.

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1. The EU's Preventive Turn Toward Big Data and Legal Automation

Throughout the last years, the EU has established a comprehensive network of security- and migration-related treasure troves of data that complement already existent coordinative data pools like the Europol Information System (EIS).[12] These databases include, among others, Eurodac[13], the Visa Information System[14], the Schengen Information System[15], the Entry/Exit-System[16], the European Criminal Records Information System on convicted third-country nationals and stateless persons[17], the European Travel Information and Authorisation System (ETIAS) watchlist[18] and the Passenger Name Record (PNR) system[19]. It is the EU Commission's declared goal to render all these databases interoperable and searchable through modern big data technologies.[20] For that purpose, two Interoperability Regulations[21] have established a European Search Portal, a Biometric Matching Service, a Common Identity Repository and a Multiple Identity Detector. European security authorities hope that these instruments will allow them to merge data silos and thus profile individuals within disaggregated datasets.[22]

This legally and technically complex merging operation levels the conceptual differences between migration and asylum law on the one hand, and general security law on the other – two legal fields which not only rely on two different legal competencies, but have traditionally differed significantly in terms of policy objectives.[23] Migration is now viewed – at least partly, if not, by now, predominantly – as a *security concern*. Migration data, in the

12 For an overview see Niovi Vavoula, *Immigration and Privacy in the Law of the European Union* (Brill 2022).

13 See Regulation 603/2013/EU.

14 See the original Regulation 767/2008/EC; For the latest revision see Regulation 2021/1134/EU.

15 See the original Convention Implementing the Schengen Agreement (CISA) of 14 June 1985, OJ L 239, 22. September 2000; see also the latest revision in Regulation 2018/1860/EU.

16 See Regulation 2017/2226 of 30 November 2017/EU.

17 See Regulation 2019/816/EU.

18 See Regulation 2018/1240/EU.

19 See Directive 2016/681/EU (PNR Directive).

20 See for example in Europol Strategy – Delivering Security in Partnership (2023), 5.

21 Regulation 2019/817/EU; Regulation 2019/818/EU.

22 See Niovi Vavoula, 'Artificial Intelligence (AI) at Schengen Borders', European Journal of Migration and Law 23 (2021), 457-484.

23 See Bettina Schöndorf-Haubold, '§ 35 Europäisches Polizei- und Sicherheitsrecht' in: Jörg Philipp Terhechte (ed.), *Verwaltungsrecht der Europäischen Union* (2nd edn, Nomos 2022), 1461-1566, para. 84; Valsamis Mitsilegas and Niovi Vavoula, 'The Normalization of Surveillance of Movement in an Era of Reinforcing Privacy Standards' in: Philippe Bourbeau (ed.), *Handbook on Migration and Security* (Elgar 2017), 232-251 (241-245).

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eyes of policy-makers, ought to be made available not just to migration authorities, but to law enforcement authorities in general. In this way, 'the law of the border becomes security law'.[24]

As a means of substantive change, EU agencies are in the business of automated predictive threat detection: These interoperable databases allow European security authorities to sift through massive amounts of data in order to predict potential threats to public security, ideally before they materialise. Such predictions often pertain not only to abstract situational analyses, but also to concrete prognoses about the dangerousness of specific individuals.[25] This, for example, is the case for the system established in the PNR Directive which obliges European security agencies to automatically analyse passenger name record data by not only matching them against existing databases, but also comparing them against so-called 'pre-determined criteria', algorithmic patterns which contain (allegedly) suspicious flight behaviours.[26] By connecting data from several different sources and running them through potentially self-learning algorithms, European security authorities hope to generate new investigative leads previously unavailable through traditional investigative work within siloed data alone.[27]. This, in the words of former Director of Europol Rob Wainwright, could allow EU agencies like Europol to be at the forefront of 'an agreed European security model based on intelligence-led policing'.[28]

Fuelled by its 'preventive turn'[29], AFSJ policy initiatives cause tectonic shifts in the system of European law. Some of these changes may be specific to certain Member States' legal cultures. Instruments like the PNR Directive, for example, relativise the substantial distinction between preventive and repressive policing, and the institutional separation of operative policing and intelligence services.[30] This decentralisation of security institutions has been central to German security law since the passing of the Grundgesetz and is

24 Valsamis Mitsilegas, 'The Preventive Turn in European Security Policy' in: Francesca Bignami (ed.), *EU Law in Populist Times* (Cambridge University Press 2020), 301-318 (305).

25 On the concept of automated predictive threat detection Christian Thönnes and Niovi Vavoula, 'Automated Predictive Threat Detection After Ligue des Droits Humains' in: Evelien Brouwer, Elspeth Guild, Stefan Salomon and Christian Thönnes (eds), *The Future of the European Security Architecture*. Max Planck Institute for the Study of Crime, Security & Law Working Paper Series 2023, 12-24 (12).

26 Art. 6 para. 3 of Directive 2016/681/EU (PNR Directive).

27 See for instance the Commission's stated hope that the PNR system can identify dangerous persons who are 'as of yet, not known to the law enforcement authorities', Commission Staff Working Document, SWD (2020) 128 final, 24.

28 Europol Review 2011, 5.

29 A notion coined and explained in Mitsilegas (n. 24), 302-304.

30 Christian Thönnes, 'Fluggastdatenspeicherung', Die Verwaltung 55 (2022), 527-559 (530).

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considered a crucial response to the centralised security apparatus under the Nazi terror regime.[31] Other shifts are even more fundamental in nature: No administration disposes of enough (human) civil servants to conduct surveillance on entire populations and predict threats before they appear. EU security law has chosen two responses to this conundrum: Reliance on private power and automation. EU law increasingly obliges private entities like financial institutions[32], airline carriers[33] or – potentially – providers of digital communication services[34] to use their access to massive amounts of customer data for the purposes of data retention and automated profiling.[35] Moreover, the attempt to predictively identify dangerous individuals within seas of data, because of human cognitive overload, leads to an increased delegation of decision-making and -preparation from humans to machines (such as self-learning algorithms).[36]

Of course, Member States' legal orders also pursue automated predictive threat detection. Given that the envisioned technologies only work when fed colossal amounts of data, however, the supranational level is particularly suited to organise access to the powerful, international – and often private – gatekeepers of big data.

Such big data-based surveillance and profiling regimes create a whole host of specific fundamental rights challenges.[37] This was recently emphasised by both the Court of Justice of the European Union (ECJ)[38] and the German Federal

31 See Matthias Bäcker, '§ 28 – The Security Constitution', in: Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Constitutional Law in Germany* (C. H. Beck 2025), 1294-1246 (1291, para. 23).

32 This is established in Directive 2015/849/EU, see Lukas Landerer, 'The Anti-Money-Laundering Directive and the ECJ's Jurisdiction on Data Retention', eucrim (2022), 67-72.

33 This is established in Directive 2016/681/EU (PNR Directive).

34 Under the Commission's proposal for a Regulation on preventing and combating child sexual abuse material, such providers could be obliged to preventively search and detect such material within their services, see Thönnes and Vavoula (n. 25), 20-23.

35 See Valsamis Mitsilegas, 'The Privatisation of Surveillance in the Digital Age' in: Valsamis Mitsilegas and Niovi Vavoula (eds), *Surveillance and Privacy in the Digital Age* (Hart Publishing 2021), 101-158.

36 Timo Rademacher, 'Artificial Intelligence and Law Enforcement' in: Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020), 226-250 (245); Karen Yeung, 'Why Worry About Decision-Making by Machine?' in: Karen Yeung and Martin Lodge (eds), *Algorithmic Regulation* (Oxford University Press 2019), 21-48; Thönnes (n. 30), 558.

37 For an overview see Evelien Brouwer, Elspeth Guild, Stefan Salomon and Christian Thönnes, The Future of the European Security Architecture (September 11, 2023). Max Planck Institute for the Study of Crime, Security & Law Working Paper Series 2023 – 06, available at SSRN: https://ssrn.com/abstract=4547775.

38 ECJ, *Ligue des droits humains ASBL v. Conseil des ministres*, judgement of 21 June 2022, case no. C-817/19, ECLI:EU:C:2022:491, paras 193-228.

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Constitutional Court (BVerfG).[39] There are, for instance, concerns regarding the necessity and proportionality of big data profiling regimes which are often untargeted and mostly affect unsuspicious citizens.[40] European law enforcement is increasingly looking for the proverbial needle in a haystack. Due to a statistical phenomenon known as *base rate fallacy,* this is bound to produce a high amount of false positive hits, thus casting unsubstantiated suspicion on a large amount of people.[41] In addition to concerns regarding the discriminatory nature of many policing algorithms[42], norms like Art. 11 Law Enforcement Directive (LED)[43] also address more principled concerns regarding legal automation: Under which circumstances can the loss of meaningful human control over the exercise of public power be justified?[44]

2. The EU's Turn Toward Supranationalised Security Governance

Institutionally, AFSJ policy relativises one the main characteristics distinguishing the EU as a 'constitutional union'[45] from nation states. The Legal Service's book[46] cites Walter Hallstein: 'The Community has no […] direct power of coercion […] and no police'. Almost sixty years later, this no longer fully holds true. The 2019 reform of the Frontex Regulation[47] introduces a 'standing corps', about 10,000 members of which come from the agency's original statutory staff.[48] This statutory staff can 'be deployed in operational areas' as members of multi-national border guard teams.[49] Although their actions are also subject to the relevant Member State's authorisation and national law,[50] this statutory Frontex staff is authorised to exercise coercive force

39 BVerfG, *Hessendata,* judgement of the First Senate of 16 February 2023, 1 BvR 1547/19 and 1 BvR 2634/20, paras 67-85.

40 See for the PNR context ECJ, *Ligue des droits humains* (n. 38), paras 125-192.

41 For statistics pertaining to the PNR system see Staff Working Document (n. 27), 28; on the phenomenon of base rate fallacy in predictive policing scenarios see Thönnes (n. 30), 549.

42 See Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact', Cal. L. Rev. 104 (2016), 671-732.

43 Directive 2016/680/EU ('Law Enforcement Directive').

44 Both the German Constitutional Court and the ECJ mainly discussed this as a problem for judicial remedies caused by algorithmic opacity, see BVerfG, *Hessendata* (n. 39), para. 100; ECJ *Ligue*, *des droits humains* (n. 38), para. 195, but there is a deeper principled argument about the loss of interpersonal relationships of recognition, see Thönnes (n. 30), 555.

45 For the academic history of the *Verfassungsbund* terminology see Ingolf Pernice, 'Die dritte Gewalt im europäischen Verfassungsverbund', EuR 31 (1996), 27-43.

46 Calleja and Rusche (n. 2), 16.

47 Regulation 2019/1896/EU (Frontex Regulation).

48 See Art. 54 para. 1 lit. (a), Art. 55 Frontex Regulation.

49 See Art. 55 para. 3 and Art. 82 Frontex Regulation.

50 See Art. 82 paras 2 and 3 Frontex Regulation.

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to fulfil their tasks.[51] There now is an EU legislative act regulating the administrative use of firearms by EU agents.[52] These coercive powers elevate AFSJ law beyond the robust investigative powers the Commission wields in fields like competition law. Here too, Commission agents may conduct investigative measures. The use of coercive force, however, is explicitly reserved to the relevant Member State's civil servants.[53] Frontex officers also wear uniforms specifically identifying them as EU officers, as well as a 'blue armband with the insignias of the Union'.[54] Even though one may argue that Frontex officers are still part of a broader Member State operation, they will be perceived by affected subjects as a distinctly European police authority. These facts have led observers to describe these reforms as a first step towards a genuine EU police force.[55]

But even beyond these extreme examples, the EU has entered the business of security legislation. Its explicit legislative powers to do so are mostly confined to judicial and police cooperation on specific matters.[56] Yet, the Union has, with Member States' overwhelming support, used its legislative powers on the internal market and data protection to lay down rules on how European security agencies may use modern technologies for the purpose of protecting public security. The Artificial Intelligence (AI) Act[57] which, *inter alia*, regulates how law enforcement authorities may use AI software for the purposes of predictive policing and real-time remote biometric identification was recently adopted based on Articles 16 and 114 Treaty on the Functioning of the European Union (TFEU). Due to the complexity especially of transnational policing, modern police work will increasingly rely on modern technology. Regulating these technologies therefore means regulating policing.[58]

The fact that substantive EU law and EU institutions have to tackle these challenges means that EU security law now inches ever closer to the core areas of national security law. At least in German police and criminal procedure law, one of the main substantive paradigms regulating operative measures is the presence, for preventive measures, of a concrete threat or, for repressive measures under criminal procedural law, of a concrete (or other-

51 See Article 82 para. 8 Frontex Regulation.

52 See point 2 of Annex V Frontex Regulation.

53 See for instance Article 20 para. 6 Regulation 1/2003/EC.

54 See Article 82 para. 6 Frontex Regulation.

55 Schöndorf-Haubold (n. 23), para 124; Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy', GLJ 21 (2020), 532-548 (532 f.).

56 See Title V on the AFSJ in the TFEU.

57 Regulation 2024/1689/EU.

58 For an overview of the AI Act's impact on security law see Christian Thönnes, 'The EU AI Act's Impact on Security Law – A Debate Series', Verfassungsblog, 9 December 2024, doi: 10.59704/148d0746da7c7f3c.

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wise qualified) suspicion.[59] While the norms on operative police measures are themselves almost exclusively regulated by German laws,[60] EU law increasingly determines or influences which data can be processed with which technologies under which type of human intervention: The Law Enforcement Directive, for example, contains data protection rules and a (partial) prohibition on automated decision-making,[61] the recently-adopted AI Act regulates the use of AI software for policing purposes[62] and the ECJ, in *Ligue des droits humains,* set standards for automated predictive, person-related threat detection.[63] Member State laws may determine when a concrete threat or suspicion justifies police action – but EU law increasingly influences *how* the epistemic basis for such measures may be produced.

This also has an institutional dimension: EU agencies like Europol may not ultimately put shackles on criminal suspects[64], confiscate illicit goods or close down suspicious businesses. Especially in complex, transnational investigations requiring intelligence-led policing, however, Europol may use its intelligence to request the initiation of national criminal proceedings[65], and then, through its operational support and coordination, significantly influence whom to arrest based on which intelligence.[66] In such complex investigations, it is unlikely that national or regional police authorities will possess the necessary resources and expertise to challenge the intelligence which Europol provides them – nor are they incentivised to do so.[67]

It would then seem artificial and implausible to maintain that substantive security law and institutional police conduct remain completely uninfluenced by the EU – or, when it comes to the judicial review of intelligence-induced

59 For an overview over the structure of German security law see Bäcker (n. 31), paras 59-82.

60 Both federal laws for repressive policing and (mostly) *Länder* laws for preventive policing.

61 Article 11 Directive 2016/680.

62 For challenges the AI Act creates for national security law see Plixavra Vogiatzoglou, 'The AI Act National Security Exception', Verfassungsblog, 9 December 2024, doi: 10.59704/292082becc7cc8e6.

63 See Thönnes and Vavoula (n. 25); for a German perspective see Kristin Pfeffer, 'Vom Verfassungsstaat zur Sicherheitsunion', NVwZ 42 (2023), 1286-1293 (1288 f.).

64 '[Europol] shall not apply coercive measures in carrying out its tasks', nor does it have the 'power to execute investigative measures'. It may, however, 'provide operational support to the competent authorities of the Member States during the execution of investigative measures', Art. 4 para. 5 Regulation 2016/794/EU (Europol Regulation).

65 See Article 6 paras 1 and 1 a of the Europol Regulation. See on this power to request criminal proceedings Valsamis Mitsilegas and Fabio Giuffrida, 'Bodies, Offices and Agencies' in: Valsamis Mitsilegas (ed.), *EU Criminal Law* (2nd edn, Hart Publishing 2022), 349-479 (366 f.).

66 For an overview see Mitsilegas and Giuffrida (n. 65), 362-369.

67 It is Europol's declared strategy, to deliver, through its 'Innovation lab', innovative technological solutions to Member States that they would not be able to develop themselves, Europol Strategy – Delivering Security in Partnership (2023), 8.

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operative police measures, that EU agencies bear no legal responsibility for them. In terms of fundamental rights sensitivity, there is not always a clear red line that separates operative police measures from the big data-induced instruments that enable them. To the outside world, all but the coercive measures at the end of the investigative production chain may be invisible – but given how much complex data analysis informs modern policing in complex cases, the preparatory intelligence work that precedes ultimate police action will increasingly be decisive.[68]

II. Beyond *Verwaltungskooperationsrecht:* The AFSJ's Under-Constitutionalisation

Despite these developments, under EU primary law, maintaining security still remains 'the sole responsibility of each Member State'[69]. Perhaps counterintuitively, it is precisely this structural attachment to the limitation of the EU's competencies that has enabled its AFSJ-related powers to grow whilst often evading judicial scrutiny. This is because the AFJS's adherence to intergovernmental *Verwaltungskooperationsrecht* (1.) has, in the face of its simultaneous expansion, rendered it under-constitutionalised and curiously removed from the Union's citizens (2.).

1. The AFSJ's Structural Adherence to *Verwaltungskooperationsrecht*

When EU security agencies contribute to executive decision-making, their involvement is usually organised in multi-jurisdictional composite administrative procedures. Composite administrative decision-making occurs when several administrative entities (potentially across several jurisdictions) contribute in different ways and at different stages to an ultimate administrative decision – be it that an EU body provides input for an ultimate Member State measure or *vice versa*.[70] Ordinarily, composite administrative

68 See Andrew Guthrie Ferguson, *The Rise of Big Data Policing* (New York University Press 2017); Timo Rademacher (n. 36), 226-250.

69 Art. 4 para. 3 sentence 3 TEU; Art. 72 TFEU contains a similar commitment. On the conceptual nuances of the guarantees of national sovereignty over security matters Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015), 286-287.

70 For definitions see Herwig Hofmann, Multi-Jurisdictional Composite Procedures (June 4, 2019), Université du Luxembourg Law Working Paper Series Paper No. 2019-003, 2; Filipe Brito Bastos, 'An Administrative Crack in the EU's Rule of Law', Eu Const. L. Rev.16 (2020), 63-90 (64).

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procedures are an innovative way to maintain several administrative entities legally separate and decentralised, yet integrate them into a unified and effective legal procedure. As such, they fulfil two seemingly competing desires of the European constitutional-administrative system: 'uniform implementation of EU law throughout the EU and preservation of national administrative sovereignty'.[71] When several independent administrative levels are interwoven in a complex network, however, attributing legal accountability or guaranteeing comprehensive judicial remedies is no simple feat.[72] Partly owing to this reason, few systematic, overarching procedural regulations for composite administrative procedures exist. Much rather, they are mostly regulated on a policy-specific basis.[73]

In this way, the structural identity of the administrative law related to European security is still highly reflective of the AFSJ's structural commitments to intergovernmentalism: Upholding public security is strictly Member States' business – and EU authorities are merely there to provide informal support and coordination. Within the AFSJ, the idea that ultimate administrative power resides primarily within Member States is often seen as rooted in the EU's constitutional constraints. The principle of conferral[74] and Member State sovereignty are often considered to prevent the EU from wielding genuine executive power, especially within the particularly sensitive AFSJ.[75]

For that reason, when it comes to AFSJ matters, Member States formally make the final decisions. Due to the limited role the Treaties assign to the Union, EU security law, at its doctrinal foundation, is constructed according to the principles of what German legal scholars call *Verwaltungskooperationsrecht*.[76] This concept, sometimes also termed *Verbundverwaltungsrecht* and most closely translated with 'law of administrative cooperation', appropriately describes a paradigm within which administrative law conceives of EU authorities as adopting the role of service-oriented coordinators within a

71 Bastos (n. 70), 66.

72 Hofmann (n. 70), 3. It is for this reason that German constitutional law tends to avoid so-called *Mischverwaltung* (mixed administration), see Peter Huber, 'Das Verbot der Mischverwaltung', DÖV (2008), 844-851.

73 Herwig Hofmann, Gerard Rowe and Alexander Türk, 'The Present and Future Condition of European Union Administrative Law' in: Herwig Hofmann, Gerard Rowe and Alexander Türk (eds), *Administrative Law and Policy of the European Union* (Oxford University Press 2011), 906-938 (917). A unified proposal for EU administrative procedures is offered in Paul Craig, Herwig Hofmann, Jens-Peter Schneider and Ziller Jacques, *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press 2017).

74 See Art. 4 para. 1 TEU.

75 See for instance Schöndorf-Haubold (n. 23), para. 5; Tuori (n. 69), 288.

76 Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004), for the AFSJ, this paradigm is specifically emphasised by Schöndorf-Haubold (n. 23), paras 6, 136.

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network of intergovernmental cooperation.[77] Fittingly for the purposes of security law, it is typical for EU *Verwaltungskooperationsrecht* to centre on the gathering, processing, and exchange of information.[78]

What matters for *Verwaltungskooperationsrecht* are informational relationships between different levels of administrations, not the (fundamental rights-informed) relationship between the administration and its citizens. While producing finely-grained rules for the former, *Verwaltungskooperationsrecht* fails in allocating legal accountability and thus containing the EU's power when it manifests externally and directly affects legal subjects.[79] Such effects are not, in principle, ruled out, but *Verwaltungskooperationsrecht* ordinarily conceives of them as indirect – mediated through Member States' direct security measures. The EU legislator did see the need to create checks on EU administrative power within this paradigm. But such checks mainly take the form of ever-flourishing mechanisms of both inner-administrative and independent executive *supervision and oversight.*[80] The activities of Frontex, for example, are supervised by a Management Board, a Fundamental Rights Officer, a Consultative Forum and an internal Data Protection Officer.[81] While certainly beneficial, even very comprehensive supervision and oversight mechanisms cannot generally substitute the effective legal remedies that Art. 47 Charter of Fundamental Rights (CFR) requires.[82]

2. Under-Constitutionalisation and Its Discontents

This leads to an *under-constitutionalisation* of EU security law: Despite all the concept's contentions and nuances[83] subjecting public power to systematic substantial restraints and comprehensive judicial review undoubtedly is

77 On this paradigm see Eberhard Schmidt-Aßmann, 'Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts' in: Eberhard Schmidt-Aßmann and Bettina Schöndorf-Haubold (eds), *Der europäische Verwaltungsverbund* (Tübingen: Mohr Siebeck 2005), 1–24.

78 Hofmann, Rowe and Türk (n. 73), 919.

79 See Schöndorf-Haubold (n. 23), para. 136.

80 Hofmann, Rowe and Türk (n. 73), 931-932.

81 See Article 99 Frontex Regulation.

82 On EU law's over-emphasis on non-judicial review see Catharina Ziebritzki, *The EU's Liability for Its Refugee Camps* (Nomos 2025), 196; Hofmann, Rowe and Türk (n. 73), 937. The ECJ also emphasised that 'the lack of judicial review cannot be compensated for by parliamentary review', see ECJ, *Deutsche Lufthansa v. Berlin,* judgement of 21 November 2019, case no. C-379/19, ECLI:EU:C:2019:1000, para. 57.

83 On that see Christoph Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation' in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional* Law (2nd edn, Hart Publishing 2009), 169-204 (195-199).

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one of the hallmarks of a constitutionalising process.[84] The constitutional significance of conceiving the EU legal order as a 'community based on the rule of law' was emphasised by the Court itself in *Les Verts*[85] – a decision quoted extensively in the Legal Service's book.[86] Within the AFSJ, an extremely dynamic field of legal developments, EU law has yet to redeem these aspirations. This is because AFSJ policy has outpaced the Treaties' constitutional framework. The Union's augmented role in security governance can no longer fully be constitutionalised within the composite administrative paradigm of *Verwaltungskooperationsrecht* which treats EU agencies as mere informal helpers and therefore does not adequately address the EU's impact on its citizens' fundamental rights. If, as AFSJ-specific *Verbundverwaltungsrecht* suggests, EU authorities *merely prepare* ultimate Member State action, and the actual *interferences with fundamental rights* will be fully attributable to Member States, it appears natural, that most of the constitutional safeguards, should pertain to the Member States, as well. This simplistic picture of what is, in fact, a profound enmeshment of supranational and national executive power promotes a misallocation of legal responsibility which in turn lends itself to convenient inaction[87] when it comes to checking the EU's executive power.

In the AFSJ context, this is particularly problematic. Many areas of EU law are governed by complex composite administrative procedures. Most of them, however, essentially pertain to economic governance – think of tele-

84 'At a bare minimum, the rule of law must reflect the common concern that public power should be limited by legal standards that are enforceable by independent courts […]', Bastos (n. 70), 80; see also Hofmann, Rowe and Türk (n. 73), 922 f.

85 ECJ, *Les Verts v. Parliament,* judgement of 23 April 1986, case no. C-294/83, ECLI:EU:C:1986:166, para. 23. The decision did not address AFSJ-specific problems. Much rather, the Court discussed the question whether it has 'jurisdiction to hear and determine an action for annulment brought under Article 183 of the Treaty against a measure adopted by the European Parliament' (para. 19). It did nevertheless proclaim a general legal principle which is rooted in the rule of law. In *Sogelma,* the General Court emphasised this and applied *Les Verts* underlying principles to EU agencies, see Court of First Instance, *Sogelma – Societá generale lavori manutenzioni appalti Srl v. European Agency for Reconstruction,* judgement of 8 October 2008, case no. T-411/06, ECLI:EU:T:2008:419, paras 33-57.

86 See Calleja and Rusche (n. 2), 19; Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.*), 70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 34-57 (35); Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission Legal Service (ed.*), 70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023),76-94 (76, 86).

87 See Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU', European Papers 9 (2024), 179-208 (207 f.).

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communications, energy, infrastructure, or banking oversight law. This usually means that a highly professionalised executive will be dealing with large corporations represented by highly specialised lawyers. By contrast, criminal suspects targeted by Europol, or asylum seekers targeted by Frontex will often lack the necessary resources to have someone navigate the complexities of *Verwaltungskooperationsrecht* for them. One of the core features distinguishing AFSJ law from other legal areas is that, here, executive power often meets *natural* rather than merely *legal persons* – and these natural persons often come from particularly marginalised communities.

The AFSJ's under-constitutionalisation undermines the binding force of law. When affected parties are unlikely to obtain judicial review of EU action, the latter is less likely to be meaningfully guided by the law.[88] Courts also do not have the chance to interpret applicable EU law and thus help make it an effective mechanism regulating legal practice. This is compounded by the fact that, due to the AFSJ's intergovernmental roots, parliamentary oversight often falls by the wayside.[89] Hence, security is increasingly treated as a de-politicised task which is left to the functional considerations of a highly complex and sophisticated intergovernmental executive.[90] This development is fully in line with what the Copenhagen School has described as 'securitisation': A dynamic that perpetually expands security considerations to an increasing number of policy areas, by deeming such matters as technocratic and 'above politics', thereby delegating them away from ordinary legal and political processes.[91] Within the field of EU law, this could allow Member States to achieve desired policy goals without facing the level of political and legal scrutiny they would face 'at home'.[92] From a constitutional perspective, unchecked securitisation could thus undermine the legitimacy of European security law.[93]

The Legal Service has aptly described how one of the Treaty of Lisbon's chief accomplishments is 'to put the citizen at the heart of the democratic life of the Union'[94]. The Legal Service's book subscribes to the Union's citizen-

88 On this objective function of judicial review for EU law Bastos (n. 70), 82.

89 See Hofmann, Rowe and Türk (n. 73), 930; Schöndorf-Haubold (n. 23), para. 138.

90 This observation is also made in Tuori (n. 69), 289.

91 See for instance Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1997), 26.

92 As a general observation in Hofmann, Rowe and Türk (n. 73), 930.

93 See Ester Herlin-Karnell, The Constitutional Structure of Europe's Area of "Freedom, Security and Justice" and the Right to Justification (Hart Publishing 2019); Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique', Current Legal Probs 72 (2019), 203-251 (235-240, 245-247); Moreno-Lax (n. 87), 180-184.

94 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-392 (381).

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centred endeavour – it is, after all entitled '70 Years of EU Law – a Union for Its Citizens'. Indeed, at least since the ECJ rendered its plenary decisions on the rule of law crises in Hungary and Poland where it emphasised that the fundamental values enshrined in Art. 2 Treaty on European Union (TEU) 'define the very identity of the European Union as a common legal order'[95], said article can be read as a 'republican manifesto'.[96] In accordance with these republican values, EU security law, when it infringes upon the fundamental rights of individuals, ought to put them in a position to freely and effectively contest the Union's measures.[97] This would require coming to terms with AFSJ policy's external impact on legal subjects. Rather than offloading the 'hot-responsibility-potato'[98] to Member States, the Union should ensure that its substantive and procedural guarantees be designed in a citizen-centred way. It ought to overcome its near-exclusive focus on inter- and intra-administrative relationships.

In its current form, AFSJ policy seems curiously removed from the Union's dedication to its citizens as it tends to obscure the ways in which it affects them – both positively and negatively.[99] That may be one of the reasons why AFSJ policy remains effectively unmentioned in the Legal Service's otherwise thoroughly citizen-centred book.

III. Case Studies – Europol, Frontex, and PNR

I have argued that the AFSJ's commitment to intergovernmental *Verwaltungskooperationsrecht* hinders individual legal protection and thereby renders invisible how the Union infringes in fundamental rights. So far, I have made a rather abstract, conceptual argument. I would now like to highlight how this curious under-constitutionalisation manifests in legal practice. While this contribution cannot fully do justice to the AFSJ's complexities, it is useful to hone in on some of its institutions and instruments.

Notably, effective legal protection is undermined by both a lack of adequate legal procedures and the absence of clear substantive rules on funda-

95 ECJ, *Hungary v. Parliament and Council*, (n. 6), paras 127, 232; see also ECJ, *Poland v. Parliament and Council* (n. 6).

96 Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408.

97 Von Bogdandy (n. 96), 20-22.

98 De Coninck uses this metaphor in the context of Frontex border operations, see Joyce de Coninck, 'Shielding Frontex', Verfassungsblog, 9 September 2023, doi: 10.17176/20230909-182846-0.

99 Herlin-Karnell offers a similarly republican critique of the AFSJ in Herlin-Karnell (n. 93), 158.

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mental rights violations. The activities of Europol and Frontex are illustrative of these shortcomings (1.). The preliminary reference procedure, unfortunately, is not suitable to bridge these gaps (2.). Recent legal developments around the PNR Directive highlight a different way, in which the AFSJ's structural commitments create legal uncertainty (3.).

1. Europol and Frontex as Informal and Procedurally Elusive Providers of Public Security

Since *Verwaltungskooperationsrecht* conceives of EU security authorities as informational facilitators of external Member State action, their activities often take the form of informal or factual conduct, lacking external binding force. For example, this is the case when Europol requests the initiation of a (national) criminal investigation[100] or gives advice in its coordinative capacity, either in advance of operative measures based on its processing of personal data, or on-site during Europol agent deployments.[101]

While it may at first appear that such actions produce lesser infringements when compared to the ultimate operative measures undertaken by Member States – and that is the implicit premise of *Verwaltungskooperationsrecht* – Europol's activities may prove decisive in steering Member State action. Not only does Europol provide innovative technological solutions to Member States and provides operational support with ongoing investigations through so-called mobile offices.[102] Fuelled by its vast data processing capabilities, it also enhances national criminal investigations by providing intelligence-based support within specific 'analysis projects' which focus on certain crime areas or criminal networks.[103] This allows Europol to identify so-called 'high-value targets' and their associates.[104] For example, Europol itself recounted how it identified a 'hitman hired through an internet assassination website' based on an 'urgent, complex crypto-analysis'[105], how it targeted the main leader of a large-scale luxury car theft ring and helped unravel the criminal network[106],

100 Art. 6 paras 1 and 1 a Europol Regulation.

101 See Mitsilegas and Giuffrida (n. 65), 357; Timo Rademacher, 'Factual Administrative Conduct and Judicial Review in EU Law', REDP/ERPL 29 (2017), 399-435 (400).

102 Europol Report, Europol in Brief (2023), 11.

103 Europol Report, Europol in Brief (2023), 9.

104 Europol Strategy – Delivering Security in Partnership (2023), 5.

105 Europol Press Statement, 7 April 2021, see <https://www.europol.europa.eu/media-press/newsroom/news/dark-web-hitman-identified-through-crypto-analysis>, last access 28 January 2026.

106 Europol Press Statement, 31 May 2024, see <https://www.europol.europa.eu/media-press/newsroom/news/rent-drive-steal-how-luxury-car-thieves-were-stopped-in-their-tracks>, last access 28 January 2026.

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or how it analysed digital media through 'computer forensic tools' in order to identify 'an extremist preacher who was of interest to other investigations in the EU'[107]. In 2021, Europol's European Migrant Smuggling Centre alone identified 26 such high-value targets.[108]

Europol's role as a an 'information hub'[109] has recently been strengthened when it received vast troves of data that were not subject to regular categorisation procedures and unrelated to specific criminal activities listed in Annex 2B to the Europol Regulation.[110] When the European Data Protection Supervisor (EDPS) admonished Europol, the Regulation was quickly amended.[111] With the EDPS's legal action declared inadmissible by the General Court (GC),[112] and the amendments to the Europol Regulation passed in 2022, Europol now disposes of an even wider array of powers.[113] For instance, it can now directly gather data from private parties where Member States may need a warrant.[114] It can thus unleash big data technologies to establish new links and investigative leads within more than four petabytes of data.

Let us now imagine a case involving Europol's novel powers. By cross-referencing personal data within the vast databases at their disposal, or by generating new investigative leads through modern technologies, it may identify a person as a 'high-value target'. Europol may then trigger a national criminal investigation and advise Member States to take operative action against that individual.[115] Let us now assume that Europol's processing operation violated EU law. The underlying data may, for example, have been illegally obtained, or the technology used to process the data may have yielded a false positive – given the manifold issues with input data quality, algorithmic discrimination, and flawed statistical models,[116] this is not hard

107 Europol Review 2013, 28.

108 Europol Report, Europol in Brief (2023), 27.

109 EU Commission, 'The European Agenda on Security', COM(2015) 185 final, 4.

110 Apostolis Fotiadis, Ludek Stavinoha, Giacomo Zandonini and Daniel Howden, 'A data "black hole"', The Guardian, 10 January 2022.

111 Regulation 2022/991/EU.

112 General Court, *EDPS v. Parliament and Council*, order of 6 September 2023, case no. T-578/22, ECLI:EU:T:2023:522.

113 For an analysis of these developments see Sarah Tas, 'The Dangerous Increasing Support of Europol in National Criminal Investigations', New Journal of European Criminal Law 14 (2023), 534-551 (539 f.).

114 This is usually done in order to identify the competent national jurisdiction (Art. 26), but there are increased powers in so-called 'online crisis situations' (Art. 26a) and regarding Child Sexual Abuse Material (Art. 26b). On the implications see Tas (n. 113), 538.

115 Europol's power to ask Member States to initiate criminal investigations has been extended with Regulation 2022/991, see Article 6 Europol Regulation. For an overview see Thomas Wahl, 'Amended Europol Regulation in Force – Criticism Remains', eucrim (2022), 98-100.

116 See Barocas and Selbst (n. 42).

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to imagine. In such cases, the data subject's right of access to information on personal data relating to them held by Europol would be highly fragmented.[117] The assumption that the individual would learn of Europol's actions before Member States take operative action against them may therefore already be far-fetched. But even if that were the case, the affected individual would have almost no legal recourse against Europol.

That is because the EU legal order provides only insufficient legal protection against factual conduct by EU agencies. These procedural gaps have been illustrated by *Rademacher*[118]: The ECJ's case law on the 'binding effect' under Art. 263 para. 1 TFEU[119] reflects the fact that the action for annulment was not created to capture the kind of conduct in which Europol typically engages. It makes no sense to declare a factual or an informal act 'to be void', as Art. 264 TFEU states.[120] The action for annulment would therefore not be suitable to challenge the aforementioned Europol actions.[121]

Alternative procedures would also fail to provide adequate remedies against factual conduct. Consider the European action for damages[122]: First of all, there are many unanswered crucial substantive legal questions, when it comes to Europol's liability for fundamental rights violations, such as the necessary severity of harms, questions of causality and the attribution of legal responsibility.[123] The Court's recent decision in *Kočner v. Europol*, where it decided to hold Europol and a Member State jointly and severally liable for damage resulting from unlawful processing,[124] is a positive step forward in that regard. The Court's reasoning in that case, however, strongly relied on the specific wording and systematic context of Art. 50 para. 1 of the Europol Regulation of 2016 which has since been changed.[125] Art. 98 of the Frontex Regulation is worded quite differently. For this reason, and given the fact that the case pertained to an irregular data breach of intimate photos and messages

117 Tas (n. 113), 544.

118 See Rademacher (n. 101).

119 First ECJ, *IBM v. Commission of the European Communities*, judgement of 11 November 1981, case no. 60/81, ECLI:EU:C:1981:264; then an initial loosening of the criterion in ECJ, *AKZO v. Commission of the European Communities,* judgement of 24 June 1986, case no. 53/85, ECLI:EU:C:1986:256; then finally a restrictive interpretation in Court of First Instance, *Hans-Martin Tillack v. Commission of the European Communities,* judgement of 4 October 2006, case no. T-193/04, ECLI:EU:T:2006:292.

120 Rademacher (n. 101), 425.

121 See Mitsilegas and Giuffrida (n. 65), 357.

122 Articles 340 para. 2, 268 TFEU.

123 On that see Ziebritzki (n. 82), 287-319; Rademacher (n. 101), 430-435.

124 ECJ, *Marián Kočner v. Europol*, judgement of 5 March 2024, case no. C-755/21 P, ECLI:EU:C:2024:202, para. 71.

125 ECJ, *Kočner* (n. 124), paras 54-72.

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and not the regular course of investigative operations,[126] it remains to be seen whether the *Kočner* decision will provide guidance for future cases.

The General Court's case law on the liability of Frontex in multi-actor operations at the EU's external borders so far provides little hope for clarification[127]: In *WS and others v. Frontex,* two Syrian nationals sought compensation for their deportation from Greece to Türkiye in a joint operation carried out by Frontex and Greece. The General Court refrained from ruling on the applicants' substantive claim that Frontex had violated its human rights obligations, holding that Frontex merely 'provide[s] technical and operational support to the Member States' and has 'no competence […] as regards the assessment of the merits of the return decisions'[128]. For that reason, the GC argued, there was no 'causal link […] between the damage […] and the conduct of which Frontex is accused'. The GC instead invoked 'the sole responsibility of the host Member State'.[129] Several scholars have pointed out that, given Frontex's extensive involvement in the planning, monitoring, and execution of border operations, the agency carries joint responsibility when it comes to the execution of return decisions.[130] Interestingly, the GC refused to engage with the deportation's execution, instead heavy-handedly focusing on Greece's return decision.[131] As long as this case law stands, in multi-actor border operations there will continue to be 'blame-shifting by design'.[132]

Advocate General (AG) Ćapeta recently delivered her Opinion in the *WS and others v. Frontex* case.[133] Recommending that the ECJ set aside the GC's judgement, AG Ćapeta emphasises that the GC failed to adequately address the plaintiff's challenges. They did not intend to challenge the Member State's return decision. In fact, no return decision had ever been issued for them. *That* – and whether Frontex can be held liable for failing to verify the existence of such a return decision before executing it – was the point of the challenge. AG Ćapeta sides with the plaintiffs, finding that Frontex acted

126 ECJ, *Kočner* (n. 124), paras 111-113.

127 The action for damages has often been raised as a suitable remedy in such cases, see Fink (n. 55), 547 f.; Ziebritzki (n. 82), 390-393.

128 General Court, *WS and others v. Frontex,* judgement of 6 September 2023, case no. T-600/21, ECLI:EU:T:2023:492, paras 64 and 66 respectively.

129 General Court, *WS and others v. Frontex* (n. 128), para. 66.

130 For example Fink (n. 55).

131 For critiques of the decision see De Coninck (n. 98).

132 Melanie Fink, 'Why It Is so Hard to Hold Frontex Accountable', EJIL: Talk!, 26 November, 2020; *Hillary* and *Schotel* argue that the decision undermines both the credibility of the Court and EU agencies in general, Lynn Hillary and Bas Schotel, 'The Implications of the 2023 Frontex Judgment on the EU Agencies and the Legal Credibility of the Court', European Law Blog, 14 February 2024.

133 Opinion of Advocate General Ćapeta, *WS and others v. Frontex*, delivered on 12 June 2025, case no. C-679/23 P, ECLI:EU:C:2025:427.

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unlawfully by its omission to verify the existence of a return decision. She also states that there was a causal link between Frontex's omission and the plaintiff's decision to flee to Iraq from Türkiye[134], as well as expressing openness to joint and several liability shared by Frontex and Member States in joint return operations.[135] While AG Ćapeta's Opinion is certainly encouraging, it remains to be seen whether the ECJ will follow her reasoning in this case – and whether *WS and others v. Frontex* will succeed in producing reliable criteria for attributing legal responsibility to Frontex in multi-actor operations at the EU's external borders.[136]

Perhaps even more importantly for our aforementioned individual who, in our case example, becomes the subject of illegal data processing by Europol, the action for damages does not provide for *preventive protection*. A damage must have been *caused* for it to be compensated through this action. The mere *prospect* of future harm caused by, for example, illegal data processing, even if there is a plausible expectation that such future harm will occur, is not currently covered by Art. 340 TFEU.[137] Even under the Court's doctrine established in 1974 in *Kampffmeyer,* according to which the Union (then: the Community) could be held liable for 'imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed'[138], it would be unlikely for preventive actions for damages against Europol to succeed. This is because it is not foreseeable which concrete steps, if any, Member States will take based on Europol's advice. Neither is how, when and which fundamental rights will be affected in the future.

The lack of preventive protection also explains why awarding *symbolic damages* in actions under Art. 340 TFEU would likely fail to bridge the aforementioned gap in legal protection. It is true that, in earlier case law, the Court has occasionally used symbolic damages to acknowledge a breach of Union law, and has even hinted that mere recognition of the unlawfulness of the contested act as such may suffice as compensation.[139] It is also true that a focus on symbolic damages, may remove the ECJ's reasons for adhering to

134 Opinion of Advocate General Ćapeta (n. 133), para. 116.

135 Opinion of Advocate General Ćapeta (n. 133), para. 93.

136 For an analysis of AG Ćapeta's Opinion see Laura Salzano, '"We Were Just Cooperating!"', Verfassungsblog, 30 July 2025, doi: 10.59704/6b353778a623166e.

137 Rademacher (n. 101), 434 f.

138 ECJ, *Kampffmeyer v. Commission and Council,* judgement of 14 July 1967, case no. 56-60/74, ECLI:EU:C:1967:31, para. 6.

139 See for example ECJ, *Annibale Culin v. Commission of the European Communities,* judgement of 7 February 1990, case no. C-343/87, ECLI:EU:C:1990:49, awarding 'the token sum of one franc by way of compensation for the non-material harm' para. 29; see also ECJ, *Abdulbasit Abdulrahim v. Council and Commission,* judgement of 28 May 2013, case no. C-239/12 P, ECLI:EU:C:2013:331, para. 72. I am grateful to the reviewers for this suggestion.

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its criterion of 'sufficiently serious breach' of EU law which it usually requires under Art. 340.[140] Where the recognition of unlawfulness alone is deemed compensation enough, there is less of a chilling effect on the exercise of the Union's discretionary powers – an effect the ECJ has previously cited as a justification for the seriousness requirement.[141] Yet, even if the EU courts were to adopt this stance, they would still struggle to overcome both the clear wording of Art. 340 and the systemic logic of actions for damages more generally. Damages must have been *caused* in order to be compensated. Art. 340's lack of preventive protection will apply even where the compensation sought is merely symbolic.[142]

The EU legal order's procedural shortcomings within AFSJ policy thus prevent the fundamental right to data protection (Art. 8 CFR) from achieving one of its main purposes: conferring preventive protection against future substantive rights violations based on illegal data processing.[143] The EU legal order knows no such thing as a comprehensive action for declaratory relief.[144] This stands in stark contrast to, for example, the German and French administrative legal orders[145], the former of which provides for the *allgemeine Feststellungsklage*[146], and the latter of which knows urgent applications for protection of a fundamental freedom (*référé-liberté*)[147].

To illustrate how such legal remedies can be instrumental in delivering preventive protection for Art. 8 CFR, consider the Higher Administrative Court of Münster's 2018 decision on mass data retention: In this case, a German internet access provider asked the Court to declare it exempt from obligations arising from the German Act on Telecommunications under which it could be obliged to engage in mass retention of its customers' internet traffic and location data. The plaintiff argued that a preventive declaration was necessary since they would otherwise run the risk of incurring administrative fines for failing to comply with their legal obligations. Naturally, this litigation was brought as an action for declaratory relief (*Feststellungsklage*). The Court

140 Rademacher (n. 101), 433; Ziebritzki (n. 82), 249.

141 See for example ECJ, *Vermehrungsbetriebe GmbH v. Council and Commission,* judgement of 25 May 1978, case no C-83/76, ECLI:EU:C:1978:113, paras 5-6.

142 This is also emphasised by Rademacher (n. 101), 434.

143 On that purpose see Ralf Poscher, 'The Right to Data Protection – A No-Right Thesis' in: Russell Miller (ed.), *Privacy and Power* (Cambridge University Press 2017), 129-142.

144 Even if there was, the principle of separated judicial review or *double exclusivity* would still create gaps in legal protection, see below in sub-section (2).

145 For an overview over the legal developments towards such procedural tools in Germany, the UK, France, and Austria see Rademacher (n. 101), 426-428.

146 See § 43 Verwaltungsgerichtsordnung (German Code of Administrative Court Procedure).

147 See Article L. 521-2 Code de justice administrative (French Code of Administrative Justice).

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ruled for the plaintiff, arguing that German law was in violation of the ECJ's case law on mass data retention and emphasising that the *Feststellungsklage* conferred preventive protection in this case.[148]

If this case had occurred under the Union's procedural regime, such preventive protection would have likely been unavailable. The action for damages would fail to confer adequate legal protection, even if it was only aimed at symbolic damages. The internet service provider in question would have had to either reluctantly comply with the unlawful obligation – and thereby become an unwilling accomplice to a violation of their customers' right to data protection –, or to wait until EU authorities take executive action against them, thereby incurring significant legal and financial risks.

Similar observations would hold for our aforementioned case pertaining to unlawful Europol action: Our affected individual would have to wait and see what one, or potentially several Member States do with their illegally obtained, and potentially inaccurate information. The effects of this delay may be irreversible.[149] As soon as Europol communicates some form of suspicion regarding a serious crime to one or several Member State authorities (or even private parties), the harm to fundamental rights, for instance to the reputation of the affected person, is already done. Going forward, the individual can always expect being confronted with this suspicion. Legal action against Member State measures which are based on Europol's illegal processing would entail moving before potentially several courts across multiple jurisdictions, hoping that some of them will trigger a preliminary reference procedure in order to have the ECJ decide on the legality of Europol's actions under Art. 267 para. 1 lit. b) TFEU.

2. The Shortcomings of the Preliminary Reference Procedure

Indeed, the preliminary reference procedure appears to be where the Legal Service would place its hopes in such cases. The Legal Service is, of course, right in emphasising this procedure's transformative effect.[150] Under Art. 267 TFEU, the Court is also able to rule on instruments that are non-binding to Member States.[151] The Legal Service's emphasis on the preliminary reference procedure's

148 Higher Administrative Court of Münster, order of 22 June 2017, 13 B 238/17, para. 27. This general line of judicial reasoning was later confirmed by the German Federal Administrative Court in a similar case, see Federal Administrative Court, judgement of 14 August 2023, 6 C 7.22 (6 C 13.18); ECJ, *SpaceNet* (n. 5).

149 On the irreversible nature of illegal data processing Rademacher (n. 101), 423.

150 See Liberati, Ramopoulos and Bianchi (n. 86), 87.

151 See ECJ, *FBF v. ACPR,* judgement of 15 July 2021, case no. C-911/19, ECLI:EU:C:2021:599, paras 52-57.

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importance for fundamental rights compliance is therefore perfectly reasonable – generally speaking. For the particular context of AFSJ policy, however, I think that this procedure is not a perfect fit, at least under the current constitutional configuration of EU law. While a general discussion of the strengths and drawbacks of the preliminary reference procedure would exceed this article's scope,[152] I will just briefly mention three reasons here:

First, the ECJ can only decide on preliminary references if there are national judges willing to make them. In itself, that is a trivial fact which has not hindered the procedure's general success. However, the AFSJ's structure makes it particularly unlikely for preliminary references to come forth.[153] That is because it is structurally committed Member States' ultimate responsibility for upholding public security. For that reason, it conceives of EU agencies as mere informal supporters regulated by *Verwaltungskooperationsrecht*. Given the AFSJ's emphasis on Member States' ultimate authority in security matters, many national judges will consider EU law irrelevant for the question of whether a national security measure conforms with national law – and thus sweep Europol's contribution under the proverbial rug. One example could be German criminal procedural law: German courts have traditionally held that the question whether criminal evidence was legally collected (questions concerning *Beweiserhebung*) is to be strictly separated from the question whether said evidence may be used in court (*Beweisverwertung*).[154] Courts may argue that, even if Europol illegally processed data relating to the defendant, that only bears on a *Beweiserhebungsverbot*, but not on a *Beweisverwertungsverbot*.[155] A reference to doctrines of this kind will provide national judges with a useful justification to avoid a preliminary reference procedure which, to them, especially in AFSJ-related cases, may appear counterintuitive and cumbersome anyway. Europol's contribution to fundamental rights harms would thus be rendered procedurally invisible.

Second, these problems are compounded by the principle of separated judicial review, also termed *double exclusivity* since it prevents both the ECJ from ruling on national measures, as well as national courts from invalidating

152 For further references see Virginia Passalacqua and Francesco Costamagna, 'The Law and Facts of the Preliminary Reference Procedure', European Law Open 2 (2023), 322-344.

153 For an example see Ziebritzki (n. 82), 212-214.

154 See Bundesgerichtshof (German Federal Court of Last Instance in criminal matters), judgement of 21 February 1964 – 4 StR 519/63.

155 For a short illustration on how violations of EU primary and secondary law may intersect with German criminal procedural law in a case relating to the illegal use of an AI-based remote biometric identification system see Christian Thönnes, 'Daniela Klette und die Frucht der vergifteten Maschine', Verfassungsblog, 22 March 2024, doi: 10.59704/38f07745e9336f86; for a general illustration see Tobias Singelnstein, 'Folgen des neuen Datenschutzrechts für die Praxis des Strafverfahrens und die Beweisverbotslehre', NStZ 40 (2020), 639-644.

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Union measures.[156] The abovementioned case touches on complex substantive legal questions caused by the enmeshment of the EU's composite administrative system: How should the illegality of a measure taken on one administrative level upstream bear on the legality of an ensuing measure taken on another administrative level downstream? Or, worded differently: How to address the downstream effects of EU agencies' preparatory measures? There are no obvious answers to this problem of *derivative illegality*,[157] but, it would seem reasonable to hold that European courts, national and supranational, ought to find such answers collaboratively. However, the *Kooperationsverwaltungsrecht* paradigm which makes the legislature refrain from providing clear guidelines to such questions, combined with a strict adherence to double exclusivity, renders a collaborative development of doctrinal answers difficult. Double exclusivity does follow neatly from the EU's constitutional aims, namely guaranteeing uniform implementation of EU law whilst respecting Member States' administrative autonomy.[158] However, it also ignores the factual interdependence of administrative reality. Even though, within the AFSJ's administrative union, EU and national authorities are deeply enmeshed, within judicial review they are artificially treated as strictly separate.[159]

Double exclusivity, moreover, would still cause significant procedural problems, even if the Union were to introduce some form of general declaratory relief which conferred preventive protection.[160] Consider our Europol case: Even if an affected person succeeded in having the ECJ declare both the processing itself and any future transmission of processing results to Member State authorities unlawful under EU law, this would not prevent national law enforcement authorities – who might nonetheless become aware of those results – from taking action. Such policing measures would be based on national security law which, as illustrated above, does not necessarily make their legality dependent on the lawfulness of the intelligence which informed them. In any case, Art. 276 TFEU would bar the ECJ from ruling on such national policing measures.

The Legal Service has pointed out that the ECJ, in *Borelli* and *Berlusconi*, has addressed issues relating to the combination of double exclusivity and derivative illegality before. On the one hand, there are those procedures where national authorities adopt binding preparatory acts which leave no

156 Bastos (n. 70), 68.

157 On potential solutions see Filipe Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures', CML Rev. 55 (2018), 101-134.

158 Bastos (n. 70), 66.

159 On this Hofmann, Rowe and Türk (n. 73), 930; Bastos (n. 70), 64; for an illustration pertaining to Frontex see Fink (n. 55), 532.

160 On the necessity of general declaratory relief for preventive protection see above in subsection (1).

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discretion to the subsequently deciding EU authority, and on the other are those where the EU administration enjoys full discretion in making a final decision.[161] In the former *Borelli* constellation, EU courts are precluded from reviewing a final EU decision based on national preparatory acts and national courts ought to review preparatory acts based on their national law.[162] In the latter *Berlusconi* constellation, EU courts have exclusive jurisdiction to review the final decision made by EU authorities, whilst national courts may not review national preparatory acts.[163] With this distinction, the ECJ managed to establish legal certainty by concentrating judicial review of composite decision-making at one judicial entity, whilst at the same time keeping administrative levels neatly apart, and thus conforming with the constitutional principles behind double exclusivity. EU courts will not apply national law and national courts will not have the final say on EU law.[164]

Unfortunately, though, I am not convinced that the doctrinal principles established in *Borelli* and *Berlusconi* effectively resolve the complex judicial questions in AFSJ matters. *Berlusconi* was rendered in the context of the Single Supervisory Mechanism[165], where national authorities (here: national supervisory banking authorities) prepare a final decision taken by an EU authority (here: the European Central Bank). By contrast, composite decision-making in the AFSJ usually works the other way around: EU authorities (Frontex, Europol etc.) prepare final national decisions (by law enforcement authorities or courts).[166] This, combined with the particular competency-related sensitivity of AFSJ matters, will make implementing *Berlusconi*-like rules quite difficult: You cannot concentrate AFSJ decision-making at the ECJ since Art. 276 TFEU prohibits the Court from reviewing 'the validity of proportionality of operations carried out by the police or other law-enforcement services of a Member States'. On the other hand, conferring exclusive judicial review on Member State courts would run counter to *Foto-Frost* in that they would be allowed to make final decisions on matters relating to EU law, thus potentially undermining EU law's uniform application.[167] One

161 For an even more finely-grained distinction see Bastos (n. 70), 67.

162 ECJ, *Oleificio Borelli SpA v. Commission of the European Communities*, judgement of 3 December 1992, case no. C-97/91, ECLI:EU:C:1992:491, paras 10-15.

163 ECJ, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS), judgement of 19 December 2018, case no. C-219/17, ECLI:EU:C:2018:1023, paras 43-47.

164 For this observation with further references to ECJ case law see Bastos (n. 70), 74.

165 See Council Regulation 2013/1024/EU.

166 *Hofmann* also distinguishes between 'top-down'- and 'bottom-up'-procedures, Hofmann (n. 70), 7.

167 ECJ, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, judgement of 22 October 1987, case no. 314/85, ECLI:EU:C:1987:452, para. 15.

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single Europol or Frontex action may be ruled legal in one Member State, but illegal in another.

Such divergences could, of course, be avoided if national courts were restricted to reviewing whether AFSJ-related measures conform to their respective national laws. But this would create the exact inverse of the gap in legal protection produced by *Berlusconi:* Where in *Berlusconi,* national law will remain disapplied such that national authorities may violate it at their leisure,[168] in the AFSJ, the preparatory actions of *EU security agencies* (and their compatibility with *EU law*) would be rendered procedurally invisible.

The ECJ's decision in *Rimšēvičs* likely will not alleviate the aforementioned concerns either. True, in annulling a national legal act adopted by the Latvian Anti-Corruption Office, the ECJ created an exception to the principle of double exclusivity.[169] The Court's reasoning, however, was narrowly tailored to the Statute of the European System of Central Banks (ESCB Statute) (an explicit remedy under Art. 14.2 in particular) and the European Central Banking system. The Court even explicitly acknowledged the AFSJ and Art. 276 TFEU as an example, where its reasoning would *not apply.*[170] I therefore do not see a *Rimšēvičs* moment on the horizon for the Union's constitutional configuration in general, and the AFSJ in particular.[171]

The principle of double exclusivity thus remains a procedural hurdle in the context of AFSJ policy. Some national courts may decide to refer questions on the legality of Europol's actions to the ECJ. But given double exclusivity's implicit assumption 'that any given decision will be adopted *either* by national *or* by EU authorities'[172], they will be left alone with the question on how to deal with the *enmeshment* of EU and national measures. This undermines affected individuals' capacity to challenge the *entirety* of AFSJ-related decision-making processes.[173]

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168 This is rightly criticised by Bastos (n. 70), 78-79.

169 ECJ, *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia*, judgement of 26 February 2019, case nos C-202/18 and C-238/18, ECLI:EU:C:2019:139.

170 ECJ, *Rimšēvičs* (n. 169), paras 58-59.

171 This view is shared by René Smits, 'A National Measure Annulled by the European Court of Justice', Eu. Const. L. Rev. 16 (2020), 120-144 (139-142); Alicia Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs*', CML Rev. 56 (2019), 1649-1660 (1657). There is a plausible alternative reading, which interprets the decision as 'a genuine constitutional moment', see Daniel Sarmiento, 'Crossing the Baltic Rubicon', Verfassungsblog, 4 March 2019, doi: 10.17176/20190324-204345-0. Even so, I think that this constitutional moment would struggle to get around the explicit wording of Art. 276 TFEU. I am grateful to Paolo Mazzotti for helping me press this point.

172 Bastos (n. 70), 68.

173 Likewise Bastos (n. 70), 81.

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Third, the procedural design of preliminary references does not seem to be tailored to AFSJ-related cases. Contrary to the action for annulment and the action for damages, the preliminary reference procedure was originally designed as a 'non-contentious procedure'[174] aimed at clarifying abstract questions on the correct interpretation of EU law.[175] For that reason, the procedure decentres plaintiffs and instead heavily relies on the factual input provided by the national judge. It also privileges the Commission and Member States – the Union's 'inner circle'.[176] In the aforementioned AFSJ-related cases, affected subjects will litigate how a concrete EU executive measure affects them *specifically*. Contrary to the preliminary reference procedure's original purpose, this is *very much a contentious situation* in which many factual questions vis-à-vis the affected individual as well as the EU agency in question will need to be addressed[177]: What are the particular circumstances and characteristics of the plaintiff? What technology exactly did Europol use and how did it engage with the particulars of the case? Given the marginal role plaintiffs play in establishing the relevant facts of the preliminary reference, it is unclear that the procedure is well equipped to tackle such questions, and procedurally involve the plaintiff while doing so.[178] That may not be a problem when the plaintiff is an international corporation represented by highly specialised attorneys, as is usually the case in competition law cases – but Frontex's and Europol's actions typically affect individuals who are less affluent and well-versed with the intricacies of EU law.

Overall, I therefore maintain that the preliminary reference procedure, is just not an adequate tool to provide the kind of multi-faceted dialogue that EU security law's difficult doctrinal challenges require.[179] Given its procedural design, constitutional context and unidirectional nature, it fails to fully capture the complexity of administrative enmeshment in some AFSJ-related cases.

174 Passalacqua and Costamagna (n. 152), 340.

175 The Court emphasised this in an order issued in the context of *Costa v. Enel,* see ECJ, *Costa v. Enel,* order of 3 June 1964, case no. 6/64, ECLI:EU:C:1964:34.

176 See Passalacqua and Costamagna (n. 152), 335-337.

177 This also distinguishes AFSJ-related cases from ECJ, *FBF v. ACPR* (n. 151). The guidelines and recommendations issued by the European Banking Authority may be soft law norms, but they are still abstract norms.

178 See Passalacqua and Costamagna (n. 152), 335-340; for a more in-depth critique see Jos Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice* (Eleven Publishing 2018).

179 See also Schöndorf-Haubold (n. 23), paras 69 f.; Hofmann, Rowe and Türk (n. 73), 935.

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3. The PNR Directive and the Drawbacks of an Absent Administration

The last example pertains to the PNR Directive. Contrary to, for instance ETIAS[180], the PNR system completely relies on Member State authorities (so-called 'Passenger Information Units' or PIUs) to gather flight passengers' data and conduct automated predictive threat detection.[181] Perhaps in an effort to safeguard Member States' administrative sovereignty, the EU legislator shied away from entrusting a European security agency with such sensitive tasks; there is no 'PNR Central Unit'[182]. Moreover, the fact that the EU legislator chose to implement the PNR system via a Directive, rather than a Regulation, leaves Member States a lot of administrative leeway.

In *Ligue des droits humains,* the ECJ severely curtailed the PNR system's scope and demanded procedural safeguards for fundamental rights compliance.[183] This has created a contentious legal situation which seems to be compounded by the lack of a proper European PNR administration directly bound by EU laws. First, almost all national transposition laws now need to be amended. Since all transposition laws indiscriminately expanded the PNR system's scope to all European flights, and the Court decided that such indiscriminate surveillance of free movement within the Union would be disproportionate,[184] all these laws now violate EU law and should therefore remain disapplied. Given that PIUs are national authorities, however, they are directly bound by national transposition laws, and only indirectly by the re-interpreted PNR Directive. Paradoxically, Member States' security authorities are therefore now compelled by law to exercise public power for Union purposes based on laws that are incompatible with EU law and should therefore not be applied.[185] Since the clear wording of transposition laws differs so starkly from the re-interpreted PNR Directive, they cannot be saved through systematic interpretation. They are, to put it differently, *zombie laws,* not quite dead, not quite alive.[186]

Second, in terms of procedural safeguards, the Court only formulated loose and open criteria, instead delegating the selection of included intra-EU

180 The European Travel Information and Authorisation System as established by Regulation 2018/1240/EU.

181 Art. 4 para. 2 lit. a), Art. 6 para. 2 lit. a), para. 3 PNR Directive.

182 Interestingly, there *is* an ETIAS Central Unit, see Art. 7 of the ETIAS Regulation.

183 For a summary and critique of the decision see Christian Thönnes, 'A Directive Altered Beyond Recognition', Verfassungsblog, 23 June 2022, doi: 10.17176/20220623-153431-0.

184 ECJ, *Ligue des droits humains* (n. 38), para. 171.

185 On the German transposition law see Thönnes (n. 30), 537-540.

186 Similar uncertainty vis-à-vis national transposition laws ensued after the invalidation of Directive 2006/24/EC in ECJ, *Digital Rights Ireland* (n. 5).

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flights[187], the formulation of 'clear and precise rules' for human review of automated hits[188] as well as strategies to avoid high false-positive rates[189] and indirect discrimination[190] to Member States. This restraint is perhaps motivated by the principle of separated judicial review: If the Court formulated clearer standards, it would essentially be making administrative law for administrations over which it has no jurisdiction. Yet, recent attempts by Member States to circumvent the ruling,[191] demonstrate that, for security law, this completely decentralised implementation may not be conducive to fundamental rights compliance.

If the EU legislator, in creating the PNR Directive, had not been committed to the AFSJ's characteristic deference to Member States' administrative sovereignty, and had instead established a European PNR Central Unit, the aforementioned sources of uncertainty may have been diminished: A PNR Central Unit would have been directly bound by the re-interpreted PNR Directive (or then: Regulation). It could also have provided guidance to national PIUs on how to comply with the Court's findings – and EU citizens could have challenged the Central Unit directly, rather than having to navigate procedural detours through national PIUs which are confused as to which law applies to them. Due to its particular sensitivity to fundamental rights, it is typical for security law, that administrative standards evolve through judicial reactions to contentious legal challenges.[192] The efficiency of that dynamic appears to depend on a capable administration that is, in turn, directly bound to and accountable under the law.

IV. Conclusion and Suggestions for Reform

With this contribution, I do not intend to claim that the EU's project to organise security on a supranational level is fundamentally illegitimate. On the contrary, it seems plausible that complex, international criminal networks are best combated at the supranational level. I therefore hope that this critique can spark a conversation about how the Union's laws and institutions have to change for the AFSJ to truly grow into the constitutional role both the EU Commission and many Member States seem to envision for it. The institutional reality of EU security law has outgrown the AFSJ's original

187 ECJ, *Ligue des droits humains* (n. 38), paras 167-175.

188 ECJ, *Ligue des droits humains* (n. 38), para. 206.

189 ECJ, *Ligue des droits humains* (n. 38), para. 203.

190 ECJ, *Ligue des droits humains* (n. 38), para. 197.

191 See the Council Discussion Paper 11911/22 of 9 September 2022; Elif Mendos Kuşkonmaz, 'The Grand Gala of PNR Litigations', Eu Const. L. Rev. 19 (2023), 294-319 (309-310).

192 On the evolution of German and European security law see Bäcker (n. 31), paras 5-24.

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structural premises.[193] This is no tragedy, it just calls for legal reform. In order to mend its current under-constitutionalisation, the AFSJ must overcome its commitments to intergovernmental *Kooperationsverwaltungsrecht*, fully commit to the EU's security-related power and build it a solid, citizen-centred, constitutional foundation.

This work will require steps to be taken by a wide array of actors on several levels. Some potential solutions, such as a re-conception of the criteria of Art. 340 TFEU[194], or narrow exceptions to the principle of double exclusivity could be achieved through the ECJ's jurisprudence. Some steps could also be taken via secondary legislation: A general and comprehensive Union act on administrative procedure would provide more legal certainty. An augmentation of procedural pathways may also be achievable by secondary legislation. It may, for example, be possible to specify the procedural criteria of Art. 340 para. 2 TFEU in such a way that the action for damages could confer preventive protection in a manner similar to general actions for declarative judgement.[195] Such reforms, however, would always run the risk of clashing with the wording of the Treaties which, of course, take precedence.[196]

It is also conceivable that the Member States could contribute by amending their laws of administrative and criminal procedure: They could, for example, stipulate that in any case involving significant input from an EU agency, such as Europol, affected persons must be informed, and that, as part of any ensuing national judicial proceeding, it must be possible to summon and question Europol agents and to examine Europol documents. In Germany, similar mechanisms have been devised to involve national authorities, such as intelligence agencies, and their documents where their activities are relevant for the case at hand, including, if necessary, through a confidential *in-camera* procedure.[197] National police and criminal procedure laws could also clarify their criteria for *derivative illegality,* with a view to achieving roughly uniform standards across Europe. It seems only fair that intelligence that could not have been obtained *but for supranational integration* should be subjected to supranational standards.

193 For a similar observation see Bastos (n. 70), 88.

194 See the proposals in Rademacher (n. 101), 430-435; Fink (n. 55), 547-548; Ziebritzki (n. 82), 389-393.

195 Rademacher (n. 101), 434.

196 It is for this reason that I am slightly less optimistic about the potential of the action for damages than Ziebritzki appears to be, see Ziebritzki (n. 82), 248-249.

197 See § 99 of the German Code of Administrative Court Procedure (VwGO). I am grateful to Ralf Poscher for this suggestion.

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Some of the deliberative work will have to be done by *us* – that is, by legal scholarship and practitioners such as the Legal Service. The radically increased role of the Union in security matters will challenge us to re-think some of the paradigms through which we view European administration.

Ultimately, however, what I have described above calls for *constitutional reform.* The Union's current constitutional constraints impose limits on the AFSJ's expansion. The principle of double exclusivity, for example, appears to be deeply rooted in the EU's constitutional conception of itself as an administrative union. As long as the *entirety* of enmeshed composite proceedings cannot be adequately subjected to judicial review, there will remain gaps in legal protection that are barely bridgeable. So long as Union authorities – and above all, the Member States – insist on a constitutional configuration and an administrative law that hold them accountable only to the extent appropriate for informal yet ultimately insignificant service-providers to national administrations, they should be constitutionally limited to that role. European law enforcement cannot have its cake and eat it, too. It cannot reap the benefits of a supranational security apparatus built on a Security Union that vigorously wields robust executive power, when it comes to migration management and active crime-fighting – while at the same time invoking the traditional, intergovernmental image of strictly sovereign nation states when it comes to being held legally accountable.

A fully emancipated Security Union hinges on a fully constitutionalised European security apparatus – and that may well require a reform of the Treaties. I readily admit that such reform would be extremely challenging and therefore politically unlikely. Until that happens, however, the Security Union – however prudentially reasonable it may appear – will continue to bear the blemish of under-constitutionalisation.

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Telling (Social) Europe Differently: Fractures, Discontinuities, and Alternative Trajectories in 70 Years of EU Law

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Abstract

European Union (EU) integration is political and contingent, yet many legal accounts portray it as a process of steady institutional expansion and individual emancipation. This framing is particularly problematic for the social dimension of integration, which regulates labour and welfare – domains directly linked to democratic participation and the distribution of power and wealth.

This article has therefore two objectives. First, it uses Social Europe to show how *70 Years of EU Law – A Union for Its Citizens*, the volume discussed in this special issue and thus the Commission Legal Service present the history of EU integration indeed as largely legal, institutionally driven, incremental, emancipatory, and narrowly European. Second, the article conversely proposes to place a democratic, constructive, and distributive reflection at the

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centre of how EU integration, including its social dimension, is narrated. The story of the EU and its law should not be told as a unidirectional, legal, institutional, and individually emancipatory progression but through the recognition of fracture, discontinuity, and alternative trajectory. The meaning of EU competences, legal forms and practices, and their distributive consequences emerges and transforms in power struggles that determine which of several plausible meanings becomes law and policy. By revisiting the past, this article highlights the reversibility of these struggles and recovers other 'plausible worlds' of EU law in the social field that have not (yet) been realised.

Keywords

Social Europe – EU Social Policy – EU Law – EU Integration – EU Legal History

I. Introduction: 70 Years of Fractures, Discontinuities, and Alternative Trajectories

EU integration is political and contingent, yet many legal accounts portray it as a process of steady institutional expansion and individual emancipation,[1] propelled by in particular its Court of Justice of the European Union (CJEU).[2] EU law appears as a source of individual rights while the received narratives downplay the distributive consequences of EU integration.[3] In

1 Emblematically, Mauro Cappelletti, Monica Seccombe and Joseph H. H. Weiler (eds), *Methods, Tools and Institutions. Book 1. Political, Legal and Economic Overview* (Walter de Gruyter 1986); Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483.

2 The appearance of incrementality and at times even inevitability is also promoted by the idea of an 'evolution' of EU law. Although partially critically, Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021). See for a contestation in this special issue, Giulia La Torre, 'The Formation of the EU Legal System', HJIL 86 (2026), 133-166. A more positive take on the usefulness of the notion of 'evolution' in historical analyses of law is offered in, e. g., Simon Deakin and Frank Wilkinson, 'Labour Markets and Legal Evolution' in: Simon Deakin and Frank Wilkinson (eds), *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press 2005), 1-40 (35).

3 For a conclusive critique Floris de Witte, 'Emancipation Through Law?' in: Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016), 15-34. On the importance of the distributive dimension of EU integration, e. g., Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe', Journal of Law and Political Economy 1 (2021), 301-332.

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70 Years of EU Law – A Union for Its Citizens (*70 Years of EU Law,* the volume), the volume examined in this special issue, the Commission Legal Service (CLS) tends to reproduce a similar narrative in its historisation of EU integration via law.[4]

This article has two objectives. *First,* it uses the social dimension of EU integration (Social Europe) to show how the CLS presents the history of EU integration indeed as largely legal, institutionally driven, incremental, emancipatory, and narrowly European.[5] This framing is particularly problematic for Social Europe, which regulates labour and welfare – domains directly linked to democratic participation and the distribution of power and wealth.[6] I argue that scholars, practitioners, and citizens – the intended audience of the volume discussed – should contest this narrative if they seek a genuinely democratic, constructive, and distributive reflection on Europe's future. The past must inform this process: how EU law and its distributive effects have been shaped by past politics is essential for reflecting on its future within a democratic process.

Second, the article proposes to place such democratic, constructive, and distributive reflection at the centre of how EU integration, including its social dimension, is narrated. The story of the EU and its law should not be told as a unidirectional, legal, institutional, and individually emancipatory progression but through the recognition of *fracture, discontinuity, and alternative trajectory*.[7] Fractures here are understood as interruptions revealing the non-linearity of EU-making, and therefore, that under the guise of their contin-

4 A similar assessment in Jacob van de Beeten, 'Festschrift or Fiction? Omissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

5 The social dimension of EU integration is discussed in Isabel Galindo Martín et al., 'Chapter 6 – From an Economic Community to a Union for Its Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 129-152. Another relevant chapter is the discussion of EU citizenship in Jonathan Tomkin and Elisabetta Montaguti, 'Chapter 4 – EU Citizenship: In the Service of EU Citizens' in European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the EU 2023), 96-114. The latter chapter is not discussed in this paper due to space constraints.

6 See, for instance, the idea of *economic democracy* developed by German labour lawyer Hugo Sinzheimer in the 1930s. Although itself a contested notion, this idea tends to consider collective bargaining by trade unions and employer organisations as a means of democratic expression and decision-making in the economic sphere. On Sinzheimer and economic democracy, e. g., Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).

7 Paolo Mazzotti's contribution to this special issue expands the enquiry by tracing 'change', 'continuity', and 'discontinuity' within the foundational assumptions of EU law/integration; Paolo Mazzotti, 'An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity', HJIL 86 (2026), 85-131.

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uous existence, EU regulatory instruments can serve very different policy purposes at different points in time. These fractures designate the moments where policy development is interrupted and readjusted. Discontinuities mark broader moments of foundational political reorientation in EU integration, and alternative trajectories highlight its unrealised other paths.[8] The meaning of EU competences, legal forms and practices, and their individual and collective distributive consequences often appear and transform in power struggles that determine which of several plausible meanings becomes law and policy.[9] By revisiting the past, this article highlights the reversibility of these struggles and, recovers other 'plausible worlds' of EU law in the social field that have not (yet) been realised.[10]

The article proceeds in five steps. Section II analyses the narrative of Social Europe in *70 Years of EU Law*. Section III discusses the interpretative choices underpinning this narrative. Section IV contrasts it with how legal scholars working on EU social policy have conceptualised the field as the main relevant scholarship. Section V develops the article's main contribution by showing, through the example of Social Europe, how fractures, discontinuities, and alternative trajectories can be mobilised to narrate EU integration differently in a way that provides space for reimagining this process as a democratic, constructive, and distributive site. The section focuses on the European Social Fund (ESF), European social dialogue, and the origins of EU labour law. These examples are respectively understood as fracture, discontinuity, and alternative trajectory in Social Europe. Section VI reflects on how these neglected paths of EU integration provide an alternative account that indeed enables democratic, constructive, and distributive reflection on Europe.

8 The concept of 'alternative trajectory' is tied to the search for 'contingency' in critical legal studies or the history of international law, Robert W. Gordon, 'Critical Legal Histories', Stanford L. Rev. 36 (1984), 57-125; Ingo Venzke and Kevin Jon Heller, *Contingency in International Law: On the Possibility of Different Legal Histories* (University Press 2021). Yet, as Moyn underlines, research should be aware of 'plausible' worlds. Discussing counterfactuals is worthwhile but it is equally worthwhile to note the constraints placed on them, Samuel Moyn, 'From Situated Freedom to Plausible Worlds' in: Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 517-526. Simon Deakin and Frank Wilkinson bring a similar interest to labour law, Deakin and Wilkinson (n. 2), 35.

9 Situating EU law into a broader web of societal actors, Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015); Bruno de Witte, 'Legal Methods for the Study of EU Institutional Practice', Eu Const. L. Rev. 18 (2022), 637-656.

10 The idea of 'plausible worlds' draws from Moyn (n. 8).

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II. The Commission Legal Service's Narrative of Social Europe in *70 Years of EU Law*

This section examines how *70 Years of EU Law* narrates Social Europe. Judging from the volume's introductory summary of EU integration, Social Europe is not the CLS' main concern. This introduction largely confines the EU's social dimension to free movement and non-discrimination,[11] with Title IV of the Charter of Fundamental Rights as the only explicitly social reference among the values linked to Article 2 Treaty on European Union (TEU).[12]

The sixth chapter, *From an Economic Community to a Union for Its Citizens,* offers a more complex account of social integration. It introduces Social Europe through the figure of a young, European woman who moves inside the EU from Helsinki to Lisbon and whose rights to work, non-discrimination, and consumer market participation are secured by EU law.[13] From this narrative, the chapter traces Social Europe by briefly addressing social aspects of free movement, the transformation of EU equality law into a fundamental right, and offering overviews of EU law on labour, vocational training, consumption, food, and health.[14] It is encouraging that the chapter recognises that Social Europe now extends beyond labour to areas such as food or health, a connection often less visible in scholarship. It also acknowledges both the economic origins of the four freedoms and the political character of EU social integration, for example by referring to proposals for future legislation on the right to disconnect, gender equality, and patients' rights.[15]

11 Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (17-29).

12 The publication only lists financial regulations setting out the EU's funding mechanisms as expressing the value of 'solidarity'. This may be understood as relating only to financial solidarity among the Member States. In any event, it is a limited vision of solidarity and overlooks the social acquis except for EU equality law mentioned as expressing 'equality/non-discrimination'. The EU's social (Title X TFEU) and employment (Title IX TFEU) policy competences are also absent. The list provided is non-exhaustive but an interpretational choice. Friedrich Erlbacher and Herrmann Katarzyna, 'Chapter 1 – Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 34-57 (55-57).

13 Galindo Martín et al. (n. 5), 133-134.

14 Galindo Martín et al. (n. 5), 134-154.

15 Galindo Martín et al. (n. 5), 134, 155-156.

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III. Interpretational Choice on Social Europe in *70 Years of EU Law*

Despite this more complex account, the CLS' narrative remains consistent with the broader pattern of portraying EU integration as legal, institutionally driven, incremental, emancipatory, and narrowly European. Although this paper touches mainly upon the first characteristics, this third section also points to the narrative's narrow Europeanness as others have forcefully highlighted its flaws in terms of individual trajectories and the collective, eventually discriminatory biases of EU integration.[16]

First, the sixth chapter, like much scholarship discussed in Section IV below, locates the origins of Social Europe in the institutional adoption of the labour and equality law directives of the 1970s,[17] aside from free movement of workers.[18] These directives were adopted on legal bases intended to strengthen the common market, in particular Article 100 Treaty of Rome (EEC). As the CLS notes, the original EEC Treaty appeared not to 'cover standardisation of labour and working conditions as such, only the promotion of the common market'.[19] By identifying *hard labour law* by the Community as the starting point of Social Europe aside free movement, *70 Years of EU Law* nonetheless reproduces a familiar but incomplete trope that overlooks earlier governance mechanisms of Social Europe, such as the European Social Fund, discussed in Section V. 1. below. Although the chapter begins with the individual experience of a young worker, it moreover soon reverts to depicting Social Europe as an institutional process of expansion linking its development primarily to the Commission and the Court.[20]

16 E. g., Hanna Eklund (ed.), *Colonialism and the EU Legal Order* (Cambridge University Press 2025).

17 Galindo Martín et al. (n. 5), 138. The relevant 1970s directives related to labour law, occupational health and safety, and equality law, e. g., Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, OJ 1975 L 045; Directive 77/187/EEC of 14 February 1977 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses'; Directive 80/987/EEC of 20 October 1980 on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer, OJ 1980 L 283; Directive 80/1107/EEC of 27 November 1980 on the Protection of Workers from the Risks Related to Exposure to Chemical, Physical and Biological Agents at Work, OJ 1980 L 327. These and other relevant directives are also cited in (n. 337) in *70 Years of EU Law*. On the scholarly narrative, Section IV below.

18 Unlike Mazzotti in this special issue (n. 7). I consider free movement to rely on a different logic than Social Europe, i. e., the establishment of markets instead of the offsetting of the effects of their operation.

19 Galindo Martín et al. (n. 5), 138.

20 E. g., the discussion of the development of EU labour law by Commission and Court, Galindo Martín et al. (n. 5), 138-140.

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Second, the CLS' narrative omits major setbacks in EU social integration, thereby presenting integration as an ever-incremental process. Absent are, for example, the standstill in EU social law in the early 2000s,[21] the curtailment of social and labour rights under EU-led financial assistance during the sovereign debt crisis,[22] and the persistent subordination of social rights to economic freedoms in CJEU case-law.[23] As Paolo Mazzotti also observes in this special issue,[24] wherever the sixth chapter discusses a policy field of Social Europe, it suggests a gradual and inevitable shift from economic origins to a people-centred focus thus obscuring conflict and regression.

Third, EU law is primarily portrayed as an emancipatory source of rights, sidelining its distributive and exclusionary consequences.[25] The opening

21 As reflected in Claire Kilpatrick, 'The Roaring 20s for Social Europe. The European Pillar of Social Rights and Burgeoning EU Legislation', European Review of Labour and Research 29 (2023), 203-217.

22 E. g., the special section on the displacement of Social Europe in issue 14(1) of the *European Constitutional Law Review*, published in March 2018, or Claire Kilpatrick, 'Social Europe via EMU: Sovereign Debt, the European Semester and the European Pillar of Social Rights', Giornale di diritto del lavoro e di relazioni industriali 160 (2018), 737-759; Francesco Costamagna, 'National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal', ELJ 24 (2018), 163-190; Eftychia Achtsioglou and Michael Doherty, 'There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm', ELJ 20 (2014), 219-240; Philomila Tsoukala, 'Eurozone Crisis Management and the New Social Europe', Columbia Journal of European Law 20 (2013), 31-76; Stefano Giubboni, 'The Rise and Fall of EU Labour Law', ELJ 24 (2018), 7-20. To be precise, the sovereign debt crisis is acknowledged in *70 Years of EU Law* but in a fundamentally different perspective: the introduction heralds the EU's response in the creation of centralised banking regulation and the European Stability Mechanism, Calleja and Rusche (n. 11), 18.

23 Prevalent in CJEU, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, judgement of 18 December 2007, case no. C-341/05, ECLI:EU:C:2007:809; CJEU, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, judgement of 11 December 2007, case no. C-438/05, ECLI:EU:C:2007:772; CJEU, *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, judgement of 18 July 2013, case no. C-426/11, ECLI:EU:C:2013:521; CJEU, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, judgement of 21 December 2016, case no. C-201/15, ECLI:EU:C:2016:972. This subordination of social rights was widely echoed, e. g., Sacha Garben, 'Balancing Social and Economic Fundamental Rights in the EU Legal Order', European Labour Law Journal 11 (2020), 364-390.

24 Mazzotti (n. 7).

25 EU action may even be understood as *rights-infringing*, in this special issue, Christian Thönnes, 'Invisible Infringements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330. The subordination of social rights to economic freedoms or the curtailment of social and labour rights in the sovereign debt crisis show the relevance of this characterisation for Social Europe. While it is possible for EU institutions to incur liability for rights infringements caused by their action, the bar for effective access thereto is at a high level, CJEU, *Ledra Advertising Ltd and Others v. European Commission and European Central Bank*, judgement of 20 September 2016, case nos C-8/15 to C-10/15, ECLI:EU:C:2016:701.

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vignette of the young European woman, discussed in the previous Section, does precisely that: individual opportunities are highlighted, but distributive and exclusionary consequences remain unacknowledged. Similarly, the volume recasts early free movement and vocational training policy – as admitted by the CLS, originally designed to allocate the factor of production 'labour' – as expressions of personal freedom.[26] The chapter's only engagement with scholarship, citing Dutch jurist Henry G. Schermers (1985), argues for example that the CJEU and the Commission transformed vocational training policy into free movement of students.[27] While a free movement of students undoubtedly exists now, this narrative overlooks that both the case-law[28] and the first *Erasmus* programme[29] tied such mobility to the creation of a skilled workforce and that access to its current version remains restricted, for example through conditions on the receipt of study finance in another Member State.[30] These limits shape actual patterns of distribution and exclusion in the EU. In recalling everyday life stories of Europeans, Ben Judah's non-academic volume *This is Europe: The Way We Live Now* illustrates this: the free movement of students can be the story of a girl from a disadvantaged family in the small Latvian town Liepāja who turns to online sex work to avail herself effectively of her right to study in Italy.[31]

Fourth, the CLS constructs Social Europe as narrowly European. Its benefits are framed as accruing to EU citizens – specifically, as the CLS emphasises, 'national[s] of one Member State'.[32] This framing disregards, for instance, how EU social law regulates access to work and training in the EU for non-EU nationals and, thereby, interacts with risk and injustice within global geographical mobility.[33] Even within EU citizenship, it obscures struc-

26 Galindo Martín et al. (n. 5), 134, 142.

27 Galindo Martín et al. (n. 5), 142-144 in particular (n. 350).

28 See the concept of 'would-be-worker' status in Gisella Gori, *Towards an EU Right to Education* (Kluwer Law International 2001), 41.

29 The first *Erasmus* programme, also cited by *70 Years of EU Law* (n. 358), explicitly aimed to increase cross-border student mobility 'in order that the Community may draw upon an adequate pool of manpower with first-hand experience of economic and social aspects of other Member States […].' Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (ERASMUS), OJ 1987 L 166, Art. 2(i).

30 Emblematically, CJEU, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, judgement of 18 November 2008, case no. C-158/07, ECLI:EU:C:2008:630.

31 Ben Judah, *This Is Europe: The Way We Live Now* (Picador 2023), 141-158.

32 Galindo Martín et al. (n. 5), 133.

33 E. g., Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or

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tural injustice: the Helsinki-Lisbon journey exemplifies mobility for privileged EU citizens, but not the barriers faced by the same EU citizens coming from disadvantaged regions or backgrounds. Such barriers are rooted in the conditions attached to the longer-term access to free movement law and its equal treatment rights, such as financial resources, studies, or work.[34] This latter vision narrows even further the question of for whom the world of EU law is for, that is mainly for those privileged EU citizens already able and eventually willing to move across borders.

Although more ambitious and contextual than other contributions to the volume, the sixth chapter ultimately remains bound by an interpretive template that centres on law and institutions, assumes incremental progress, celebrates emancipatory potential, and limits its gaze to a narrow European frame. Even though not all these characteristics can be explored here, they shape how citizens, practitioners, and scholars think and envision EU integration, its social and distributive dimensions, and their futures. Fractures, discontinuities, and alternative trajectories, which are essential to understanding seventy years of social integration, are instead largely left unexplored in the volume, although they would resituate and eventually contest its way of narrating EU integration.

IV. Sketching Social Europe in Lawyers' EU Social Policy Scholarship

A central question is whether EU social policy scholarship – the main body of literature relevant to the sixth chapter of *70 Years of EU Law* – acknowledges Social Europe's fractures, discontinuities, and alternative trajectories more fully. This section contrasts the narratives of Social Europe found in *70 Years of EU Law* with those emerging from the academic field. It argues that while EU social policy scholarship offers a more nuanced account, it remains, for its scope and maturity, shaped by a still linear conception of integration.

Educational Projects and Au Pairing (Recast), OJ 2016 L 132; Directive 2021/1883/EU of 20 October 2021 on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment, and Repealing Council Directive 2009/50/EC, OJ 2021 L 382.

34 European Parliament and Council, Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, OJ L 158, 30 April 2004, 77-123'; CJEU, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, judgement of 15 September 2015, case no. C-67/14, ECLI:EU:C:2015:597.

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As in *70 Years of EU Law*, most accounts in EU social policy scholarship situate Social Europe's beginnings in the 1970s, when the first labour law directives were adopted, aside from the earlier free movement of workers.[35] Free movement, however, relies on a different regulatory logic: while social and labour law offset negative effects of market operation, free movement law provides equal treatment rights to non-nationals as precondition to market participation. Both narratives emphasise the initially weak social competences in Arts 117-118 EEC on social policy, and the shift toward legislative action in the economic downturn of the 1970s.[36] Yet legal scholars also introduced more conceptual interpretations of Social Europe's constitutional design most notably through the idea of an 'embedded liberal bargain'.[37] From this perspective, integration aimed to extend markets across national borders while it left Member States responsible for their social regulation.[38] This constitutional design then structurally constrained Social Europe.

From the 1980s, scholarship increasingly recognised the United Kingdom's (UK's) opposition to social policy directives as a major constraint,[39] and discussed the 1980s and 1990s Delors Commissions' single market

35 This narrative finds several expressions in EU law scholarship characterising the 1970s directives as a 'change of direction', the 'Community's new deal', or a 'shift' from a 'strategy of non-intervention' to a 'harmonisation strategy', compare Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012), 8 f.; Jeff Kenner, *EU Employment Law From Rome to Amsterdam and Beyond* (Bloomsbury Publishing 2002), 3; Brian Bercusson, *European Labour Law* (2nd edn, Cambridge University Press 2009), 104-120. I rely on these three major 'textbooks' of Social Europe as they tend to represent the existing narratives of its development. See also Catherine Barnard, 'EU "Social" Policy From Employment Law to Labour Market Reform' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021), 678-720.

36 E. g., compare Bercusson, 'Shifting Strategies 1951-1986: ECSC, EEC, Harmonisation, Financial Instruments, Qualified Majority Voting' in: Bercusson, *European Labour Law* (n. 35), 99-125; Galindo Martín et al. (n. 5), 138.

37 Diamond Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', ELJ 19 (2013), 303-324. The notion 'embedded liberalism' has been coined by John Ruggie in describing the post-WW II economic world order, John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order International Regimes: Section 4: Cases', IO 36 (1982), 379-415. In another lineage, it may trace back to the notion of embeddedness in Karl Polanyi's work, first published in 1944, Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn, Beacon Press 1944).

38 Ashiagbor (n. 37).

39 E. g., Bob Hepple, 'The Crisis in EEC Labour Law', ILJ 16 (1987), 77-87 (82); Barnard, *EU Employment Law* (n. 35), 9-10.

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project in a social perspective.[40] The 1990s and 2000s also brought growing attention to modes of governance beyond law like policy coordination, including soft law,[41] dialogue with social partners introduced with the 1992 Maastricht Treaty,[42] or ultimately the European Semester's policy monitoring[43] and the use of EU funding as governance instruments.[44] Researchers moreover focused on setbacks and transformations in social integration. They criticised the decline of binding labour regulation from the early 2000s to the proclamation of the European Pillar of Social Rights and the erosion of social rights during the sovereign debt crisis.[45] Particular concern has been expressed about CJEU case-law subordinating social rights to economic freedoms.[46] Since the late 2010s, the field has further diversified: some observe a revival of EU labour law,[47] others

40 Barnard, *EU Employment Law* (n. 35), 10-14; Kenner (n. 35), 71-108. Interestingly, *70 Years of EU Law* does acknowledge the importance of the single market project from Jacques Delors' 1985 'White Paper Completing the Internal Market' until 1992, but does not investigate the so-called 'social dimension of the internal market', Calleja and Rusche (n. 11), 20 f. On this social dimension, e. g., European Commission, 'SEC(88) 1148 – Dimension Sociale Du Marché Intérieur'; European Commission, 'Press Release – The Social Dimension of the Internal Market: A Key Factor for the Success in 1992' <https://ec.europa.eu/commission/presscorner/detail/en/IP_88_269>, last access 11 February 2026.

41 Joanne Scott and David M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', ELJ 8 (2002), 1-18; Diamond Ashiagbor, *The European Employment Strategy Labour Market Regulation and New Governance* (Oxford University Press 2005); Gráinne De Búrca and Joanne Scott, *Law and New Governance in the EU and the US* (Bloomsbury Publishing 2006); Mark Dawson, 'Three Waves of New Governance in the European Union', ELJ 36 (2011), 208-225.

42 E. g., Catherine Barnard, 'A Social Policy for Europe: Politicians 1, Lawyers 0', Int. J. Comp. L. L. I. R. 8 (1992), 15-31; Brian Bercusson, 'The Dynamic of European Labour Law after Maastricht', ILJ 23 (1994), 1-31. For more literature, see Section V. 2. below.

43 Costamagna (n. 22); Mark Dawson, 'New Governance and the Displacement of Social Europe: The Case of the European Semester', Eu Const. L. Rev. 14 (2018), 191-209; Paul Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022).

44 Viorica Viță, 'In Conditionality We Trust: What Scope for Conditionality in the Emerging European Economic Constitution?' in: Herwig Hofmann, Katerina Patazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar Publishing 2019), 199-227; Claire Kilpatrick, 'Explaining and Remedying the Near Absence of the Budget in EU Law Scholarship', CML Rev. 61 (2024), 623-654; Claire Kilpatrick and Joanne Scott (eds), *New Frontiers of EU Funding: Law, Policy, Politics* (Oxford University Press 2024); Leticia Diéz Sánchez, 'Why Cohesion Policy Is Not about Cohesion', CML Rev. 62 (2025), 13-48. Exceptionally Bercusson's textbook stresses the use of the ESF as a governance strategy in the 1980s, Bercusson, 'Shifting Strategies 1951-1986' (n. 36), 121.

45 Comprehensively in (n. 22) above.

46 Draw on (n. 23) above.

47 Kilpatrick, 'The Roaring 20s' (n. 21); Sven Schreurs, 'Re-Embedding European Market Society? EU Labour Regulation and the "Double Countermovement" to Market-Making Integration', J. Common Mkt. Stud. 64 (2025), 881-901.

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study the intersection of Social Europe with sustainability,[48] trade and supply chains,[49] or colonial legacies.[50]

Overall, EU social policy scholarship provides a more differentiated narrative of social integration than *70 Years of EU Law*, but its dominant historical storyline still privileges legal instruments and an institutional vision of the expansion of Social Europe from the 1970s onwards.

V. Telling Social Europe Differently

This article proposes an alternative mode of narrating EU integration by placing democratic, constructive, and distributive reflection at its centre. It argues for an analytical focus on the fractures, discontinuities, and alternative trajectories that have shaped Social Europe and EU integration more broadly. The following sections illustrate this approach through three examples respectively understood as fractures, discontinuities, and alternative trajectories: the European Social Fund, the rise and demise of European Social Dialogue, and the overlooked origins of EU labour law. As conventional narratives generally downplay such alternatives by narrating EU integration as a story of progression, the approach proposed allows to recover how EU competences, legal forms and practices appear and transform in political struggles. These struggles, in turn, provide space for reimagining EU integration as a democratic, constructive, and distributive site.

1. Fractures: The European Social Fund

The ESF's history reveals a fragmented and responsive development of social integration: this fund engaged with social governance beyond law way

48 E. g., Kalina Arabadjieva and Paolo Tomassetti, Towards Workers' Environmental Rights: An Analysis of EU Labour and Environmental Law (2024). European Trade Union Institute (ETUI) Brussels Working Paper No. 2024.02, available at <https://hdl.handle.net/10419/301120>, last access 11 February 2026; Kalina Arabadjieva and Sanja Bogojević, 'The European Green Deal: Climate Action, Social Impacts and Just Transition Safeguards', YBEL 43 (2024), 34-55.

49 Albeit not strictly speaking 'EU social policy scholarship' in its received sense, A. Nissen studies the intersections between global modes of production and EU initiatives relevant to labour law, notably forced labour and other labour rights violations, Aleydis Nissen, *The European Union, Emerging Global Business and Human Rights* (Cambridge University Press 2022), 130-139.

50 Hanna Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome', EJIL 34 (2023), 831-854.

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before the 1990s, while having already a distributive character. Its development repeatedly responded to the economic, political, and socio-demographic context of EU integration. The fund is here understood as illustrating fractures in EU integration as its use shows how a continuously existing regulatory instrument has served different policy purposes over time. Its fractures are moments where the fund's policy development was interrupted and readjusted.

The ESF was set up by the very EEC Treaty. Its initial Treaty legal framework, valid from 1958 to 1971, allowed to provide upon request up to 50 % of a Member States' expenditure for the retraining of workers, their geographical mobility, or state aid for short-term work and transitional schemes for workers affected by economic restructuring.[51] The conditions for the implementation of these funding objectives were fixed by the Council.[52] The Council could also modify the ESF's very objectives after the transitional period for the establishment of the common market which was to end in 1969.[53] The ESF aimed to improve the living and working conditions in the Community.[54] Although more modest, it followed up on the financial provisions of the Treaty establishing the European Coal and Steel Community, which had also included common borrowing or more extensive social policy measures.[55] In any event, the ESF found only very limited interest among legal scholars until today.[56] Not even the 2020s many discussions on the EU budget as a governance mechanism centre on the ESF.[57]

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51 Arts 123-128 EEC. Not all types of Member State expenditure could be supported. For instance, the reconversion of workers could only be supported if the unemployed workers could find work in a new field. Workers also had to have been employed for at least six months.

52 Art. 127 EEC. As in Council of the European Economic Community, 'Règlement N° 9 Concernant Le Fonds Social Européen (1960)', Journal Officiel 56, 1189-1198.

53 Art. 126 EEC.

54 E. g., Arts 2-3 EEC.

55 Arts 49-53 ECSC. The social policy measures, for example, included housing to relocate workers in the coal and steel industries, Doreen Collins, *The European Economic Communities: The Social Policy of the First Phase, Vol. 1, 1958-72* (M. Robertson 1975); Hans Wirz, 'Doreen Collins, The European Communities: The Social Policy of the First Phase, Volume 1, The European Coal and Steel Community 1951-70, viii+128pp.; Volume 2, The European Economic Community 1958-1972, ix+286pp. £6.95, Martin Robertson, London, 1975', Journal of Social Policy 6 (1977), 106 f.

56 On the early ESF, Doreen Collins, *The European Economic Communities: The Social Policy of the First Phase, Vol. 2, 1958-72* (M Robertson 1975); Wolfgang Stabenow, 'The European Social Fund', CML Rev. 14 (1977), 435-456; Doreen Collins, *The Operation of the European Social Fund* (Croom Helm 1983). Another exception is Bercusson, 'Shifting Strategies 1951-1986' (n. 36), 121.

57 Often focused on Next Generation EU's social implications, e. g., the special issue 'The NextGeneration EU in Action: Impact on Social and Labour Policies' in issue 1S of volume 15 of the Italian Labour Law e-Journal (2022).

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In 1971, however, the Council revised the ESF's scope. It allowed ESF support where the common market negatively affected employment or a decline in employment threatened the Community's harmonious development.[58] This revision and its subsequent iterations throughout the 1970s and 1980s should start to turn the ESF conceptually into a funding instrument that offset negative effects on labour from the common market. The ESF further served to discuss employment policy on the Community level, a process accelerated by the 1973 oil-crisis' economic downturn. New ESF measures addressed specific features of the ensuing rise in unemployment, such as the alarming appearance of youth unemployment.[59] Ultimately, the ESF could support youth employment creation,[60] and, after a further reform in 1983, at least three-quarters of its beneficiaries had to be young jobseekers.[61]

While this youth-employment focus receded relatively as the ESF became integrated into the cohesion policy framework envisioned with the Single European Act,[62] the fund's development shows that EU social governance has never followed a simple trajectory of expansion. The ESF repeatedly reframed the relationship between market integration, employment policy, and social and labour regulation. It also demonstrates how distributive governance beyond law operated long before EU governance scholarship emphasised its emergence from the 1990s-2000s onwards. In other words, since 1958, the ESF served several, shifting policy purposes ranging from, for example, sectoral-industrial, employment, into spatial-regional policy. The fund illustrates how EU regulatory instruments support different policy purposes at different points in time, despite their formally continuous existence. Narrating EU integration via its fractures, the moments where policy development is interrupted and readjusted, illustrates the other options imaginable for making use of the Union's already existing regulatory toolkit.

58 Council of the European Communities, Council Decision 71/66/EEC of 1 February 1971 on the Reform of the European Social Fund, OJ L 28, 4.2.1971, 15-17.

59 Council of the European Communities, Council Decision 75/459/EEC on Action by the European Social Fund for Persons Affected by Employment Difficulties, OJ L 199, 30.7.1975, 36.

60 Council of the European Communities, Council Regulation 3039/78/EEC of 18 December 1978 on the Creation of Two New Types of Aid for Young People from the European Social Fund, OJ L 361, 23.12.1978, 3-4.

61 Articles 4 and 7 of Council of the European Communities, Council Decision 83/516/EEC of 17 October 1983 on the Tasks of the European Social Fund, OJ L 289, 22.10.1983, 38-41.

62 Youth employment, though, remained an important focal point. European Parliament and Council, Regulation 2021/1057/EU of the European Parliament and of the Council of 24 June 2021 Establishing the European Social Fund Plus (ESF+) and Repealing Regulation 1296/2013/EU, OJ L 231, 30.6.2021, 21–59.

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2. Discontinuities: The Rise and Demise of Interprofessional European Social Dialogue

Another way to expose the limits in received narratives, this paper suggests, is to look for discontinuities understood as foundational, political reorientations. This section presents the rise and demise of European Social Dialogue among trade unions and employer organisations (social partners) as two discontinuities in Social Europe, its actors, and decision-making mechanisms. It thereby underscores that foundational, political discontinuity is a much more common occurrence in EU law and policy than accepted in its conventional, often depoliticised narratives.

In *70 Years of EU Law*, Social Europe appears largely as a project of the CJEU and the Commission. Both institutions matter, but this perspective unduly restricts how and by whom EU social integration is shaped. In particular, the period from broadly 1984 to the 2010s saw collective actors – European trade unions and employer organisations – gain influence in Social Europe's decision-making via a nascent procedure of social dialogue.[63] Their political objectives came to align in the late 1980s with those of EU institutions and Member States in favour of European social dialogue and later split up in a second foundational, political reorientation to bring the dialogue procedure to a halt.

Labour regulation is more complex than other regulatory fields in terms of the actors involved. Besides public institutions, trade unions, and employer organisations have collectively regulated pay or working conditions throughout many European countries by their agreement.[64] While procedures differ, collective regulation of the economy has a lasting tradition.[65]

63 European social dialogue found scholarly interest at its introduction by the 1992 Maastricht Treaty but mainly as to its legal interpretation and capacity to provide for neo-corporatism. E. g., Brian Bercusson, 'Maastricht: A Fundamental Change in European Labour Law', Industrial Relations Journal 23 (1992), 177-190; Philippa Watson, 'Social Policy after Maastricht', CML Rev. 30 (1993), 481-513; Gerda Falkner, *EU Social Policy in the 1990s: Towards a Corporatist Policy Community* (Routledge 1998). A partial exception, Jon Erik Dølvik, *Redrawing Boundaries of Solidarity?: ETUC, Social Dialogue and the Europeanisation of Trade Unions in the 1990s* (ARENA 1997). For a thorough overview, Claire Kilpatrick, Marc Steiert and Jacopo Cellini, The Social Partners and EU Treaty-Making – Revisiting Maastricht Through the Archives (2025). European University Institute (EUI) Working Paper No. 2025/01, available at: https://hdl.handle.net/1814/78294.

64 On collective regulation of the economy, Dukes (n. 6).

65 Less entrenched in Central-Eastern Europe, Magdalena Bernaciak, 'All Roads Lead to Decentralization? Collective Bargaining Trends and Prospects in Central and Eastern Europe', Transfer: European Review of Labour and Research 21 (2015), 373-381; Guglielmo Meardi, 'More Voice after More Exit? Unstable Industrial Relations in Central Eastern Europe', Industrial Relations Journal 38 (2017), 503-523.

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It considers the joint action of social partners as an autonomous expression of economic democracy, a notion of democracy elaborated since the early 20th century[66] and at times still reflected by EU stakeholders in the mid- to late 1980s.[67] Social dialogue can be carried out through bipartite bargaining between trade unions and employer organisations or through consultation and decision-making in tripartite structures involving public institutions and social partners. Bipartite and tripartite social dialogue is possible across economic sectors, inside a sector, or at lower levels of economic organisation. As it balances employer and worker power, social dialogue has immediate repercussions on the distribution of power and wealth in economic production.

Historically, social partners were consulted in reflections on Social Europe since the EEC's earliest days.[68] Yet, before the late 1980s, their strength and missing alignment with the political positions of the EU institutions and the Member States were insufficient to operationalise regulation via collective agreement at the European level.[69] Before this period, practitioners and scholars legally and politically questioned whether European-level social partner confederations could enter into collective agreement.[70] By contrast, the several EU labour and equality Directives were adopted by the Council since the mid-1970s.[71] They ultimately trace to a declaration for Community social policy made by the Heads of State and Government at their 1972 Paris Summit.[72]

66 On economic democracy, (n. 6) above.

67 See Delors' first Parliament speech in January 1985, 'The Thrust of Commission Policy, Statement by Jacques Delors, President of the Commission, to the European Parliament and Extracts from His Reply to the Ensuing Debate' Europe's strength.

68 As underlined, for instance, by the Commission official working on social dialogue and former trade unionist Carlo Savoini in: Historical Archives of the European Union (HAEU) (ed.), 'INT 594 – Interview with Carlo Savoini by M. G. Melchionni – Voices on Europe'.

69 The sixth and seventh chapter in Dølvik (n. 63). Also Corinne Gobin, 'Construction Européenne et Syndicalisme Européen: Un Apercu de Trente-Quatre Ans d'histoire (1958-1991)', Revue de l'IRES 21 (1996), 119-151; Pierre Tilly, 'La place de l'acteur syndical dans le dialogue social européen, de la CECA aux années 1980' in: Éric Bussière, Michel Dumoulin and Sylvain Schirmann (eds), *Économies nationales et intégration Européenne: Voies et Étappes* (1st edn, Franz Steiner Verlag 2014), 119-140.

70 The Commission had asked French labour law scholar Gérard Lyon-Caen to assess the legal landscape as early as 1972, Gérard Lyon-Caen, 'À La Recherche de La Convention Collective Européenne, Étude Pour La Commission Des Communautés Européennes', Etude pour la Commission des Communautés Européennes Doc. n.°V/855/72-F (1972).

71 The instruments in (n. 17) above.

72 European Council, Declaration of the European Summit Held in Paris on 19-21 October 1972.

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Collective regulation entered the European-level with a process of consensus-building among three cross-sectoral European social partner organisations in the 1980s – the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederation of Europe (UNICE), and the European Centre of Employers and Enterprises providing Public Services (CEEP). These three organisations were invited to a series of high-level meetings and thematic work sessions by the first Delors Commission.[73] From its first days in January 1985, this Commission politically and administratively supported contacts among the above-mentioned social partners.[74]

These regular contacts should prove crucial to align the political priorities of the Commission, the Member States and the social partners. The latter used this opportunity for capacity-building as all organisations came to consider themselves as initially unable to bargain collectively on the European level. The three moreover aligned their positions internally as employers had initially rejected European collective bargaining,[75] and they established productive personal contacts such as among ETUC General-Secretary Emilio Gabaglio, UNICE General-Secretary Zygmunt Tyskiewicz, and the Commission Director-General responsible for social dialogue Jean Degimbe.[76] These are only some examples that illustrate the importance of institutional, non-institutional, and even individual actors in this process of political reorientation.[77] Even the Member States agreed in the 1991 Maastricht Intergovernmental Conference with the Commission and the three social partners on a procedure for European social dialogue included in a social policy agreement annexed to the Maastricht Treaty. This procedure institutionalised social partner consultation and enabled EU legal acts that extend collectively bargained agreements.[78] It applied to 11 of the then 12 Member States to the exception of the United Kingdom which had opted out, and relied almost

73 A comprehensive account in Kilpatrick, Steiert and Cellini (n. 63).

74 Though, one can question the Delors Commission's motives: was the initiative about autonomous collective bargaining or to provide legitimacy for its own initiatives via social partner consultation? Kilpatrick, Steiert and Cellini (n. 63).

75 Kilpatrick, Steiert and Cellini (n. 63), 58-62; Dølvik (n. 63), Chapters 5-7.

76 As underlined by the many first-person recounts of the period, Zygmunt Tyszkiewicz, 'The European Social Dialogue 1985-1998: A Personal View' in: Emilio Gabaglio and Reiner Hoffmann (eds), *European Trade Union Yearbook 1998* (European Trade Union Institute 1999); Jean Degimbe, *La politique sociale européenne: du Traité de Rome au Traité d'Amsterdam* (European Trade Union Institute 1999); Jean Lapeyre, *The European Social Dialogue: The History of a Social Innovation (1985-2003)* (European Trade Union Institute 2017).

77 Again, Kilpatrick, Steiert and Cellini (n. 63).

78 Today's slightly reformulated Arts 153-155 TFEU.

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entirely on a proposal elaborated in 1991 by the three social partners with the Commission in a structured process.[79]

Political reorientation by the Commission, the Member States, and three social partners thus opened a door towards a Social Europe with a dimension of collective bargaining and, possibly one day, economic democracy. During the 1990s, the dialogue mechanism produced several directives translating collectively bargained 'framework agreements' into EU labour Directives.[80] This flourishing is often related to political support for social legislation by the Commission as Brian Bercusson powerfully coined EU-level social dialogue to be carried out 'in the shadow of the law'. In his perspective, employer organisations negotiated in anticipation of a Commission legislative initiative.[81] The cross-sectoral, private employer organisation UNICE indeed pursued such a strategy with collective bargaining as a means to 'avoid or delay' EU labour legislation.[82]

However, political priorities were reoriented again in a second discontinuity in the early 2000s as the Commission and Member States' support for social legislation waned.[83] This led to a world in which social partners are more reluctant to bargain successfully and framework agreements seem unlikely. By the mid-2010s, the Commission even questioned legally whether

79 The proposal was made by an 'ad hoc working party' composed of representatives of the three social partners and steered by the Commission, European Commission General-Secretariat, 'SC(91) 58 – Réunion du Groupe ad hoc en vue d'un nouveau Traité (16 avril 1991)' in: Historical Archives Service of the European Commission (HACOM) (ed.), 'BAC 489/1999 17 – Dialogue Social : Groupe de Pilotage Ad Hoc'. This working party did not operate in isolation from but closely related to the many Treaty proposals made by institutional actors and the Member States, Kilpatrick, Steiert and Cellini (n. 63). The Member States also made some modifications to the social partner proposal upon Danish initiative in order to protect the existing institutional balance in favour of the Commission, 'Compte rendu de la réunion des représentants personnels du 7 novembre 1991' in: Historical Archives Service of the European Commission (HACOM) (ed.), 'BAC 74/2005 77 – Politique Sociale – Dossier Maastricht 4'.

80 Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145; Directive 97/81/EC of 15 December 1997 Concerning the Framework Agreement on Part-Time Work Concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14; Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, OJ 1999 L 175.

81 Bercusson, 'Fundamental Change' (n. 63), 177; Bercusson, 'Dynamic of European Labour Law (n. 42), 1.

82 See 'Stratégie et Orientations politiques de l'UNICE' (21/05/92) in: Archives of Jean Lapeyre, 'Patronat – UNICE'.

83 See Kilpatrick, 'The Roaring 20s' (n. 21), 11.

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framework agreements should be translated into binding EU law.[84] This second reversal effectively halted the experiment in transnational collective bargaining.

Understanding European social dialogue as discontinuities thus clarifies how integration depends on changing political constellations. What this story suggests is that foundational, political discontinuity is a common occurrence within the development of EU law and policy. It also provides space to examine the role of constellations of institutional and non-institutional actors in determining the political, and thereby distributive outcomes of discontinuity. The two episodes show how distributive power in social and labour, but also other areas of EU regulation fluctuates, and is repeatedly politically reoriented over time and with changing political constellations.

3. Alternative Trajectories: Politics and Governance Beyond Law in Early Social Europe

The early history of Social Europe contains overlooked initiatives – alternative trajectories – that challenge the conventional chronology beginning with the 1970s labour and equality directives. Two such examples – the stories of a common exchange programme for young workers under Arts 5, 50 and 145 EEC and of Commission Recommendation 67/125/EEC concerning the protection of young persons at work ('Recommendation 67/125/EEC') – demonstrate in this section how alternative trajectories of social integration were tested but politically resisted or forgotten with time.[85]

The story of a common exchange programme for young workers and Arts 5, 50 and 145 EEC illustrates several early attempts by the European Commission in the 1960s to establish a legal basis for Social Europe. The Commission also sought to couple market-making with an element of market regulation within the same initiative. Lionello Levi Sandri, Commissioner for Social Affairs from 1961 to 1970, and his Directorate-General played a leading role

84 Silvia Borelli and Filip Dorssemont (eds), *European Social Dialogue in the Court of Justice – An Amicus Curiae Workshop on the EPSU Case*; Manuel Antonio García Muñoz Alhambra, 'An Uncertain Future for EU-Level Collective Bargaining: The New Rules of the Game after EPSU', ILJ 51 (2022), 318-345; Perrine Carré and Marc Steiert, 'Social Europe Without Social Dialogue: Decision of the Court of Justice of the European Union in C-928/19 P European Federation of Public Service Unions', Eu Const. L. Rev. 18 (2022), 315-333.

85 Other examples in Aurélie Dianara Andry, *Social Europe, the Road Not Taken: The Left and European Integration in the Long 1970s* (Oxford University Press 2022).

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in this process.[86] In principle, Arts 117-118 EEC on social policy authorised only the issuing of Commission Opinions in the field of social and labour law. The following discussion explains why these early efforts to create a legal basis for Social Europe, and to fill it with substantive regulation, ultimately failed: although the proposals were legally plausible, they faced determined political opposition from a majority of Member States.

Art. 50 EEC is a curious Treaty provision. It calls upon the 'Member States' to establish an exchange programme for young workers, yet its French version speaks of a 'common' programme – terminology closely associated with the common market.[87] This duality rendered competence under Article 50 EEC uncertain: plausible claims existed both for Member State action outside the Community framework and for Council action within it, as the Council assembled those very Member States in their Community capacity.[88] Moreover, the provision was designed to support the common market's establishment by facilitating the mobility of young workers beyond their existing free-movement rights. As Levi Sandri himself observed in writing academically, Article 50 EEC called for further measures to enable exchanges among young workers.[89]

In its first attempt to create such a programme, the Commission relied directly on Article 50 EEC.[90] Given the uncertainty surrounding competence, it also invoked Article 5 EEC, arguing that this provision imposed on Member States a duty to take all measures necessary to fulfil their Treaty obligations, including the obligation – so understood – to implement the

86 On Lionello Levi Sandri, Commissioner for Social Affairs from 1961 to 1970, Antonio Varsori and Lorenzo Mechi, *Lionello Levi Sandri e La Politica Sociale Europea* (Franco Angeli 2008).

87 My translation. The French version is phrased: 'Les États membres favorisent, dans le cadre d'un programme commun, l'échange de jeunes travailleurs.' While the 1973 translation refers to a 'joint' programme, an initial English translation from 1962 translated 'programme commun' by common programme, European Economic Community, *Treaty Establishing the European Economic Community and Connected Documents.* (European Communities Publishing Services 1962).

88 E. g., compare Art. 50 EEC in Ernst Wohlfarth, Ulrich Everling, Hans-Joachim Gläsner and Rudolf Sprung, *Die Europäische Wirtschaftsgemeinschaft : Kommentar Zum Vertrag* (Vahlen 1960); Rolando Quadri, Riccardo Monaco and Alberto Trabucchi, *Trattato Istitutivo Della Comunita Economica Europea : Commentario.* (Giuffre 1965). See, Marc Steiert, 'Youth Transitions and EU Integration: Paths to an EU Regulatory Fabric for Youth Employment' (Thesis, European University Institute 2024), 48-55.

89 Lionello Levi Sandri, 'Articolo 50' in: Rolando Quadri, Riccardo Monaco and Alberto Trabucchi, *Trattato Istitutivo Della Comunita Economica Europea : Commentario.* (Giuffre 1965).

90 European Commission, 'COM (62) 25 – Mesures Pour Favoriser l'échange de Jeunes Travailleurs Dans Le Cadre d'un Programme Commun (Proposition de La Commission Au Conseil)'.

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exchange programme under Article 50.[91] This reasoning implies a considerably broader reading of competence than would later prevail: the duty of sincere cooperation in Article 5 EEC could have been interpreted to justify action in areas such as social policy, where Article 117 EEC pursued improvements in working and living conditions but did not confer law-making powers.[92]

Through this proposal, the Commission moreover sought to align market-making with a dimension of market regulation. While the programme was primarily aimed at cross-border mobility, it would also have established a minimum and maximum duration for traineeships, introduced a framework for the remuneration of participating trainees or, where necessary, an obligation to provide adequate allowances, required Member States to recognise traineeships completed under the programme for social-security purposes even when not formally classed as employment, and provided for continuous monitoring of participants' progress.[93] None of these safeguards has since been incorporated into EU law, and despite renewed debate in the 2020s on a directive regulating traineeships in the EU, their adoption remains unlikely in light of Council opposition.[94] Domestic labour law, it seems, was expected to evolve by analogy by extending similar rights.

When several Member States challenged this reasoning, the Commission launched a second attempt to ground the exchange programme's legal basis – this time combining Arts 50 and 145 EEC.[95] The new approach sought to make use of the Council's capacity to coordinate economic, and by extension social, policy. Article 145 EEC, then nestled in EEC Treaty Part V on the Community institutions, defined the Council's tasks and empowered it to coordinate the economic policies of the Member States and to take decisions

91 European Commission (n. 90), 11.

92 For an early, yet much later and different use of the duty of sincere cooperation, ECJ, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, judgement of 10 April 1984, case no. C-14/83, ECLI:EU:C:1984:153.

93 European Commission, 'COM (62) 25 – Proposition Premier Programme d'Echange Jeunes Travailleurs' (n. 90) Arts 3-6.

94 Marc Steiert, The EU and the Regulation of Young People's Work Transitions – Individuation, Governance and Quality (2025). European Trade Union Institute (ETUI) Working Paper No. 2025.02, available at: <https://hdl.handle.net/1814/92689>, last access 11 February 2026; Joanna Helme, 'The Problems and Paradoxes with the EU's Regulation of Traineeships: A Way Forward', ILJ 53 (2024), 679-710.

95 HAEU, 'HICA.H.CM2.1964.1143.1 – Note Du Groupe Des Questions Sociales Sur Les Propositions de La Commission Concernant Certaines Mesures Déstinées à Favoriser l'échange de Jeunes Travailleurs, Dans Le Cadre Du Programme Commun, En Application de l'article 50 Du Traité (827/63 SOC 82) – Réunion Du 28/05/1963'. Ultimately leading to European Commission, 'COM (63) 14 – Projet d'un Premier Programme Commun Pour Favoriser l'échange de Jeunes Travailleurs (Présenté Par La Commission Au Conseil)'.

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necessary for achieving the Treaty's objectives.[96] The Commission contended that economic policy coordination encompassed social policy, and thus the subject matter of Article 50 EEC. In its view, Article 145 EEC empowered the Council to adopt 'any measure necessary' for this purpose, including an exchange programme for young workers.[97] This second proposal differed from the first however in regulatory content. The envisaged Council decision was not intended to be binding under Article 189 EEC but to establish a framework programme akin to those adopted for the freedom of establishment and services, with subsequent decisions to specify its obligations.[98] Even so, the proposal reveals the Commission's ambition to strengthen the procedural foundations of social policy within the Community.

A group of Member States, however, resisted these efforts to reinforce Social Europe and its legal procedures. The failure of these initiatives was not due to legal implausibility but to political opposition. Although Italy, but also to some extent Belgium and the Netherlands, showed some sympathy for the Commission's second line of argument, no majority emerged in favour of Council competence – neither under unanimity nor simple majority voting.[99] An exchange programme for young workers was eventually established as a *sui generis* form of intergovernmental cooperation among Member States, without any improvement in trainees' working conditions.[100] These

96 Article 145 EEC reads: 'With a view to ensuring the achievement of the objectives laid down in this Treaty, and under the conditions provided for therein, the Council shall: ensure the co-ordination of the general economic policies of the Member States, and dispose of a power of decision.' The provision is no longer part of the primary law framework.

97 'En effet, le Conseil est appelé, en vertu des dispositions de l'article 145 du Traité, à assurer la coordination des politiques économiques générales des Etats membres, notion qui couvre également la politique sociale et, de ce fait, la matière visée à l'article 50 du Traité. Le Conseil peut, à cet effet, prendre toute action utile et, notamment arrêter le programme commun prévu à l'article 50, […]. Il est d'ailleurs évident que les Etats membres ne peuvent pas arrêter individuellement un programme commun qui relève du domaine communautaire et qui, de ce fait, doit être déterminé par l'institution coordinatrice des politiques économiques générales des Etats membres, c'est-à-dire par le Conseil.' HAEU, '827/63 SOC 82', (n. 95) above, 2 f.

98 HAEU, '827/63 SOC 82' (n. 95), 3.

99 The Commission had argued for simple majority voting. Under Art. 148 EEC, simple majority voting applied whenever the EEC Treaty did not specify otherwise. HAEU, 'HI-CA.H.CM2.1964.1144.1 – Note Du Groupe Des Questions Sociales Sur Les Propositions de La Commission Concernant Certaines Mesures Déstinées à Favoriser l'échange de Jeunes Travailleurs, Dans Le Cadre Du Programme Commun, En Application de l'article 50 Du Traité (1738/63 SOC 177) – Réunion Du 21 et 22 Novembre 1963'.

100 Representatives of the Governments of the Member States of the European Economic Community Meeting in Council, Decision 64/307/EEC First Joint Programme to Encourage the Exchange of Young Workers within the Community, OJ 1226/64, 22. February 1964, 17 f. This programme did not use the formula characterising the legal basis of EU acts. For an archival recount, Steiert, 'Youth Transitions' (n. 88), 45-64.

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episodes thus reveal early, alternative starting points for Social Europe. These were ambitious but ultimately abandoned trajectories. They nonetheless foreshadow later debates about competence, coordination, and distribution in the European project.

Another example of an alternative trajectory can be found in Commission Recommendation 67/125/EEC.[101] Although initially successfully adopted and aligning key aspects of domestic law, this largely overlooked early piece of soft law has been forgotten by practitioners and scholars with time. It shows an alternative trajectory in so far as it underlines a way in which policy coordination through soft law and governance beyond formal legislation could have been an openly defining feature of Community law and policy since as early as the 1960s and 1970s.[102]

To achieve regulatory alignment via a non-binding Recommendation on the prohibition of child labour and the working conditions of adolescents under Arts 117-118 EEC, the Commission initiated a process of consultation and consensus-building with the Member States and other stakeholders like certain social partner organisations as early as 1961.[103] Most of the Commission's normative recommendations were ultimately elaborated in this consensus-building process.[104] The Recommendation can even be placed in a broader ambition of upward harmonisation by the Commission. As then formulated strategically by the above-introduced Commissioner for Social Affairs Levi Sandri, Recommendations in the social field could not be limited to 'a transcript of what exists in each country; [but] had to go beyond and to

101 European Commission, 'Recommandation de La Commission 67/125/CEE Du 31 Janvier 1967 Adressée Aux Etats Membres Concernant La Protection Des Jeunes Au Travail, JO 13 Février 1967, 405-408'.

102 Section IV above illustrates how scholarship acknowledges the importance of governance beyond law only from the 1990s-2000s onwards.

103 European Commission, 'CCEE_AFSO-1700 – Protection Au Travail Des Femmes et Des Jeunes Dans Les Etats Membres : La Protection de La Maternité. Volume 5 – V/1393/61 – Vergleichende Untersuchung Der Gesetze Zum Schutze Der Arbeitenden Jugend in Den Mitgliedstaaten Der EWG'.

104 Compare Document V-9408/62 – 'Vergleichende Tabelle Über Die Regelungen Des Jugendarbeitsschutzes in Den Mitgliedsstaaten Der EWG' in : European Commission, 'CCEE_AFSO-1701 Protection Au Travail Des Femmes et Des Jeunes Dans Les Etats Membres : Réunions, Études, Conventions et Règlements. Volume 2 (1961-1962) – V-9408/62 – Vergleichende Tabelle Über Die Regelungen Des Jugendarbeitsschutzes in Den Mitgliedsstaaten Der EWG'. 'V/12.098/rév. 1/64 – Projet de Recommandation concernant la Protection du Travail des Jeunes' in European Commission, 'CCEE_AFSO-1704 Protection Au Travail Des Femmes et Des Jeunes Dans Les Etats Membres : La Protection de La Maternité. Volume 5'.

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formulate concrete proposals'.[105] This is remarkable given that at the time the very meaning of the notion of harmonisation was still heatedly contested by political actors or scholars.[106]

Over the following decade, all six founding Member States aligned significant aspects of their domestic legislation on the prohibition of child labour and the working conditions of adolescent workers with many of the Commission's recommendations.[107] This episode formed part of yet another strategic process within the Commission which aimed at a policy coordination, possibly harmonisation, process within the Community's limited and non-binding social policy competences. As Jacques-Jean Ribas, Commission Director for Social Security and Social Action from 1958 to 1974, explained, the Commission sought to use its limited powers to provoke 'the birth of a process of harmonization […] by relying on the indirect results of better knowledge of the situations in the six countries, the confrontation of problems, the exchange of experiences, and collaboration […].'[108]

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105 My translation. 'La Recommandation en matière sociale – mais ce principe vaut également pour les autres secteurs – ne peut se résoudre en un procès-verbal de ce qui existe dans chaque pays particulier; elle doit aller plus loin et formuler des propositions concrètes.' Speech by Commissioner for Social Affairs Lionello Levi Sandri in the Economic and Social Committee in 'Compte-rendu des Délibérations du Comité Economique et Social concernant l'élaboration d'un avis relatif au "Projet de Recommandation de la Commission adressé aux Etats membres concernant la protection des jeunes au travail" – 52ème session plénière du 23-24/02/1966' contained in European Commission, 'CCEE_AFSO-1712 Protection Au Travail Des Femmes et Des Jeunes Dans Les Etats Membres : Protection Des Jeunes Au Travail et Protection de La Maternité. Volume 13 (1966)'.

106 Compare Assemblée Parlementaire Européenne, 'Rapport (Nederhorst) Fait Au Nom De La Commission Sociale Sur L'Harmonisation Sociale, Document 87'; Riccardo Monaco, 'Comparaison et rapprochement des législations dans le Marché commun européen', RIDC 12 (1960), 61-74; Anne Limpens, 'Harmonisation des législations dans le cadre du Marché commun', RIDC 19 (1967), 621-653.

107 Steiert, 'Youth Transitions' (n. 88), Chapter 3 – The Unanticipated History of Commission Recommendation 67/125/EEC on the Protection of Child and Adolescent Workers. For example, the Dutch legislator acknowledged the push coming from the Community, Netherlands, '13547 – Wijziging van de Arbeidswet 1919 (Jongerenstatuut) – Socialezekerheidsstelsel, Parlementaire Geschiedenis 1980-2014' (3 September 1975), <https://www.socialezekerheidsstelsel.nl/id/vjsimh9t9czr/13547_wijziging_van_de_arbeidswet_1919>, last access 6 July 2021.

108 Ribas writes on social security, but his assessment fits the area in question. My translation. "Ce même pragmatisme, et la prudence que lui imposait le peu de pouvoirs dont elle dispose, […] a conduit la Commission à favoriser la naissance d'un processus d'harmonisation, et non à le dicter, et cela en misant sur les résultats indirects d'une meilleure connaissance des situations dans les six pays, de la confrontation des problèmes, de l'échange d'expériences, de la collaboration non seulement avec les représentants des gouvernements, mais également avec ceux des divers milieux intéressés […], notamment les organisations d'employeurs et les organisations syndicales." Jacques Jean Ribas, *La Politique Sociale Des Communautes Europeenes*, (Dalloz 1969), 412.

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Not all initiatives following this strategy produced upward harmonisation of social regulation, as success depended on Member State consensus,[109] and their examples of policy and legal coordination were forgotten with time. Yet Recommendation 67/125/EEC – and likely other examples still to be identified – reveal the incompleteness of conventional hard law-based narratives on the origins of Social Europe. The origins of Social Europe's law are much more heterogeneous than assumed: they encompass multiple, legally plausible trajectories that may or may not have unfolded in the political power struggles of EU integration. For example, if conclusively followed upon, policy coordination in the field of social policy could have turned into an openly defining feature of EU integration since the early 1960s, which moreover could have included several non-institutional actors. By focusing on hard law only in narrating Social Europe, scholars and practitioners also bear a responsibility in shaping the available discourse on EU integration and therefore what may turn into one of its alternative trajectories instead. Like fractures and discontinuities, alternative trajectories help to recover and reimagine EU integration as a democratic, constructive, and distributive site.

VI. Conclusion: Informing a Democratic, Constructive, and Distributive Debate on Europe via Its Past

In *70 Years of EU Law – A Union for Its Citizens*, the Commission Legal Service presented one possible and now institutionalised narrative of EU law, including its social dimension. This narrative centres on law and institutions, incremental progress, individual emancipation, and a narrow European frame. While this article could not dispute all these characteristics equally, in particular the emancipatory and narrowly European frame, it sketches a different way of telling Social Europe and, more broadly, EU integration by foregrounding fracture, discontinuity, and alternative trajectory. It emphasises that integration has always been contested; that diverse actors and ideas

109 At the time, working mothers were also considered a vulnerable category by many. A similar Commission initiative was withdrawn, European Commission, 'CCEE_AFSO-1700 – Protection Au Travail Des Femmes et Des Jeunes Dans Les Etats Membres: La Protection de La Maternité. Volume 5 – V/1393/61 – Vergleichende Untersuchung Der Gesetze Zum Schutze Der Arbeitenden Jugend in Den Mitgliedstaaten Der EWG' (n. 103); European Commission, 'CCEE_AFSO-1714 Protection Au Travail Des Femmes et Des Jeunes Dans Les Etats Membres : Protection Des Jeunes Au Travail et Protection de La Maternité. Volume 15 (1966-1967)'. Similarly, the Europeanising effect of a Commission Recommendation adopted on vocational orientation has been modest, European Commission, 'Recommandation de la Commission 66/484/CEE, du 18 juillet 1966, aux États membres tendant à développer l'orientation professionnelle, JO 66, 24.8.1966, 2815-2819'.

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have shaped its course and therefore its distributive consequences, which must be confronted front and centre. Highlighting fracture, discontinuity, and alternative trajectory also allows for a more respectful engagement with the actors of EU law and policy by shifting the focus of analysis and debate from institutions to democratic, societal, collective, and individual participation. A deeper knowledge of the past enables a more constructive reflection on contemporary and future European issues, while attention to the distributive dimension of integration is essential to move from concealing injustices to addressing them effectively.

The examples developed here are necessarily preliminary, as further research is needed – particularly into the supposedly emancipatory, external or global dimensions of Social Europe, which this article could not explore sufficiently.[110] Yet even this limited selection shows that the EU's social integration is richer, more complex, and more contested than received narratives suggest. It also reveals that the current state of EU law is not an immutable truth but the outcome of political and institutional power struggles and therefore open to democratic, constructive, and distributive negotiation. This paper has sought to open precisely this space of reversibility for reflection. Only by understanding why EU law and policy transformed as and in the many ways they did can we grasp how they might have developed differently and how they could and should develop in the future. Much room for further inquiry and debate remains.

110 Eklund, 'Peoples, Inhabitants and Workers' (n. 50); Eklund (ed.), *Colonialism* (n. 16).

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The EU as a Catalyst for Tax Harmonisation – Triumphs and Challenges in an Asymmetric Cooperation Model

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Abstract

This paper critically analyses the taxation chapter in the book 70 Years of EU Law – A Union for Its Citizens (2023), edited by the Legal Service of the European Union (EU) Commission. The said chapter provides a clear explanation of how fundamental freedoms, as interpreted by the European Court of Justice (ECJ), affect internal legislation of Member States related to income taxation of individuals. Its approach aligns with the overall structure of the book, which emphasises the positive impact of EU law on the daily lives of European citizens, consistent with an output legitimacy perspective on Euro-

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pean integration. However, its scope is markedly narrow. To supplement its insights, this paper expands on the topics in two ways. First, consistent with the focus on output legitimacy, it highlights the major achievements of EU law in areas such as consumption taxes, customs, and corporate taxation. Secondly, it discusses the underlying tensions that lead to the current asymmetrical model of EU tax law and the policy issues it raises, including the over-reliance on the Court of Justice to promote (negative) harmonisation and the challenges posed by the unanimity requirement in taxation matters.

Keywords

European Union – European Commission Legal Service – Tax Harmonisation – Income Taxation – Indirect Taxation – Tax Competition – Tax Policy – Unanimity

I. Introduction

Taxes are the main source of revenue for EU Member States and are essential for promoting redistributive justice, welfare, and solidarity. They are also vital for achieving the European Union's goals, from striving to keep peace across the continent to upholding the rule of law and Union values broadly considered.[1] Over the 70 years of EU law, tax harmonisation within the Union has followed a remarkable path. The level of integration reached is unmatched by any other supranational effort in this field. However, this integration remains asymmetrical.[2] While the Union has exclusive competence in customs and has achieved significant harmonisation in consumption taxes, EU primary law grants only limited powers regarding taxes on income and wealth – known as direct taxes– which largely remain under Member States' control.

Despite the significant importance of taxation within EU Law and the European Union as a joint endeavour to improve the lives of EU citizens, the

1 See articles 2 and 3 TEU. On the breadth and relevance of these values for constitutional EU Law, see Luke Dimitrios Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023); see also Armin von Bogdandy, *The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024).

2 At a more fundamental level, the scholarship of Fritz Scharpf stands out as the one theorising asymmetries between negative and positive integration. See Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999), 43-83.

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matter received little attention in the book '70 Years of EU Law – A Union for Its Citizens', written by the Commission Legal Service to celebrate the anniversary.[3] The only chapter specifically addressing tax matters, titled 'The removal of tax obstacles to living, working, investing, retiring and dying in another Member State' (the tax chapter hereinafter),[4] focuses on a very specific matter within EU tax law, namely, the impact of the fundamental freedoms on the internal legislation of the Member States on income taxation of individuals.[5] It covers topics such as the elimination of tax barriers to work, setting up a company, offering services, investing or retiring in another Member State, the granting of personal and family tax allowances, taxation as a result of moving out of one's own Member State, or the treatment of cross-border charitable gifts and inheritance taxes.

The tax chapter of the Legal Service's book is well drafted and one of the clearest accounts on the topic it addresses that the present author has read. Plus, the approach adopted by the chapter aligns perfectly with that of the entire book, accurately theorised by Paolo Mazzotti in his contribution to this Special Issue as embodying an incremental understanding of European integration, in line with neo-functionalist theories. It sees the EU's legal system as a primary driver of this integration, and validates the EU's legitimacy based on the tangible, real-world benefits it delivers to its citizens, viewing these benefits as part of a consistent, developing system.[6]

However, the chapter clearly fails to comprehensively account for the broader relevance of EU law in taxation matters. This contribution aims to provide a broader perspective on how EU tax law has enhanced the lives of its citizens, put the tax chapter in context, and offer a more comprehensive

3 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023). This volume is available at <https://op.europa.eu/en/publication-detail/-/publication/f040f2c0-10d9-11ee-b12e-01aa75ed71a1/language-en>, last access 28 January 2026.

4 Wim Roels, 'The Removal of Tax Obstacles to Living, Working, Investing, Retiring and Dying in Another Member State' in: European Commission Legal Services (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 207-227.

5 The scope is defined in Roels (n. 4), 207, as follows: 'This chapter aims to give the reader a broad overview of what the European Union has achieved in the field of taxation directly affecting European citizens. It is therefore limited to the field of direct taxation: those taxes that a person or organisation pays directly to the entity that imposed it, such as income tax. The field of indirect tax, in other words taxes on goods and services, is outside the scope of this chapter.'.

6 See Paolo Mazzotti, 'An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity, HJIL 86 (2026), 85-131 and scholarly references quoted therein.

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view beyond the topics it addresses.[7] First, this contribution will expand on the account of the EU's output legitimacy by highlighting major achievements of EU Law in areas like consumption taxes, customs, and corporate income tax. Secondly, it will analyse the underlying tensions that explain the current asymmetrical integration model of EU Tax Law and the policy problems it raises from a dual perspective: the over-reliance on the Court of Justice to push (negative) harmonisation and the challenges posed by the unanimity requirement in taxation.

II. EU Tax Law Improves the Lives of EU Citizens Beyond the Negative Harmonisation of Direct Taxes on Individuals

As stated, the Legal Service's book openly praises the improvements in the lives of EU citizens brought about by EU Law. Nonetheless, the taxation chapter restricts itself to an account of a very relevant yet narrow field of ECJ jurisprudence, i. e., the enforcement of the EU fundamental freedoms in cases involving the taxation of individuals' income – a non-harmonised field of EU tax law[8]. Allegedly, the narrowing of the topic was due to space constraints.[9] However, EU Law has significantly impacted other matters that, in turn, played a significant role in improving the lives of EU citizens. This raises the question of whether the chapter's scope was appropriately defined. As a rather straightforward example, not many EU citizens – relative to the entire EU population – would retire in a different Member State than that of their country of long-lasting residence, yet most EU citizens pay value added tax (VAT) on a daily basis. Importantly for present purposes, VAT is a significantly harmonised tax whose adoption was one of the most significant achievements of the Union throughout its history.

7 In this regard, this contribution aims to complement the rather narrow view taken by the Legal Service's book on taxation matters, rather than to pose a direct confrontation to its content, as other contributions in this special issue do in other contexts. See for instance the outstanding contributions on EU institutional languages and narratives by Päivi Leino-Sandberg, '"70 Years of EU Law" The Politics of a Professional Language', HJIL 86 (2026), 59-83; Jacob van de Beeten, 'Festschrift or Fiction? Ommissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196; as well as the stark criticism to the EU human rights track record posed by Henri de Waele, 'Beyond the Posture, Beyond the Pale – Assessing the EU's Real Record as An International Human Rights Actor', HJIL 86 (2026), 245-260.

8 A similar critique is made by Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297. He criticises that the chapter dealing with EU citizenship in the Legal Service's book, Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 96-114, does not account for all relevant aspects concerning citizenship in the Union.

9 This is, in fact, disclosed in the chapter itself. See Roels (n. 4), 208.

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The impact of taxes on the lives and well-being of EU citizens is manifold. In no other area of law do citizens encounter the State more frequently than in tax law,[10] and the influence of EU Law in this field is remarkable.[11] This section will highlight two phenomena that were left out of the analysis in the tax chapter to better understand the positive impact of EU tax law in EU citizens' lives: Namely, the impact of EU Law on indirect taxation and corporate income taxation.[12] As will be shown, in both strands, the achievement of greater levels of integration has strengthened the internal market, resulting in enhanced cross-border investment as a result of neutrality in the tax treatment of different types of arrangements, and a more uniform, robust, and stable tax system. These aspects constitute the normative case that links indirect and corporate tax matters with, ultimately, the enhancement of the EU citizens' lives and well-being.

1. Impact of EU Law on Indirect Taxation

A brief assessment of EU law's impact on indirect taxes, including customs, VAT, and excise duties, would have been appropriate in the Legal Service's book, as it provides the best example of integration in taxation and a successful case study.[13]

The Customs Union has been an essential component of the internal market since its inception in the Treaty of Rome,[14] as it entailed the removal

10 This sentence opens the first chapter of the 'Tipke/Lang', the manual of reference in taxation matters in Germany. See Roman Seer, 'Steuerrecht als Teil der Rechtsordnung' in: Roman Seer, Johanna Hey, Joachim Englisch and Joachim Hennrichs (eds), *Tipke/Lang, Steuerrecht* (25th edn, Otto Schmidt 2024), 1-40.

11 See an account of EU tax law as a field within EU Law in volumes such as Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020); Sjoerd Douma, Otto Marres, Hein Vermeulen and Dennis Weber (eds), *Terra/Wattel, European Tax Law* (8th edn, Wolters Kluwer 2022); Julianne Kokott, *EU Tax Law* (Beck-Hart-Nomos 2022).

12 Due to space constraints, other significant developments in EU law impacting taxation such as those concerning administrative cooperation – enshrined in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ 2011 L 64, and its subsequent modifications, and Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ 2010 L 84 – are not dealt with in this contribution. Although one might affirm that EU citizens' lives were positively impact by these developments as well, the author considers that the impact of developments in indirect taxation and in corporate income taxation are more significant in that regard.

13 In fact, major EU tax law topics such as the value added tax or the customs union only merit sporadic mentions in the Legal Service's book. A word search throughout the entire book of the concept 'value added tax' hits three results (pages 15, 273, and 383), as does the word 'customs' (pages 14, 21, and 352), none of them referred to substantial issues.

14 For an overview, see Timothy Lyons, *EU Customs Law* (Oxford University Press 2018).

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of internal tariffs[15] and the establishment of a comprehensive set of uniform regulations applicable throughout the Union vis-à-vis imports from third countries.[16] Its essence nowadays may be found in Article 28 Treaty on the Functioning of the European Union (TFEU), which states that the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between the Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. These rules, alongside those establishing the Internal Market, marked the end of fiscal protectionism within the EU and a common policy towards third countries determined by the Union itself, as customs constitute an exclusive competence per Article 3(1)(a) TFEU. For example, this allows EU citizens resident in, e. g., Italy, to purchase a Dutch bike without tariffs or other equivalent charges being levied, and thus at a comparatively lower price.[17]

Leaving aside customs, the Union has the competence to harmonise legislation on turnover taxes, excise duties, and other forms of indirect taxation to the extent necessary to ensure the establishment and functioning of the internal market and to avoid distortions of competition.[18] This competence has been exercised extensively, as VAT is largely harmonised,[19] and excise duties on tobacco, alcohol, and energy sources have been approximated in many of their essential components.[20]

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15 On the customs union, see Arts 9 to 37 of the Treaty establishing the European Economic Community. After a transition period, all customs duties and restrictions were lifted effectively on 1 July 1968.

16 See, in the version currently in force, Regulation 952/2013/EU of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code and Commission Implementing Regulation 2015/2447/EU of 24 November 2015 laying down Detailed Rules for Implementing Certain Provisions of Regulation 952/2013/EU of the European Parliament and of the Council laying down the Union Customs Code.

17 This example is inspired by an advertising image promoting the 50 years of customs union with the following text: 'Discover a Union where you can buy a bicycle without paying customs duties'. The image may be found in Ian Muscat (ed.), *The EU Customs Union @ 50 Concept to Continuum* (Malta Customs in collaboration with the European Commission 2018), 24. Document available at <https://taxation-customs.ec.europa.eu/system/files/2019-01/01_2019_the_eu_customs_union_50th_book_en.pdf>, last access 28 January 2026.

18 Article 113 TFEU.

19 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347 (VAT Directive).

20 Excise duties are one-stage taxes applicable in the manufacturing stage, so that the manufacturer includes that cost in the price of the product. The taxable base is defined with respect to a physical feature of the good, such as volume. The structure and rate of these taxes is partially harmonised. See Council Directive 2020/262/EU of 19 December 2019 laying down the general arrangements for excise duty, OJ 2020 L 58/4.

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Regarding VAT, the layperson's perception of its harmonisation is probably different, as the most relevant component of this tax in the eyes of the consumer, namely the tax rate, varies from one Member State to another. Yet, even in this regard, there is a certain level of harmonisation in the form of minimum rates.[21] Aside from that, the most significant development occurred with the adoption of the first VAT Directive in 1967, which introduced a neutral system for entrepreneurs and the invoice-credit method.[22] This step implied the abolition of existing domestic consumption taxes with a cascading effect, which increased product prices at each stage of the value chain and led to a cumulative effect on the price the consumer paid. The harmonised EU VAT system, instead, allowed the entrepreneur to credit the VAT paid on purchases related to the economic activity, with the tax ultimately borne by the consumer, who thus pays a lower price compared to cascading consumption taxes.[23]

Another crucial aspect of VAT harmonisation was the introduction, in 1993, of a common system for cross-border transactions, which distinguished between intra-EU and third-country arrangements.[24] There are examples of the system's application with which many EU citizens would surely identify. For instance, until recently, intra-EU transfers of goods were taxed at the seller's country of origin, meaning the applicable tax rate was that of the seller's country. This allowed operators such as Amazon to establish themselves in the country with the lowest VAT rates in the EU, namely Luxembourg, and sell their products and services from this territory to consumers located in countries with higher VAT rates[25] therefore securing a competitive advantage in the form of lower prices vis-à-vis local sellers, who had to apply the local rates. This fact led the Member States to change the rules for intra-EU remote selling of goods to apply VAT at destination, meaning to use the VAT rate of the country where the consumer is located. Plus, this process led

21 In 1992, an amendment was introduced to introduce a 'floor' tax rate of 15 %, which still exists. See Article 97 of the VAT Directive. See also Council Directive 2018/912/EU of 22 June 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the obligation to respect a minimum standard rate, OJ 2018 L 162/1.

22 Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of member states concerning turnover taxes, OJ 1967 071.

23 See Ad van Doesum, Herman van Kesteren, Simon Cornielje and Frank J. G. Nellen, *Fundamentals of EU VAT Law* (3rd edn, Kluwer Law International 2020), sec. 1.2; see also Ben Terra and Julie Kajus, *Introduction to European VAT* (IBFD 2023), sec. 7.3.

24 Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers, OJ 1991 L 376.

25 The cross-border rendering of services to consumers (B2C) generally follows the origin rule as well, although there are several exceptions. See the corresponding sections of the works quoted supra at note 23.

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to significant reforms to adapt the tax to the digital economy and large online platforms.[26]

Beyond customs and VAT, there are also other significant milestones in what regards consumption and regulatory taxation, ranging from environmental taxation –the introduction of a Carbon Border Adjustment Mechanism (CBAM) constitutes a recent example[27] that was in fact addressed in a different chapter of the Legal Sevices' book[28] – to energy taxation – with the Energy Taxation Directive[29] and the proposal for its revision in the context of the EU 'Fit for 55' package.[30]

In a nutshell, the level of integration achieved in indirect taxation significantly enhanced the internal market and, therefore, enabled a more efficient exchange of goods and services, resulting in improvements in price and quality and, consequently, a direct impact on the economies and well-being of EU citizens. It is therefore surprising that the tax chapter failed to account for an entire policy field with significant implications for EU integration's output legitimacy.

2. EU Law and Corporate Income Taxation

The European Union has had a significant impact on corporate income taxes. Although there is no explicit reference in the founding treaties, EU Law is especially relevant for income tax imposed on cross-border transactions. The analysis of this strand of EU Law, specifically regarding the EU Directives on the matter, was excluded in the tax chapter, as 'most such legislation is only relevant to companies active in more than one Member

26 Council Directive 2017/2455/EU of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ 2017 L 348/7, and Council Directive 2019/1995/EU of 21 November 2019 Amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods, OJ 2019 L 310/1; Council Directive 2025/516/EU of 11 March 2025 amending Directive 2006/112/EC as regards VAT rules in the digital age, OJ 2025 L 516. See an overview in Terra and Kajus (n. 23), sec. 19.7.

27 Regulation 2023/956/EU of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ 2023 L 130.

28 James Flett, 'The European Union Carbon Border Adjustment Mechanism and Its Consistency With World Trade Organization Law' in: Commission Legal Services (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 272-294.

29 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ 2003 L 283.

30 See Sabine Schlacke, Helen Wentzien, Eva-Maria Thierjung and Miriam Köster, 'Implementing the EU Climate Law via the "Fit for 55" Package', Oxford Open Energy 1 (2022).

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State, and thus not of direct relevance to EU citizens availing themselves of their freedoms under the treaties'.[31] Two remarks should be made to nuance this statement.

First, it is essential to bear in mind that while not directly impacted, citizens are indirectly bearing the burden of corporate income taxation. At the end of the day, these taxes are economically borne by the shareholders of these corporations, their workers, or the consumers of the products and services they offer, who are very often EU citizens.[32] The relevance of the establishment of an EU internal market refers mainly to corporations; therefore, including corporate income taxation in the tax chapter, even if a short mention, would have been undoubtedly sound.

Secondly, the State budget configuration largely depends on the tax mix adopted in each Member State, as taxes are their primary source of revenue. When the collection of corporate taxes decreases – irrespective of whether the cause is exogenous, such as the 2008-12 crisis, or endogenous, due to tax reductions e. g., in order to attract investment – the revenue that would be lost is usually collected through other, more efficient, taxes, such the taxation of labour envisaged in personal income taxes or the VAT itself,[33] hence affecting the EU citizens directly.

Another aspect that clearly links corporate taxation to the impact on EU citizens' well-being concerns the perception of fairness in the tax system. The taxation of multinational enterprises has been at the centre of public debate over the last ten years, mainly due to several scandals that hit the public debate and triggered a significant wave of cooperation in the EU, successfully furthered by the Commission. These concerns furthered the development of EU tax law significantly in the form of Directives aimed at the protection of domestic taxable bases against the phenomenon of base erosion and profit shifting,[34] as well as the adoption of a minimum tax on multinational enter-

31 See Roels (n. 4), 207.

32 See a recent account in Eric Toder, 'The Incidence of the Corporate Tax' in: Reuven Avi-Yonah (ed.), *Research Handbook on Corporate Taxation* (Edward Elgar 2023), 38-55; see also Yariv Brauner, 'The Non-Sense Tax: A Reply to New Corporate Income Tax Advocacy', Michigan State Law Review 59 (2008), 591-636.

33 For an empirical account, see Georg Thunecke, Are Consumers Paying the Bill? How International Tax Competition Affects Consumption Taxation (December 23, 2023). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2023-26, available at SSRN: https://ssrn.com/abstract=4672591.

34 Anti-Tax Avoidance Directive (ATAD 1), Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ 2016 L 193/1, and ATAD 2, Council Directive 2017/952/EU of 29 May 2017 amending Directive 2016/1164/EU as regards hybrid mismatches with third countries, OJ 2017 L 144.

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prises,[35] plus an array of amendments to the Directive on Administrative Cooperation to enhance the obtention and exchange of information on tax matters, as well as the collaboration between the tax administrations of the Member States.[36] It is mainly the legislative outcome of initiatives led by the Organisation for Economic Co-operation and Development (OECD) that has reshaped international taxation since 2013.[37]

The impact of EU Law on corporate income taxation refers to instances of negative and positive harmonisation. The latter concept comprises a number of Directives dealing with specific topics, such as those mentioned in the previous paragraphs, plus the elimination of double taxation in the area of profit distributions from subsidiaries to their parents,[38] the payment of interest and royalties within cross-border groups,[39] the neutral tax treatment of cross-border reorganisations,[40] and the establishment of a minimum tax for multinational enterprise groups and large-scale domestic groups.[41] Regarding negative harmonisation, there is a significant body of case law on the influence of the fundamental freedoms on corporate income taxation, dealing with topics such as the deductibility of losses, the taxation of dividends, the treatment of permanent establishments, or exit taxation, among others.[42] The prohibition on State Aid envisaged in Article 107(1) TFEU is also highly

35 Minimum Taxation Directive (MTD), Council Directive 2022/2523/EU of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ 2022 L 328.

36 See the Directives quoted above (n. 12).

37 See the recommendations of the OECD resulting from the Base Erosion and Profit Shifting project at OECD, *OECD/G20 Base Erosion and Profit Shifting Project. 2015 Final Reports. Executive Summaries* (OECD Publishing 2015); see also OECD, *Minimum Tax Implementation Handbook (Pillar Two)* (OECD Publishing 2023).

38 Parent-Subsidiary Directive (PSD), Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2011 L 345.

39 Interest and Royalties Directive (IRD), Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ 2003 L 157.

40 Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ 2009 L 310.

41 Council Directive 2022/2523/EU on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ 2022 L 328. For an overview, see Valentin Bendlinger, *The OECD's Global Minimum Tax and Its Implementation in the EU – A Legal Analysis of Pillar Two in the Light of Tax Treaty and EU Law* (Kluwer Law International 2023).

42 For a detailed analysis, see the chapters referred to the negative integration of direct taxation Sjoerd Douma, Otto Marres, Hein Vermeulen and Dennis Weber (eds), *Terra/Wattel, European Tax Law* (8th edn, Wolters Kluwer 2022); see also Kokott (n. 11), 144-170.

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relevant to corporate income tax matters[43]. Often, Member States grant selective advantages to undertakings in the form of reduced taxation, which amounts to unlawful aid. Such a strand of negative harmonisation is accompanied by a soft law instrument, i. e., the code of conduct on corporate taxation, defining limits to prevent harmful tax competition, which all Member States have agreed to accept.[44]

All these instances of integration have resulted in a more robust internal market, the enhancement of neutrality and cross-border investment. On a different note, though, the Commission's efforts towards further harmonisation have been hampered by governance issues, most notably the need for unanimity in the field of taxation, which compromise the Union's effective action in stabilising corporate tax revenues. These issues will be dealt with in section III. 2.

This section intended to expand the views of the tax chapter regarding the positive aspects of the integration process in tax matters for EU citizens so far. Overall, an account of the matters mentioned – even if brief – would have provided a clearer view of the successful integration path the EU has pursued in taxation matters over the last 70 years and would have probably highlighted the immense role the Commission played in these developments. Yet the picture would not be complete without also accounting for the existing challenges and underlying tensions behind the described asymmetric integration model, many of which the Commission has to address recurrently. This will be thematised in the next section.

III. Underlying Tensions Amid Tax Competition and Cooperation

As stated, the tax chapter of the Legal Service's book refers to the ECJ's furtherance of the internal market by eliminating obstacles in the form of Member States' discriminatory tax regulations. This approach is blind to the significant tension arising from the division of competences in income tax matters between the EU and the Member States. The lack of harmonisation in this field is one of the primary reasons that compels the ECJ to enforce the fundamental freedoms. This lack of harmonisation may be explained due to

43 For an in-depth account see also Wolfgang Schön, 'State Aid in the Area of Taxation' in: Leigh Hancher, Yvo de Vries and Francesco Maria Salerno (eds), *EU State Aids* (Sweet & Maxwell 2021), 431-490.

44 See an in-depth analysis at Martijn Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (IBFD 2021).

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the unanimity requirement that applies to income tax matters, which has hampered further integration in this field. The purpose of this section is to examine these matters, which are crucial to understanding the relevance of EU Law in taxation.

As EU primary law does not mention direct taxes, the Member States retain exclusive competences in this field, which traditionally have been regarded as core part of their sovereignty. After granting the EU exclusive competences on monetary policy in the Euro area and customs, as well as far-reaching competences in the field of budgetary law and consumption taxation, direct taxation remains the only truly meaningful economic policy tool largely still in the hands of the Member States, along with social security matters.

As stated in the previous section, a limited number of Directives have been approved in the field of corporate taxation. These instruments were adopted following Article 115 TFEU, which allows the issuance of Directives for the approximation of Member States' regulations affecting the establishment or functioning of the internal market.[45] The ordinary legislative procedure cannot be followed to approximate legislation in tax matters, as this possibility is expressly excluded in Article 114.2 TFEU.[46] The procedure to adopt Directives ex Article 115 TFEU requires unanimity. This feature explains the limited development of secondary EU Law in this field and constitutes a major obstacle to further integration, alongside a series of issues that will be further analysed below. The section will begin with a discussion of the reliance on the ECJ jurisprudence in taxation matters to further the internal market, which is but a consequence of the lack of meaningful harmonisation.

1. Over-Reliance on the ECJ Jurisprudence and the Resulting Lack of Policy Direction

Although the Member States retain broad competences in direct taxation, they must exercise them in accordance with EU Law, especially with respect to the fundamental freedoms and the prohibition on state aid.[47] Focusing on

45 For an analysis of the relevance of Art. 115 TFEU in tax matters, see Georg Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation', in: Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020), 11-50 (16-26).

46 This includes measures referred to cooperation between tax authorities. See ECJ, *Commission v. Council*, judgement of 26 January 2016, case no. C-533/03, ECLI:EU:C:2006:64.

47 The ECJ employs such formulation in practically every decision rendered in the field since ECJ, *Finanzamt Köln-Altstadt v. Roland Schumacker*, judgement of 14 February 1995, case no. C-279/93, ECLI:EU:C:1995:3, para. 21. See Roels (n. 4), 207 f.

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the fundamental freedoms – as the tax chapter does – the Court balances two seemingly conflicting realities: The Member States' competence to decide their direct taxation policies vis-à-vis the prohibition of cross-border discriminatory obstacles that the fundamental freedoms entail. It does so by applying a rule of reason test[48], hence making one or the other prevail depending on the circumstances of the case under review.[49] Therefore, absent harmonisation, the ECJ case law has great significance in this field, and as a result, the Court is a crucial player in shaping the content of EU law regarding direct taxation.[50] This setting generates a series of issues that must be stressed:

1. The fundamental freedoms have a limited and unclear reach in income taxation matters. For instance, their configuration in the TFEU applied to income tax matters in accordance with the ECJ jurisprudence limits their reach to cases where a cross-border element is present and where a foreigner is treated worse than a national in order to prevent protectionism. The freedoms allow a more beneficial treatment of a foreigner in comparison to a national.[51] Thus, tax incentives designed to attract affluent foreign individuals that do not apply to individuals already residing in the country are unproblematic from this angle. Moreover, in income taxation matters, the Court considers that the fundamental freedoms entail a non-discrimination mandate. Therefore, other types of restrictions arising, e. g., from disparities existing in the tax regulations of the Member States, are not considered relevant.[52] At a different level, horizontal discrimination – meaning the equal treatment of non-residents investing in the same Member State –, was not

48 Note that instances of discrimination in direct tax matters are always cases of indirect discrimination, as nationality does not play a role in this field, but rather tax residence. As is widely known, indirect discrimination is addressed by the Court through the application of a rule of reason test. For an in-depth account of the intricacies of this test, see Niels Bammens, *The Principle of Non-Discrimination in International and European Tax Law* (IBFD 2012).

49 On this balance, see Sjoerd Douma, *Optimization of Tax Sovereignty and Free Movement* (IBFD 2011). See also Wolfgang Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?', Bulletin for International Taxation 69 (2015), 271-293.

50 See Rita de la Feria, 'Pillar 2, Fiat, and the EU Unanimity Rule on Tax Matters', EC Tax Review 32 (2023), 2-8 (5).

51 This scenario is known as reverse discrimination and is not covered by the fundamental freedoms, although it is relevant in the context of State aid prohibition. See a comparison of this aspect in Rita Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation: Primary Law, Secondary Law, Fundamental Freedoms and State Aid Rules* (IBFD 2014).

52 The only exception is the *Sandoz* judgement, in which the Court seemingly misapplied the usual rule of reason steps it configured. See ECJ, *Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*, judgement of 23 September 1999, case no. C-439/97, ECLI:EU:C:1999:499.

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allowed by the ECJ in tax matters, as these subjects were not comparable,[53] although in other fields of law the Court has stated otherwise.[54]

Overall, the scope of the fundamental freedoms is unclear due to their open-ended formulation and their confrontation with the competence of the Member States in the field of direct taxation under the rule of reason. The reach remains especially unclear when the Court must address a case on which no prior jurisprudence exists for a similar matter. The *Schumacker* decision may illustrate this point,[55] as it was the first case in which the ECJ recognised comparability between resident and non-resident taxpayers under specific circumstances.[56]

Another scenario in which the scope of the fundamental freedoms becomes uncertain is when the Court issues a decision that significantly deviates from or directly contradicts previous case law, without explicitly acknowledging an override. A recent example is the overruling of *Lidl Belgium*[57] by *W AG*[58], pertaining to the much-criticised final losses saga, where the Court did not even address the fact that it was deciding against its own long-standing jurisprudence on the matter.[59] In fact, it did not even mention *Lidl Belgium* in its decision.[60]

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53 ECJ, *D v. Inspecteur von de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, judgement of 5 July 2005, case no. C-376/03, EU:C:2005:424; ECJ, *Guy Riskin, Geneviève Timmermans v. État Belge*, judgement of 26 October 2016, case no. C-176/15, ECLI:EU:C:2016:488.

54 See subsequent cases ECJ, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* judgement of 5 November 2002, case no. C-466/98, ECLI:EU:C:2002:624 to ECJ, *Commission of the European Communities v. Federal Republic of Germany*, judgement of 5 November 2002, case no. C-476/98, ECLI:EU:C:2002:631, each case referring to a different EU Member State, due to the conclusion of bilateral 'open skies' agreements with the US. For a comparison of this case with those referred to income taxes, see Christiana Panayi, 'Exploring the Open Skies: EC-Incompatible Treaties Between Member States and Third Countries', YBEL 25 (2006), 315-362.

55 ECJ, *Schumacker* (n. 47).

56 The *Schumacker* judgment is addressed in the tax chapter. See Roels (n. 4), 215.

57 ECJ, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*, judgement of 15 May 2008, case no. C-414/06, ECLI:EU:C:2008:278.

58 ECJ, *Finanzamt B v. W AG*, judgement of 21 December 2022, case no. C-538/20, ECLI:EU:C:2022:717.

59 The kickstart of the final losses' saga was ECJ, *Marks & Spencer plc v. David Halsey*, judgement of 13 December 2005, case no. C-446/03, ECLI:EU:C:2005:763. For an overview, see Johanna Hey, 'Taxation of Business in the EU: Special Problems of Crossborder Losses and Exit Taxation' in: Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020).

60 See an analysis in Axel Cordewener, 'We Need to Know When Previous Case-Law Has Been "Overruled"!-A Plea for More Legal Certainty in EU Tax', EC Tax Review 32 (2023), 144-151.

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The lack of clarity regarding the scope of the fundamental freedoms as interpreted by the ECJ also arises because the decisions' content is complex to extrapolate, and prone to raising further questions and concerns.[61]

2. The ECJ case law on income taxation and the fundamental freedoms has evolved like a pendulum over time. In the first stage, spanning the first cases in the 1990s until ca. 2006, the Court expanded the scope of the fundamental freedoms significantly, heavily affecting the policy options adopted by the Member States at that time.[62] This was especially so because of the Court's assessment of comparability, a crucial component of its rule-of-reason analysis. Affirming comparability could lead the Court to declare a rule as discriminatory and contrary to EU Law, while the lack of comparability would entail excluding discrimination and, thus, the non-applicability of the fundamental freedoms to the case. The Court admitted instances of comparability in scenarios in which the predominant views on international tax matters did not. Notoriously, the ECJ tore apart the distinction between residents and non-residents in a significant number of cases.[63]

The scope of the ECJ's jurisprudence on direct tax matters was soon regarded as less deferential to the national legislator than that of most Member States' constitutional courts. There were concerns at the political level that the ECJ's decisions severely hindered policy options,[64] to the point that, for instance, the negotiations that preceded the Lisbon Treaty included discussions on limiting the Court's jurisdiction in this field.[65] Such a limitation was never substantiated, though.

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61 Additionally, on the difficulties that enforcing case law instead of regulations entail, see Gerda Falkner, 'A Causal Loop? The Commission's New Enforcement Approach in the Context of Non-Compliance with EU Law Even after CJEU Judgments' in: Emmanuelle Mathieu, Christian Adam and Miriam Hartlapp (eds), *Public Policy and the CJEU's Power* (Routledge 2020); see also De la Feria (n. 50), 6.

62 In a broader view, see the majoritarian activism notion developed in Luis Miguel Poiares Pessoa Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Bloomsbury Publishing 1998), chapter 3.

63 ECJ, *Commission of the European Communities v. French Republic*, judgement of 28 January 1986, case no. 270/83, ECLI:EU:C:1986:37; ECJ, *Schumacker* (n. 47); ECJ, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, judgement of 21 September 1999, case no. C-307/97, ECLI:EU:C:1999:438; ECJ, *Staatssecretaris von Financiën v. B. G. M. Verkooijen*, judgement of 6 June 2000, case no. C-35/98, ECLI:EU:C:2000:294; see Frans Vanistendael, 'Tax Revolution in Europe: The Impact of Non-Discrimination', European Taxation 40 (2000), 3-7.

64 See Willem Vermeend, 'The Court of Justice of the European Communities and Direct Taxes: 'Est-Ce Que La Justice Est de Ce Monde?', EC Tax Review 5 (1996), 54-55 (54).

65 See Frans Vanistendael, 'The ECJ at the Crossroads: Balancing Tax Sovereignty Against the Imperatives of the Single Market', European Taxation 46 (2006), 413-420.

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From ca. mid-2000s onwards, the ECJ began to accept grounds for justification more frequently. For overriding reasons of public policy, the Court found discriminatory measures to comply with EU Law[66]. In other words, the core of the examination shifted away from the ascertainment of comparability up to a point at which comparability was often assumed and thus not assessed.[67] Instead, the analysis focused on whether there was any justification for discriminatory treatment and, if so, whether the contested national regulations were proportionate means.[68] In light of this jurisprudence, Member States saw their chances of adopting discriminatory regulations increase as more justificatory grounds were admitted in comparison with earlier case law.[69] Still, the Court of Justice would maintain its great influence through the shaping of proportionality requirements that would significantly impact the design of anti-abuse regulations such as thin capitalisation rules, controlled foreign corporations (CFC) rules, or rules imposing limitations on the

66 Yet, the origin of these exceptions based on public policy considerations stems from ECJ, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, judgement of 20 February 1979, case no. 120/78, ECLI:EU:C:1979:42; see Frans Vanistendael, 'The Functioning of Fundamental Freedoms and Tax Neutrality in the Internal Market' in: Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020), 142-161 (143).

67 See the Opinion of Advocate General Kokott on ECJ, *Nordea Bank Danmark A/S v. Skatteministeriet*, opinion of 13 March 2014, case no. C-48/13, ECLI:EU:C:2014:153, para. 23, where she labels comparability as a 'doctrinal vestige', due to the admission of multiple justification grounds not listed in the Treaty. See a critique to the mixing up of comparability and justification in Peter Wattel, 'Non-Discrimination à La Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases', European Taxation 55 (2015), 542-553 (548-550). Wattel especially mentions the perceived comparability of non-subject to tax, non-resident subsidiaries with taxable resident subsidiaries in ECJ, *Marks &* Spencer (n. 58) and ECJ, *X Holding BV v. Staatssecretaris van Financiën*, judgement of 25 February 2010, case no. C-337/08, ECLI:EU:C:2010:89. He also mentions that the ECJ found comparability of non-taxable income and taxable income in ECJ, *Lidl Belgium* (n. 57) and ECJ, *Finanzamt für Körperschaften III in Berlin v. Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH*, judgement of 23 October 2008, case no. C-157/07, ECLI:EU:C:2008:588.

68 For an overview, see Niamh Nic Shuibhne, 'Exceptions to the Free Movement Rules' in: Catherine Barnard and Steve Peers (eds), *European Union Law* (4th edn, Oxford University Press 2023). For more in-depth perspectives, see a collection of essays on the matter in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury Publishing 2016).

69 The accepted grounds of justification include cohesion, territoriality, anti-abuse, effectiveness of fiscal supervision, neutralisation in other state, balanced allocation of taxing rights, prevention of double losses, symmetry. In turn, the ECJ did not accept as valid justification grounds the lack of harmonisation, difficulties to obtain information, lack of effectiveness of tax collection assistance, loss of tax revenues, compensation by other advantages, or double taxation. See an analysis in Wolfgang Schön, EU Tax Law. An Introduction (August 20, 2019). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2019-12, available at SSRN: https://ssrn.com/abstract=3432273, 34-44.

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deductibility of expenses, as well as other rules aimed at protecting the domestic taxable base, such as exit taxes.[70]

3. The impact of the fundamental freedoms on direct tax matters as defined by the Court leads to a policy deficit, and Member States are to be blamed by externalizing a task that should rest with them. Going back to the notion of 'removing tax obstacles' announced in the title of the tax chapter of the Legal Services' book, these obstacles – national discriminatory measures in direct taxation – arise from the lack of neutrality in the treatment of domestic and cross-border transactions. Neutrality is a key concept for advancing a meaningful internal market in direct taxation. Yet, achieving this neutrality requires a conscious policy decision. This is so because there are several options in this regard, all allegedly offering neutral outcomes but from different perspectives. One may think of the most common approaches to competitive neutrality, namely those of capital import neutrality (CIN) and capital export neutrality (CEN). CIN aims to treat profits from domestic and foreign agents doing business in the same country neutrally. CEN consists of achieving neutrality in the treatment of profits generated abroad by domestic agents and the profits of domestic agents acting domestically.[71] Achieving both at the same time is impossible. Therefore, the adoption of one or the other must be an explicit policy choice. In contrast, the rule of reason test that the ECJ applies does not follow any specific conception of neutrality but is instead triggered when discrimination arises, irrespective of the neutrality reference adopted by the country under scrutiny. Therefore, the removal of tax obstacles does not necessarily entail achieving neutrality. It only does so when the obstacles result in discrimination under EU Law. The paradigmatic example for this state of affairs is the treatment of double taxation by the Court. Double taxation is a distortive phenomenon in international taxation that impacts the behaviour of economic agents, as it generates non-neutral outcomes where cross-border activities are taxed more heavily than domestic activities. Despite double taxation being prima facie contrary to any sound

70 ECJ, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, judgement of 12 December 2002, case no. C-324/00, ECLI:EU:C:2002:749; ECJ, *Bosal Holding BV v. Staatssecretaris van Financiën*, judgement of 18 September 2003, case no. C-168/01, ECLI:EU:C:2003:479; ECJ, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, judgement of 11 March 2004, case no. C-9/02, ECLI:EU:C:2004:138; ECJ, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, judgement of 12 September 2006, case no. C-196/04, ECLI:EU:C:2006:544; see Vanistendael (n. 66), 144.

71 For an analysis of these concepts and their impact in international taxation, with further references, see Wolfgang Schön, 'International Tax Coordination for a Second-Best World (Part I)', World Tax Journal 1 (2009), 67-114; see also Werner Haslehner, 'International Tax Law and Economic Analysis of Law' in: Florian Haase and Georg Kofler (eds), *The Oxford Handbook of International Tax Law* (Oxford University Press 2023), 231-248.

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notion of internal market, the ECJ has found double taxation not to violate per se the fundamental freedoms, but only when it entails treating a cross-border event worse than a domestic one.[72]

Basing the breach of fundamental freedoms exclusively on grounds of discrimination also raises another issue: it does not provide guidance on how such a situation should be addressed. The Member State may choose how to treat domestic and cross-border instances equally, by either increasing or decreasing the tax burden to all actors. Often, the Member State opts for the former. This may be illustrated by thin capitalisation rules and their replacement by interest limitation rules, both limitating the deductibility of financial expenses. Some years ago, EU Member States included thin capitalisation rules in their corporate tax regulations, usually based on a fixed ratio comparing debt and equity, so that exceeding the adopted ratio (often 1:3) would result in the non-deductibility of financial expenses for amounts beyond the adopted ratio. Yet, these rules raised concerns under EU Law, as they applied only to cross-border transactions, allegedly to prevent corporations from eroding the domestic tax base by incurring financial expenses through payments to related entities in low- or no-tax jurisdictions. The ECJ considered these rules to be justified only on the grounds of tackling tax evasion when the non-deductible amount was to be calculated by reference to the debt payments that independent parties would have held under identical circumstances.[73]

As a result of this jurisprudence, most EU countries decided to abolish thin capitalisation rules, and some opted to replace them with an interest limitation rule, applicable as a percentage of the company's Earnings before Interest, Taxes, Depreciation and Amortization (EBITDA) and limiting the deduction of financial expenses irrespective of the cross-border or domestic character of the transactions. The design of this rule was indeed in line with EU Law, as all corporations – those operating domestically and those with a cross-border reach – were treated equally. Notwithstanding, the rule raised constitutional issues in certain jurisdictions; in fact, the German interest limitation rule is still pending review by the German Constitutional Court.[74]

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72 See ECJ, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat*, judgement of 14 November 2006, case no. C-513/04, ECLI:EU:C:2006:713; ECJ, *Margarete Block v. Finanzamt Kaufbeuren*, judgement of 12 February 2009, case no. C-67/08, ECLI:EU:C:2009:92. See an in-depth analysis of the matter from different angles in the volume of Alexander Rust (ed.), *Double Taxation Within the European Union* (Kluwer Law International 2011).

73 See ECJ, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, judgement of 13 March 2007, case no. C-524/04, ECLI:EU:C:2007:161, paras 80-87.

74 See Caroline Heber, 'The Interest Limitation Rule in the Light of European Constitutional Law', EC Tax Review 31 (2022), 72-84.

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Yet, nowadays, all Member States have a harmonised interest limitation rule deriving from the EU Anti-Tax Avoidance Directive.[75]

In short, the ECJ decisions are not targeted towards improving efficiency or building the internal market further.[76] The lack of coordination in direct tax matters and the 'externalisation' of the decision on how to address these matters – that should be addressed by policymaker s– to the Court via the enforcement of the fundamental freedoms, resulting in negative harmonisation, lead to a significant 'where do we go' issue in terms of policy. Indeed, the way to go remains unclear. As expressed by Vanistendael, 'either the EU pursues the same form of non-discrimination for all Member States (either CEN or CIN), and that means the end of full tax sovereignty, or the EU continues to respect the full tax sovereignty of the Member States and that means that the quest for non-discrimination is carried on in permanent inconsistency, or simply stopped'.[77]

2. The Lock-In Effect Resulting from the Unanimity Requirement

It must be emphasised that the relevance of the ECJ case law on income taxes and the issues noted in the previous section stems from the lack of meaningful harmonisation in this field. The main hurdle in this regard is the need to reach unanimity, as required by Article 115 TFEU.[78] The unanimity requirement results in a lock-in effect that, in the opinion of the Commission, has 'hampered progress on important tax initiatives needed to strengthen the Single Market and boost EU competitiveness'.[79] Such statement clearly conveys a sense of frustration, as the Commission struggles to further integration. Yet, the statement also obviates a rather more fundamental question, i. e., whether taxing powers should be granted to the Union.[80] From that perspective, a holistic approach that also takes EU budgetary matters into

75 Article 4 ATAD.

76 See Rita de la Feria and Clemens Fuest, 'The Economic Effects of EU Tax Jurisprudence' in: Werner Haslehner, Georg Kofler and Alexander Rust (eds), *EU Tax Law and Policy in the 21st Century* (Kluwer Law International 2017), 353-384.

77 Vanistendael (n. 66), 148.

78 Article 113 also establishes unanimity for indirect taxes, although in this field the harmonisation process has advanced within a reasonable pace.

79 See COM(2019) 8 final, Communication From the Commission to the European Parliament, the European Council and the Council, 'Towards a More Efficient and Democratic Decision Making in EU Tax Policy', 2019, 3.

80 See an in-depth analysis in Martha Caziero, The Taxing Powers of the European Union: A Legal Analysis of the Levying of EU Taxes (IBFD 2025).

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account, as well as a revamp of the own resources system for the financing of the Union, would be more appropriate.[81]

The Commission already tried to move to qualified majority voting in tax matters during the negotiations preceding the Single European Act without success.[82] During the 70 years of EU Law, unanimity has been maintained for income tax matters. The last attempt by the Commission consisted of a proposal to move progressively towards qualified majority voting through the *passerelle* clause in 2019.[83] Still, a number of Member States opposed this initiative. Other alternatives, such as enhanced cooperation[84] or the 'nuclear option' of Article 116 TFEU[85], have never been put into practice.

One may understand the Commission's frustration when assessing the number of rejected proposals on income taxation over the years.[86] Aside from the earlier Directives on the removal of cross-border obstacles in corporate taxation, the later Directives on Base Erosion and Profit Shifting (BEPS) and minimum taxation[87] are the result of international initiatives prompted by shocks stemming from scandals that reached the mainstream media on tax fraud, abuse, and aggressive tax planning.[88] Currently, there are several open initiatives, such as adopting a single set of rules to determine the tax base for

81 See for an overview of the current state of affairs of the own resources system in Christian Neumeier, 'Political Own Resources: Towards a Legal Framework', CML Rev. 60 (2023), 319-344. Such an approach will not be explored here, as the reach of the commented book chapter focuses exclusively on the internal market aspect of taxation measures.

82 See Claus-Dieter Ehlermann, 'The Internal Market Following the Single European Act', CML Rev. 24 (1987), 361-409; David Allen, 'European Union, the Single European Act and the 1992 Programme' in: Dennis Swann (ed.), *The Single European Market and Beyond – A Study of the Wider Implications of the Single European Act* (Routledge 1992), 26-52; De la Feria (n. 50), 3.

83 Article 48 (7) TFEU. See, in the Legal Service's book, Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law', in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-384.

84 See an in-depth analysis of the enhanced cooperation mechanism in tax matters in Caroline Heber, *Enhanced Cooperation and European Tax Law* (Oxford University Press 2021).

85 See Joachim Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization', EC Tax Review 58 (2020), 58-61. See Peter Wattel, 'Taxation in the Internal Market' in: Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017), 319-349 (328).

86 See an account of the areas in which harmonisation attempts on direct tax matters have failed at Kofler (n. 45), 13 f. This includes initiatives that are very relevant to form a proper EU internal market, such as the adoption of uniform rules on tax residence and the taxation of cross-border workers, or even more ambitiously, the adoption of a multilateral convention to prevent double taxation.

87 See references at n. 34 to 36.

88 See Shu-Yi Oei and Diane Ring, 'Leak-Driven Law', UCLA L. Rev. 65 (2018), 532-618.

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groups of companies in the EU[89] or preventing the misuse of shell entities for tax purposes.[90] Bringing all Member States into agreement is fairly challenging, especially when some benefit from the current *status quo* and may see their status as tax-friendly jurisdictions hampered. Tax havens within the EU indeed pose a challenge to more harmonisation. States still compete with one another to capture investment and value, with income tax among the main tools used for this purpose. This rationale, in fact, fits well with the goal of furthering an open market economy with free competition, favouring an efficient allocation of resources.[91] The tension between competition and cooperation is evident within the EU, which explains the described blockade, given the veto power over any direct tax harmonisation initiative.[92] Some would consider that such a setting trumps the ideals of solidarity envisaged in Articles 2 and 3 TEU or is against fairness understood in a broad sense.[93] Yet, the division of competences and the room for action of the EU established in primary law delineate clear limits that can only be overcome through a new deal to be achieved through unanimity again.

From a governance perspective, De la Feria identifies four consequences of the unanimity rule.[94] First, unanimity enables member States to block initiatives that could enhance efficiency in the internal market and address pressing challenges such as those posed by the digitalised economy. Secondly, it allows countries to use their veto as a bargaining chip against other interests of their own in the European Union, as exemplified by Poland and Hungary's initial opposition to the adoption of the minimum taxation Directive to leverage it in other negotiations. Thirdly, it distorts the definition of priorities, as the Commission will tend to define proposals that could realistically reach consensus in their adoption, rather than those that properly address pressing issues. Fourthly, unanimity will often result in the approval of legislation with a lower standard due to the need to accommodate the interests of all Member States involved, e. g. by including lacunae, ambiguous language, or excessive leeway in the domestic implementation. Overall, the risk of bureaucratisation in such a governance setting is significant.

The takeaway is that the coordinating legislation to eliminate barriers and achieve efficiency in the internal market regarding direct taxation is lacking,

89 COM/2023/532 final, Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT).

90 COM/2021/565 final, Proposal for a Council Directive Laying down Rules to Prevent the Misuse of Shell Entities for Tax Purposes and Amending Directive 2011/16/EU.

91 Article 120 second sentence TFEU.

92 See Ana Paula Dourado, 'The Commission Proposal to Replace Unanimity with a Qualified Majority in the Case of Tax Matters', Intertax 47 (2019), 341-344.

93 See references at n. 1.

94 De la Feria (n. 50), 4.

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and the existing status quo does not show prospects of changing, at least not in the mid-term. Yet, ideally, the Commission and the Member States would seriously reconsider the governance model of direct taxation in the EU. This is yet another perspective missing in the tax chapter of the Legal Services' book that would have been worth noting.

IV. Conclusion

The aim of this paper was to critically address the chapter titled 'The removal of tax obstacles to living, working, investing, retiring and dying in another Member State', which belongs to the Commission Legal Service's book titled '70 Years of EU Law – A Union for its Citizens'. This is the only chapter that specifically addresses tax matters. Yet, it restricts itself to addressing a very narrow parcel of the impact of EU Law in taxation matters, i. e., the impact of the ECJ jurisprudence on direct taxes affecting individuals. While very instructive in illustrating the evolution of this specific matter, the chapter fails to address other EU tax-related aspects that should have been covered to offer a more comprehensive view of how taxation improves the lives of EU citizens.

Considering that the chapter forms part of a section of the book devoted to showing that 'EU Law Improves the Lives of EU Citizens', the paper took a two-fold approach. First, it highlighted EU Law's major achievements in areas that were not addressed, such as consumption taxes, customs, and corporate income taxation. Secondly, it offered an account of the underlying tensions that explain the current asymmetrical integration model of EU Tax Law and the policy issues it raises to illustrate existing risks on the improvement of the lives of EU Citizens through a coordinated approach to taxation, such as the over-reliance on the Court of Justice to further (negative) harmonisation, and the issues that the unanimity requirement poses in taxation matters.

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The Republican Thrust of *70 Years of EU Law*: Theorizing 'A Union for Its Citizens'

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Abstract

Päivi Leino-Sandberg's opening contribution to this special issue identifies deficits in the Commission's book *70 Years of EU Law*. This concluding contribution explores its promise, as expressed in its subtitle 'A Union for Its Citizens'. 'A Union for Its Citizens' is underpinned by a republican thrust, which this contribution substantiates in four steps. The first develops a tailored concept of republicanism, with the second step presenting evidence for it in EU law. The third step deepens the thesis by demonstrating its compatibility with core republican tenets, while the final step outlines how

* Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. I thank the Dienstagsrunde, Aurore Gaillet, Thomas Maissen, Alexander Somek and Jacques Ziller for their valuable suggestions. The text was translated with DeepL, revised with the help of ChatGPT and finalised with help from Paolo Mazzotti, Dimitrios Syntrivanis and Moritz Vinken. An earlier German version was published in Armin von Bogdandy, Patrick Hilbert and Angelika Siehr, *Renaissance des Republikanismus* (Mohr Siebeck 2024), 1-89.

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to drive European republicanism forward, and, with it, European constitutionalism and federalism.

Keywords

European Constitutional Law – European Republicanism – 70 Years of EU Law – Legal Service of the EU Commission – Art. 2 TEU

I. Thesis and Program

Some consider the European Union (EU) Commission Legal Service's *70 Years of EU Law* to be inspired by Hallstein's 'Rechtsgemeinschaft' or Cappelletti's, Seccombe's, and Weiler's 'Integration Through Law'.[1] I read it in light of European republicanism: the book's subtitle is 'A Union for Its Citizens', a civic focus underlies all contributions, and its final chapter focusses on advancing the Union's civic transformation.[2]

The words 'A Union for Its Citizens' signal a choice and direction, which were missing from the book's predecessor, *Thirty Years of Community Law*.[3] The Legal Service takes a contentious position on what the Union is about. Sceptical voices will view this republicanism as propaganda from Brussels.[4] State-centred approaches would have preferred 'A Union for Its Member

1 See Christos Karetsos and Alexandros Bakos, 'The European Union's Geoeconomic Turn: Less Openness and More Realpolitik', HJIL 86 (2026), 197-224; Giulia La Torre, 'The Formation of the EU Legal System', HJIL 86 (2026), 133-166; Päivi Leino-Sandberg, "70 Years of EU Law' – The Politics of a Professional Language', HJIL 86 (2026), 59-83; Aitor Navarro, 'The EU as a Catalyst for Tax Harmonisation – Triumphs and Challenges in an Asymmetric Cooperation Model', HJIL 86 (2026), 357-378; as well as Jacob van de Beeten, 'Festschrift or Fiction? Omissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

2 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 377-388.

3 European Commission Legal Service (ed.), *Thirty Years of Community Law* (Publications Office of the European Communities 1983).

4 See, for instance, the problematisations of Jacob van de Beeten (n. 1), Maciej Krogel, 'Is It Enough to Say 'Common Values' When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244; 'Leino-Sandberg (n. 1), Paolo Mazzotti, 'An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity', HJIL 86 (2026), 85-131; Marc Steiert, 'Telling (Social) Europe Differently: Fractures, Discontinuities, and Alternative Trajectories in 70 Years of EU Law', HJIL 86 (2026), 331-356; Christian Thönnes, 'Invisible Infringements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330 and Henri de Waele, 'Beyond the Posture, Beyond the Pale – Assessing the EU's Real Record as An International Human Rights Actor', HJIL 86 (2026), 245-260.

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States'.[5] A positivist approach might suggest 'A Union for Its Peoples', following Art. 3 para. 1 TEU.

I support giving European citizenship such importance, not least for driving forward European republicanism. I see great promise for European republicanism because it develops European constitutionalism and federalism by stressing European citizenship, European solidarity, as well as checks and balances. It deepens theoretical insight while also providing practical orientation. Its promise is particularly relevant bearing in mind the current cleavages of European society and its geopolitical awakening. By 'going republican', European society might shine bright and, in so doing, withstand a global trend going in the opposite direction.[6]

To explore the promise of European republicanism, I substantiate it in four steps: theory, evidence, defence, and practice. The first step involves developing a tailored concept of republicanism (II.), the second step presents evidence for it by looking at a range of proposals, debates, legal acts, and judgements to show how European republicanism is developing (III.). The third step deepens European republicanism by demonstrating its compatibility with core republican tenets, namely self-determination, virtue, and a public forum (IV.). The final step looks to the future, taking into account competing approaches to an 'ever closer union' (V.).

II. Theory

1. A Topical Concept of Republicanism

Article IV, Section 4 of the American constitution famously stipulates that '[t]he United States shall guarantee to every State in this Union a Republican Form of Government'. Referring to this provision, John Adams once wrote to Mercy Otis Warren: 'I confess I never understood it, and I believe no other Man ever did or ever will'.[7] As there is no settled meaning, even amongst

5 One proponent of such approaches is the Second Senate of the German Federal Constitutional Court, see its landmark decisions, BVerfGE, *Maastricht*, judgement of 12 October 1993, 2 BvR 2134, 2159/92; BVerfGE, *Lisbon,* judgement of 30 June 2009, 2 BvE 2/08.

6 For the global trend, see the contributions in Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism. Comparative Analysis and Critique* (Edward Elgar Publishing 2019).

7 Letter from John Adams to Mercy Otis Warren, 20 July 1807, available at <https://founders.archives.gov/documents/Adams/99-02-02-5195>, last access 17 February 2026. For a history Mortimer N. S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Palgrave 2003); on that thought Thomas Maissen, 'Républiques et républicanismes en époque moderne. Théories et pratiques dans une perspective occidentale' in: Olivier Christin (ed.), *Républiques et républicanismes. Les cheminements de la liberté* (Le Bord de l'eau 2019), 27-45.

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those who should know best, what should 'Republicanism' mean to Europeans in 2025? Given two millennia of conceptual history and its broad spectrum of current applications – from Donald Trump's Make America Great Again (MAGA) republicanism[8] to Kantian and Hegelian,[9] neo-Greek and neo-Roman[10] republicanisms – a common denominator, if there is one, would be too flimsy to be useful. Nor is it meaningful to seek the 'true' concept of republicanism: conceptual work aims not for truth but for utility.[11]

This contribution requires a concept of republicanism that is useful in current debates on European law. Such a concept should be rooted in its history, be compatible with the tenets of Article 2 TEU and allow us to make useful distinctions for the current debates. To this end, I explore the relationship between republicanism and democratic constitutionalism, as the latter is the prevailing approach of those engaging constructively with the European Treaties.

Historically, the concepts of republic and democracy began as antagonists. From Aristotle to Cicero, Machiavelli, Madison, and Kant, many authors viewed the republic – where mandated officials pursue the common good in a controlled way – as the most legitimate form of government, expressing scepticism towards democracy as the rule of the masses. This understanding of the republic was widespread in Europe from the early modern period onwards and might even constitute a common constitutional tradition.[12] Only in the 19th century did democracy begin to gain legitimacy, primarily as a demand for a more egalitarian society.

The 20th century witnessed a fusion of democratic and republican constitutional thinking that had a deep impact on both concepts. The fusion was spearheaded by the constitutional law of the French Third Republic and the Weimar Republic. On that basis, Constantino Mortati, an architect of Italy's republican constitution of 1947, defined Italian republicanism as a combination of democracy and fundamental rights under a rigid and power-sharing

8 Richard Abel, 'The Fate of Liberal Democracy Under Donald Trump', VRÜ 55 (2022), 505-527.

9 Rainer Forst, *Die noumenale Republik. Kritischer Konstruktivismus nach Kant* (Suhrkamp 2021); James Bohman, 'Is Hegel a Republican? Pippin, Recognition, and Domination in the Philosophy of Right', Inquiry: An Interdisciplinary Journal of Philosophy 53 (2010), 435-449.

10 Philip Pettit, *Republicanism. A Theory of Freedom and Government* (Clarendon 1997); Quentin Skinner, 'On the Slogans of Republican Political Theory', European Journal of Political Theory 9 (2010), 95-102.

11 Max Weber, 'Die Objektivität sozialwissenschaftlicher und sozialpolitischer Erkenntnis' in: *Gesammelte Aufsätze zur Wissenschaftslehre* (Mohr Siebeck 1922), 146-214 (208 f.).

12 See Martin van Gelderen and Quentin Skinner (eds), *Republicanism. A Shared European Heritage* (2 volumes, Cambridge University Press 2002).

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constitution.[13] United States (US) constitutional developments set this fusion as the global standard, combining the administrative state of the New Deal with the democratic inclusion of the civil rights revolution.[14] Along that path, many constitutional systems merged their understanding of republicanism with that of constitutional democracy.

From the 1980s onward, a strand of republicanism developed that saw democratic practices as too technocratic and lethargic, or too juridical, and advocated for greater citizen involvement. In 1982, Claude Nicolet published a monograph that is credited with the renaissance of republicanism in the French presidential Fifth Republic.[15] Subsequently, a new republicanism emerged in the United States against the intellectual climate of the Reagan era,[16] in Germany against that of Kohl's chancellorship, and in Italy against that of Berlusconi's so-called 2nd Republic[17]. After the fall of socialism, Central and Eastern Europe witnessed similar republican aspirations, seeking more than just the adoption of Western European political practices.[18] Such thought informs important authors who have problematised the democratic credentials of European integration.[19]

Against this background, I put forward a concept of republicanism that fits the EU Treaties, and in particular their constitutional core, and thus sits in harmony with European constitutionalism. This excludes the republicanism currently advocated by the US Republican Party, which seeks to dismantle

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13 Costantino Mortati, 'Concetto, limiti, procedimento della revisione costituzionale' in: Istituto di diritto pubblico e di dottrina dello Stato della Facoltà di scienze politiche dell'Università di Roma (ed.), *Studi di diritto costituzionale in memoria di Luigi Rossi* (Giuffré 1952), now in Costantino Mortati, *Raccolta di scritti – Vol. II: Scritti sulle fonti del diritto e sull'interpretazione* (Giuffré 1972), 5-41, esp. 20-34.

14 See Bruce Ackerman, *We the People. Volume 3: The Civil Rights Revolution* (Harvard University Press 2014); Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press 2010).

15 Claude Nicolet, *L'idée républicaine en France, 1789-1924: Essai d'histoire critique (1982)* (Gallimard 1994). The book describes its reception in the 1994 edition, 509 ff.

16 See the contributions by Frank Michelman, Cass Sunstein, Kathryn Abrams, Derrick Bell, Preeta Bansal, Paul Brest, Richard Epstein, Michael A. Fitts, Linda K. Kerber, Jonathan Macey, Jerry Mashaw, H. Jefferson Powell and Kathleen Sullivan in the Special Issue of perhaps the most influential law journal, the Yale Law Journal, 'Symposium: The Republican Civic Tradition', Yale L. J. 97 (1988).

17 Günter Frankenberg, *Die Verfassung der Republik. Autorität und Solidarität in der Zivilgesellschaft* (Nomos 1996); Maurizio Viroli, *Repubblicanesimo* (Laterza 1999).

18 Paul Blokker, 'Dissidence, Republicanism, and Democratic Change', East European Politics and Societies 25 (2011), 219-243.

19 See Dieter Grimm, 'Constitutionalisation Without Constitution. A Democracy Problem' in: Nicholas W. Barber, Maria Cahill and Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart 2019), 23-40; Alexander Somek, 'What is Political Union?', GLJ 14 (2013), 561-580; Mark Dawson and Floris de Witte, 'From Balance to Conflict. A New Constitution for the EU', ELJ 22 (2016), 204-224.

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the democratic administrative state as established by the New Deal and to roll back the democratic inclusion achieved through the civil rights movement.[20] Several scholars argue that these policies also violate American republicanism.[21]

A concept of republicanism tailored for European legal scholarship must lie in the field of European democratic constitutionalism. It must then allow us to make useful distinctions in this field in order to advance its debates. I distinguish European republican constitutional thinking from other relevant positions on European constitutional law with reference to three characteristics: firstly, an orientation towards European citizenship; secondly, public authority must be limited and mandated; and thirdly an ambitious understanding of the common good. All three elements are present in *70 Years of EU Law*.

The first characteristic, the civic focus, understands the Union as a common affair of free and equal citizens, united in a common public cause. As its subtitle indicates, citizenship is the key term in *70 Years of EU Law.* Republicanism is useful to situate the book, but also to critique it. Seen from the perspective of republicanism, the book presents a reductive understanding of European citizenship; the dedicated chapter only focuses on children and homosexual persons. Here, as elsewhere in the book, the citizens' participation in political processes is largely missing.[22] To put it bluntly: much of what the book presents on citizenship would also fit in a book with the subtitle 'A Union for Its Subjects', or 'Une Union pour ses Administrés'.[23] A republican lens substantiates what other contributions have critiqued as too much

20 Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press 2014); Adrian Vermeule, *Common Good Constitutionalism* (Polity 2022).

21 In this sense even a speechwriter of George W. Bush, David Frum, *Trumpocracy: The Corruption of the American Republic* (Harper Collins 2018).

22 Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publication Office of the European Union 2022), 92-110. For a similar criticism of this Chapter, see Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297. The second edition added some pages on the 'Jean Monnet actions' in the broader context of the Erasmus+ programme: Themis Christophidou, 'The Jean Monnet Actions: Promoting Excellence in European Studies since 1989' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 11-14. This is relevant because of the underlying assumption: '[l]earning about the objectives and the functioning of the European Union is an important part of promoting active citizenship and the common values of freedom, tolerance and non-discrimination'. This is a welcome addition, but still does not fully capture the tenets of solidarity and political participation.

23 On this key concept of French public law Camille Morio, *L'administré: essai sur une légende du droit administratif* (LGDJ 2021).

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reliance on output legitimacy. Only the last chapter gives political participation a greater role, and even there, civic participation in EU affairs remains on the fringes. Similarly, the dimension of republican solidarity remains underexplored.

Nevertheless, a republican lens makes sense. First, it takes seriously the choice of the title: no other constitutional approach gives citizenship similar importance. Second, it helps in developing the republican approach to EU law, in turn sharpening EU federalism. Third, it stresses useful distinctions in the field of EU constitutional law. The focus on European citizenship distinguishes *70 Years of EU Law* from market-centred and member state-centred understandings of the European Union, which see, at best, a subordinate role for European citizenship or, at worst, no role at all.[24] The civic focus also distinguishes European republicanism from understandings that reduce the Union to a means against national policies that negatively impact other Member States.[25] That is a far cry from regulating the common interests of equal and free citizens, which is the essence of republicanism and the topic of most chapters in *70 Years of EU Law*. This civic focus also distinguishes European republicanism from understandings focused on the Union's mobile population.[26] A republican Europe is not just for people who take planes.[27]

The second characteristic is an institutional system of controlled government with limited and mandated authority. Republicanism once opted for mixed constitution, while modern approaches have developed this into a separation of powers with effective checks and balances.[28] Accordingly, *70 Years of EU Law* dedicates an entire part, indeed its first part, to this republican concern. Democracy, the rule of law, the protection of fundamental rights, and the separation of powers are interdependent in this under-

24 See Paul Kirchhof, 'The European Union of States' in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart/C. H. Beck 2011), 735-761 (736 f., 739 f.); Joseph H. H. Weiler, 'The Crumbling of European Democracy' in: Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018), 629-638.

25 Thus the conflict of laws-approach of Christian Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart 2022), 399 ff. For discussion, see the 'Symposium on Law, Conflict and Transformation – The Work of Christian Joerges', European Law Open 4 (2025), 1-155, with contributions by Anna Beckers, Vladimir Bogoeski, Christian Joerges, Turkuler Isiksel, Anna Peychev, Sabine Frerichs, Steven Klein, Gunther Teubner, Poul F. Kjaer, Maria Weimer, Agustín J. Menéndez, and Harm Schepel.

26 See Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union', Theoretical Inquiries in Law 8 (2007), 453-488.

27 Enrico Letta, 'Much More Than a Market – Speed, Security, Solidarity', Report to the European Council 2024, 62.

28 Maissen (n. 7).

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standing.[29] The third element is an understanding of the common good that demands more than just satisfying needs and balancing interests, more than just a functioning market economy, and more than just civil rights.

These characteristics deepen the difference between European republicanism and alternative approaches to the European Union. Its civic understanding of the common good deepens its distinction from member state-centred understandings, which primarily interpret the European common good through the alignment of state interests. This characteristic also deepens the distinction from market-liberal approaches that read the Union through the lens of a common market.[30] A republican understanding demands more than just a market that provides for material prosperity. It also opposes liberal interpretations of human rights as pre-political and instead sees them as conditions for democratic processes. Above all, these characteristics position European republicanism against populist governments that undermine the separation of powers and checks and balances, citing their electoral mandate.[31] Among all these approaches, republicanism fits *70 Years of EU Law* best.

2. The Common Good as Solidarity

The emphasis on citizenship, limited and mandated government and the common good are deeply rooted in the republican tradition.[32] Solidarity's roots are less deep and mainly hail from French republicanism.[33] I see solidarity as particularly useful in our current European context to further substantiate the republican common good.

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29 On this interdependence, Armin von Bogdandy, *The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024), 90-93.

30 Ernst-Joachim Mestmäcker, 'Zur Wirtschaftsverfassung in der Europäischen Union' in: Rolf H. Hasse, Josef Molsberger and Christian Watrin (eds), *Ordnung in Freiheit. Festgabe für Hans Willgerodt zum 70. Geburtstag* (Gustav Fischer Verlag 1994), 263-292. Considered as a possible scenario in European Commission, 'White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025', 1 March 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A2025%3AFIN>, last access 17 February 2026, Scenario 2.

31 See European Parliament Resolution of 17 May 2017 on the situation in Hungary, 2017/2656(RSP), OJ EU 2018 C 307/75; Gábor Halmai, 'Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective' in: Stefan Kadelbach (ed.), *Verfassungskrisen in der Europäischen Union* (Nomos 2018), 85-104.

32 See references in (n. 7) to (n. 19).

33 The authority is Nicolet (n. 15); see also Serge Audier, *La pensée solidariste. Aux sources du modèle social républicain* (Presses Universitaires de France 2010); Pierre Crétois and Stéphanie Roza (eds), *Le Républicanisme social: une exception française?* (Éditions de la Sorbonne 2014).

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Modern solidarity was first theorised by Émile Durkheim. He introduced organic solidarity as the linchpin of societies based on the division of labour. Léon Duguit and George Scelle were pioneers in translating this idea into legal scholarship.[34] Like many of our key concepts – such as legitimacy, trust, identity, and integration – solidarity has two dimensions.

First, as an analytical term, it explains social cohesion. This is illustrated by the text that launched European integration and which *70 Years of EU Law* duly quotes. On 9 May 1950, Robert Schuman declared that Europe would emerge 'through concrete political achievements (*réalisations*) that first create a de facto solidarity (*solidarité de fait*)'. According to Schuman, the communitarisation of the coal and steel industries would lead to economic interdependence, and this interdependence (division of labour) would then create solidarity *de facto*. This solidarity is based first and foremost on the recognition of social interdependence, not on a moral stance. It is not a matter of altruism or any other kind of do-gooderism.

At the same time, this concept has normative relevance insofar as it justifies demands to protect or strengthen solidarity as the key social mechanism. This includes obedience to the law[35] as well as redistribution to ensure social cohesion (and thus the proper functioning) of societies based on the division of labour. Politically, this dimension was first articulated by French radicalism,[36] which was mainstreamed in Europe after World War II.[37]

This concept of solidarity holds much promise. First, it is rooted in Schuman's declaration (and thus the deep origins of European integration). Second, it strengthens the distinctiveness of republicanism in European society with regard to redistribution and social cohesion, perhaps its two most critical issues.

Consider the demands of nationalist forces termed as 'welfare chauvinism', often associated with deep Euroscepticism.[38] Such demands have become a broad trend by which parties on the right moved away from their previous rejection of the welfare state towards a position that accepts it, but excludes

34 Hugo Canihac, 'Du solidarisme aux Communautés européennes. Le concept de solidarité dans la pensée de George Scelle', Revue Française d'Histoire des Idées Politiques 51 (2020), 195-230.

35 For a long time the most important dimension of solidarity in EU law, Roland Bieber, 'Zur Entwicklung des Rechtsbegriffs der Solidarität in der Europäischen Union: Anmerkungen zur jüngsten Rechtsprechung', Schweizerisches Jahrbuch für Europarecht (2020), 591-606.

36 Margaret Kohn, 'Radical Republicanism and Solidarity', European Journal of Political Theory 21 (2022), 25-46.

37 This is the key in Tony Judt, *Postwar Europe* (Penguin 2005).

38 Early on Jørgen Goul Andersen and Tor Bjørklund, 'Structural Changes and New Cleavages: the Progress Parties in Denmark and Norway', Acta Sociologica 33 (1990), 195-217.

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foreigners. That is incompatible with European solidarity as advocated by European republicanism.[39]

Furthermore, since 2009, the Union has been distributing considerable financial resources. This has triggered opposition even in the pro-integration field, so solidarity has become a salient issue. It is significant that the Court of Justice of the European Union (CJEU) has referred to the solidarity of Art. 2 of the Treaty on European Union (TEU) in two of its (perhaps) most important decisions since *Van Gend en Loos*, which deal with both redistribution and the ultimate foundation of the Union.[40] These decisions brought the Union to a new level of constitutionalism (III. 3.). A solidaristic republicanism conceptualises this move.

This framing of European republicanism distinguishes it from the US constitutional thinking that dominates most theories of republicanism. The focus on solidarity is particularly appropriate for continental Europe, as the social question is fundamental to most European constitutions of the 20th century, unlike the US constitution (which is a point that holds even in the interpretation of progressive constitutional theories).[41] The latter are about rights, political participation, and fairness, but not about the social question as a constitutional issue. Solidarity is only mentioned in passing in Pettit's key work.[42] The Anglo-American political, social, and ideological contexts are different from those of continental Europe. Scholars should reflect on this.

III. Evidence

1. The Ventotene Manifesto

What is the evidence for European republicanism? The term as such appears only rarely, and certainly not in *70 Years of EU Law*. Only a few authors advocate for the idea of European republicanism. In Germany, political scientist

39 Markus Ketola and Johan Nordensvard, 'Reviewing the Relationship Between Social Policy and the Contemporary Populist Radical Right: Welfare Chauvinism, Welfare Nation State and Social Citizenship', Journal of International and Comparative Social Policy 34 (2018), 172-187.

40 The decisions are from the same day and are almost identical, ECJ, *Hungary v. Parliament and Council*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2021:974, para. 129; ECJ, *Poland v. Parliament and Council*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 147.

41 Maurizio Fioravanti, *Costituzionalismo. La storia, le teorie, i testi* (Carocci 2018), 75-79; See only the articles in the relevant Special Issue of the Yale Law Journal (n. 16).

42 Philip Pettit, *On the People's Terms. A Republican Theory and Model of Democracy* (Cambridge University Press 2012) does assign importance to social justice, but only in the state context; see further Philip Pettit, *Just Freedom. A Moral Compass for a Complex World* (W. W. Norton 2014).

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Ulrike Guérot promotes the revolutionary foundation of a European republic.[43] The economist Stefan Collignon and the political scientist Thilo Zimmermann conceive of a European republic that is founded on its economic integration and common goods.[44] Kostas A. Lavdas and Dimitris N. Chryssochoou conceptualise the Union as a *res publica composita*,[45] and Thorsten Thiel reconstructs it along the lines of Philip Pettit and Hannah Arendt.[46] In legal literature, Anna Kocharov's analysis of the politicised EU as Republican Europe has triggered a broad response,[47] Elias Deutscher has confirmed ordoliberal insights with Pettit, and Lieneke Slingenberg has analysed ECHR decisions with him.[48] Robert Schütze's European federalism is republican.[49] While there are contributions, they do not yet constitute a robust research field.

A broader examination produces much more, and broader, evidence. That examination starts with the Italian prison island of Ventotene. There, in 1941, leftist Altiero Spinelli and liberal Ernesto Rossi jointly drafted a manifesto for a post-fascist Europe that is federal and – an aspect that is often overlooked – republican.[50] This manifesto aligns with the Federalist Papers, Kant, and like-minded political forces that have intervened in European constitutional developments since 1848.[51]

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43 Ulrike Guérot, *Warum Europa eine Republik werden muss! Eine politische Utopie* (Dietz 2016).

44 Stefan Collignon, *The European Republic* (The Federal Trust Foundation 2003); Thilo Zimmermann, *Europäischer Republikanismus. Ein kohärenter Erklärungsansatz für die wirtschaftliche und politische Integration in Europa?* (Springer Cham 2023), 139 ff.

45 Kostas A. Lavdas and Dimitris N. Chryssochoou, *Republican Europe in a Liberal Milieu* (NYU Law School 2009).

46 Thorsten Thiel, *Republikanismus und die Europäische Union. Eine Neubestimmung des Diskurses um die Legitimität europäischen Regierens* (Nomos 2012).

47 Anna Kocharov, *Republican Europe* (Bloomsbury Publishing 2017).

48 Elias Deutscher, 'The Competition-Democracy Nexus Unpacked – Competition Law, Republican Liberty and Democracy', YBEL 41 (2022), 197-251; Lieneke Slingenberg, 'The Right Not to Be Dominated: The Case Law of the European Court of Human Rights on Migrants' Destitution', HRLR 19 (2019), 291-314.

49 Robert Schütze, Models of Demoicracy: Some Preliminary Thoughts (2022). EUI Working Paper LAW 2020/08, 36 ff., available at: https://hdl.handle.net/1814/67823; Robert Schütze, 'The Internal Market: A Constitutional Perspective' in: Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law – Volume II: The Internal Market* (forthcoming; Oxford University Press 2026, manuscript on file with the author), Section VI. C.

50 Altiero Spinelli and Ernesto Rossi, 'Per un'Europa libera e unita. Progetto di un manifesto' in: Altiero Spinelli and Ernesto Rossi (eds), *Il Manifesto di Ventotene* (Guida 1982), 9-30 (22 ff.). On Spinelli's contribution, see Lucio Levi (ed.), *Altiero Spinelli and Federalism in Europe and in the World* (Angeli 1990).

51 Nadia Urbinati and Vikram Visana, 'Beyond the Polis' in: Eugenio Biagini and Gary Gerstle (eds), *A Cultural History of Democracy in the Modern Age* (Bloomsbury Academic 2022), 215-237 (224); Éva Bóka, *Engineering European Unity. The Quest for the Right Solution Across Centuries* (Central European University Press 2022), 96.

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Many analyses of European integration consider this manifesto as a slightly quirky and ultimately unsuccessful initiative, as evidenced by the failure to establish a Union constitution, first via the failed Treaty of 1984 establishing the European Union and second in the form of the failed Constitutional Treaty of 2004.[52] Yet, the manifesto is linked to today's European constitutional core. This is true for European federalists, many of whom have a republican orientation.[53] It is a federalism that aims to unite republics in a common republic. Such federalism has inspired Italian socialist Giuliano Amato, French liberal Valéry Giscard d'Estaing, founder of the *Républicains indépendants* party, and Belgian Christian democrat Jean-Luc Dehaene, who drafted, as a member of the Presidium of the Constitutional Convention, Art. 2 TEU.[54]

This tradition underlies Amato's understanding of European integration as 'Constructing Utopia'[55] as well as Macron's Sorbonne speech from 2017.[56] The same applies to the demands of the Conference on the Future of Europe for more European solidarity, more European civic participation, and more European decision-making.[57] This last point is the key concern in *70 Years of EU Law*'s last chapter that seeks to make this possible without Treaty change. No wonder that the Commission's 2017 White Paper on the Future

52 Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005), 32 f.; Cecilia Valente, Carola D'Alessandro and David Ramiro Troitiño, 'Altiero Spinelli: Federalism in the European Integration' in: David Ramiro Troitiño, Ricardo Martín de la Guardia and Guillermo A. Pérez Sánchez (eds), *The European Union and Its Political Leaders: Understanding the Integration Process* (Springer 2022), 141-158 (150 f.).

53 See only Koen Lenaerts and Stanislas Adam, 'La solidarité, valeur commune aux états membres et principe fédératif de l'Union européenne', C.D.E. 57 (2021), 307-417 (314 f.); Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).

54 On the process Alain Pilette and Etienne de Poncis, 'Valeurs, objectifs et nature de l'Union' in: Giuliano Amato, Hervé Bribosia and Bruno de Witte (eds), *Genèse et destinée de la constitution européenne. Commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (Bruylant 2007), 287-310 (299 f.); Clemens Ladenburger and Pierre Rabourdin, 'La constitutionnalisation des valeurs de l'Union. Commentaires sur la genèse des articles 2 et 7 du traité sur l'Union européenne', Revue de l'Union européenne 657 (2022), 231-239 (239).

55 Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin, 'Introduction' in: Giuliano Amato, Enzo Moavero Milanesi, Gianfranco Pasquino and Lucrezia Reichlin (eds), *The History of the European Union. Constructing Utopia* (Hart 2019), 1-3.

56 Emmanuel Macron, 'Initiative pour l'Europe – Discours pour une Europe souveraine, unie, démocratique', 26 September 2017.

57 Conference on the Future of Europe, 'Report on the Final Outcome', May 2022, <https://futureu.europa.eu/de/pages/reporting?locale=de>, last access 17 February 2026; 'Editorial Comments: From Conference to Convention? Ideas and Prospects for Reform of the EU Treaties', CML Rev. 59 (2022), 1583-1596.

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of Europe even posits the republican 'Ventotene Manifesto' as the pivotal source for the EU's path and future.[58]

Republican federalists are an important force in European society, but they are not domineering. Even among European socialists, liberals, and Christian democrats, many think in a Member State-centred way. Nevertheless, republican ideas have traction beyond European federalists. Consider the celebrations for the Constitutional Treaty on 29 October 2004. After signing, the signatories gathered for the group photo that was to bear witness of the new foundation. Emblazoned above their heads was the formula 'Europaeae rei publicae status'. It allows for various translations, such as 'The state of the European state'. But the more obvious one is: 'The constitution of the European Republic'.[59]

The Constitutional Treaty failed in 2005, but not its republican project. The Lisbon Treaty of 2007 incorporated much of the Constitutional Treaty. This is particularly true in respect of Art. 2 TEU. This incorporation reflects a democratically important point that is often neglected: the Constitutional Treaty met with great approval in European society. When the Member States halted the ratification process because of the French and Dutch 'no' votes, this was done against the Austrian, Belgian, Cypriot, Estonian, Greek, Hungarian, Italian, Latvian, Lithuanian, Luxembourg, Maltese, Romanian, Slovakian, Slovenian and Spanish 'yes' votes. While Germany had not yet ratified pending the Federal Constitutional Court's Lisbon decision, its legislator had already voted in favour of ratification. In this respect, it cannot be claimed that 'the Europeans' rejected the Constitutional Treaty outright. On the contrary: the vast majority were in favour. The incorporation of what I consider the republican manifesto of the Constitutional Treaty into the Treaty of Lisbon is legitimate.

2. Art. 2 TEU as a Republican Manifesto

What legal evidence is there that republicanism informs the evolution of EU law? I start with a comparison of Art. 2 of 1958 with Art. 2 of 2009. In 1958, integration aimed at the establishment of a common market, the progressive approximation of national economic policies, the promotion of a

58 European Commission (n. 30), 6.

59 <https://www.europarl.europa.eu/about-parliament/de/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe>, last access 21 January 2026. On the concept of republic at that time: Florence Chaltiel, 'Une Constitution pour l'Europe. An I de la République Européenne', R. M. C. 471 (2003), 493-502.

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harmonious development of economic activities, continuous and balanced expansion, increased stability, an accelerated raising of the standard of living, and closer relations between the Member States (Art. 2 of the Treaty establishing the European Economic Community [EEC Treaty]). There is not a word of this in Art. 2 TEU in its Lisbon version of 2009, which speaks of pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men, human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.

The comparison reveals a categorical change over time. Even a sceptic will admit that these twelve principles can serve as a republican manifesto and that their positivisation, operationalisation, and institutionalisation can prove the relevance of republican thought. This is all the more important as integration could have also led to executive federalism through a regulatory agency far removed from citizens and democratic processes.[60] Today, the Union operates under constitutional principles that, while not exclusive, are key to the republican tradition. What Art. 2 EEC Treaty was about continues to be relevant (Art. 3 para. 3 TEU), but in serving the European constitutional project.

A comparison of Art. 2 TEU with its predecessor in the Amsterdam Treaty of 1997 confirms the republican thrust. The predecessor was more influenced by Anglo-American liberalism: it spoke of liberty instead of freedom and was silent on solidarity. If one places understandings of fundamental rights between liberalism (a negative and individualistic understanding focused on liberty) and republicanism (a positive and intersubjective understanding focused on freedom), the Union's fundamental rights today, after 50 years of development, can be located in the latter field.[61]

It reinforces the republican interpretation of the Treaties that Art. 2 TEU postulates a European society. This is the second major innovation of Art. 2 TEU,[62] one that *70 Years of EU Law* is shy to use.[63] Yet, European society is

60 Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr 1972); such thought is still present, see Peter L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press 2010).

61 See the overview in Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017).

62 For more detail Armin von Bogdandy, On Meaning and Promise of European Society (November 25, 2024). MPIL Research Paper No. 2024 – 30, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5032634.

63 There is only one specific reference, Isabel Galino Martín, Gaetane Goddin, Bernd-Roland Killmann, Denis Martin, Barbara Rous, Napoléon Ruiz García, Anna Szmytkowska, Freya van Schalk and Hubert van Vliet, 'From Economic Community to a Union for Its Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 129-152 (152). However, many uses of 'society' in *70 Years of EU Law* can be understood as referring to European society.

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implicit throughout the book: if EU citizens form something, that something is not a European people or a European nation, but a European society, as posited by Art. 2 TEU.[64] In 2024, the Legal Service gave the concept a key role, positing that Hungary's anti-LGBTIQ law 'is a frontal and deep attack against […] European society'.[65]

Society is a 'collective singular', as are state, people, *demos* or nation,[66] and it is key in the republican tradition. One of the most important documents of European constitutionalism, Art. 16 of the Declaration of the Rights of Man and of the Citizen of 1789, uses society in a way that became key for republican government: 'Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.' In this tradition, the Ventotene Manifesto aims for a *riforma della società*,[67] which can only point to a reform of European society.

What was a political projection in 1941 is now constitutionally enshrined. Art. 2 TEU states that there is a European society, one that is characterised by twelve constitutional principles that all square with the republican tradition.[68] This European society is far more than the European civil society referred to in Art. 11 para. 2 TEU. The idea of civil society is 'private commitment to the public good'. The term 'society' used in Art. 2 TEU is much broader as it refers to a social totality whose political institutions are those of the European Union and all Member States.

The society in Art. 2 TEU reinforces its interpretation as a republican manifesto as it stresses republican equality. It suggests a meaning of Union interest which goes beyond the aggregate of national interests (Art. 17 para. 1 sentence 1 TEU). The term also suggests that most of today's challenges are no longer specific to the Member States, but affect citizens of different Member States as members of one society. For example, the conflict over the democratic rule of law is not only a conflict with some Eastern Member States, but also a conflict between different political and

64 Of course, Art. 2 TEU's concept of European society not only includes citizens, but also resident foreign nationals. Given the EU Treaty's commitments to universalism and global constitutionalism (Art. 3 para. 5 TEU, Art. 21 TEU), its republicanism cannot follow the exclusionary logic of the early Roman republic.

65 ECJ, *Commission v. Hungary*, opinion of advocate general of 5 June 2025, case no. C-769/22, ECLI:EU:C:2025:408; Lena Kaiser, Andreas Knecht and Luke Dimitrios Spieker, 'European Society Strikes Back', Verfassungsblog, 26 November 2024, doi: 10.59704/00f6c17a50fc172c.

66 Albrecht Koschorke, *Hegel und wir* (Suhrkamp 2015), 82-92.

67 Spinelli and Rossi (n. 50), 38 ff.

68 Advocate General Capeta sums this up as the constitutional mandate for a 'good society', ECJ, *Commission v. Hungary* (n. 65), para. 157.

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ideological camps that are present in almost all Member States. A coding of the conflicts that focuses only on the Member States overlooks Union citizens.

European citizenship, one key to European republicanism, has been a legal concept since 1992.[69] Initially, this citizenship met with scepticism.[70] Soon, however, it developed legal and social effects: today, 75 % of Union citizens are aware of this status and treasure it.[71] Along those lines, *70 Years of EU Law* uses a concept quintessential to the evolution of EU law over the last 70 years. Not all approaches to EU law and not even all strands of European constitutionalism attribute such importance to EU citizenship, so one might doubt the Legal Service's choice to put it front and centre. I see it as legal and legitimate, because Art. 2 TEU informs the mandate of the institutions and hence the Commission's Legal Service (Art. 1 para. 2 TEU and Art. 3 para. 1 TEU).[72]

3. Operationalisation of the Manifesto

Initially, only a few lawyers recognised the legal significance of the European republican manifesto, i. e. of Art. 2 TEU. This perception shifted when what the French (Art. 89), Italian (Art. 139 CI), and US (Art. IV Section 4) constitutions protect as the republican form of government began to waver. Given the European Council's incapacity to rise to the challenge, the CJEU mobilised the republican manifesto, much supported by the Commission's pleadings. It is little wonder that *70 Years of EU Law* Part 1 summarises this case law as quintessential for the 70 years of EU law.

From 2018 onwards, the CJEU issued decisions with transformative impact that its President compared to that of its landmark cases *Van Gend en Loos*

69 First published in European Parliament, Resolution on the draft Treaty establishing the European Union, OJ C 77, 19 March 1984, 33. On Spinelli's role Sergio Pistone, 'Altiero Spinelli and the Strategy for the United States of Europe' in: Lucio Levi (ed.), *Altiero Spinelli and Federalism in Europe and in the World* (Angeli 1990), 133-140.

70 See Joseph H. H. Weiler, 'Citizenship and Human Rights' in: Jan A. Winter, Deirdre M. Curtin, Alfred E. Kellerman and Bruno de Witte (eds), *Reforming the Treaty on European Union. The Legal Debate* (Kluwer 1996), 57-86 (65).

71 European Commission, Standard Eurobarometer 103 – Spring 2025: European Citizenship, Survey of March-April 2025, 26-28.

72 On Art. 3 para. 1 TEU, Ferdinand Weber, 'Die Daseinsberechtigung der Union – Artikel 3 Absatz 1 EUV' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen in Artikel 1 bis 19 EU-Vertrag* (Nomos 2024), 179-235.

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and *Costa v. ENEL*:[73] *ASJP*,[74] *LM*,[75] *Commission v. Poland*[76]. The Court's plenary stated that the values of Art. 2 TEU 'define the very identity of the European Union as a common legal order'.[77] The Union values thus assume a position comparable to the constitutional identity of Member States. Importantly, they define not only the European Union but ultimately every legal relationship in European society. With this case law, European constitutionalism evolved from a functional (effet-utile) constitutionalism, oriented towards the effectiveness of Union law, to a genuine, a principled constitutionalism.[78] The European Council and the Union legislator have confirmed this case law.[79] All Union institutions and many Member States now make use of the principles of Art. 2 TEU. This is relevant under constitutional law: the political organs are also competent to interpret constitutional law and shape its understanding.

What speaks in favour of interpreting this development as a republican one? In terms of comparative law, it is an application of what the French, Italian, and US constitutions understand as a defence of the republican form of government. The emphasis on the separation of powers is a particularly republican objection to those who refer to their electoral mandate as supreme. The role that the European Court of Justice (ECJ) assigns to the principle of solidarity (Art. 2 sentence 2 TEU) confirms a republican reading. It holds that the Union budget is one of the most important instruments with which 'the principle of solidarity referred to in Art. 2 TEU, which is itself one of the fundamental principles of Union law, can be given concrete form'.[80] Koen Lenaerts and Stanislas Adam have pushed forward this understanding of solidarity.[81] The European legislator justifies many legislative and

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73 Koen Lenaerts, 'Upholding the Rule of Law Through Judicial Dialogue', Speech at King's College London, 21 March 2019, <https://youtu.be/qBOeopzvPBY?si=USv8JBlgV-7zks9Y&t=1163> [min: 19:23], last access 21 January 2026.

74 ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgement of 27 February 2018, case no. C-64/16, ECLI:EU:C:2018:117, paras 30, 32, 35.

75 ECJ, *LM*, judgement of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586, paras 35, 48, 50.

76 ECJ, *Commission v. Poland*, judgement of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, paras 42, 47, 58.

77 ECJ, *Hungary v. Parliament and Council* (n. 40), paras 127, 232.

78 Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New Constitutionalism', CML Rev. 61 (2024), 1471-1500.

79 Regulation 2020/2092/EU of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I. Recitals 3 and 5 expressly refer to the case law.

80 ECJ, *Hungary v. Parliament and Council* (n. 40), para. 129; *Poland v. Parliament and Council* (n. 40).

81 Lenaerts and Adam (n. 53), 314 f.

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budgetary measures as an expression of European solidarity, a European solidarity that probably surprised everyone in 2020: the response to the pandemic exemplifies European solidarity, not only because of the sums involved, but also because of the easing of conditionality.[82] The European legislator is now relying on the solidarity clause of Art. 122 Treaty on the Functioning of the European Union (TFEU) to introduce the Support to mitigate Unemployment Risks in an Emergency (SURE) and Next Generation EU programmes.[83] In doing so, it is transforming a set of rules that initially aimed to set limits on national budgets into a macroeconomic constitution under which the Union organises joint expenditure and redistribution. Given all these developments, it is surprising that *70 Years of EU Law* pays little attention to solidarity.

European solidarity is important in many other areas of EU law. There is 'financial solidarity between the nationals of the host Member State and those of the other Member States'.[84] The case law on the general prohibition of discrimination, on Union citizenship, and on the free movement of workers fits a republican scheme: the aim is always to ensure equal freedom, including between private individuals. European solidarity justifies interventions in private autonomy and the market economy, which aligns more with republican than liberal understandings. The Court's statement that EU citizenship is 'one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration […] and which is an integral part of the identity of the European Union as a specific legal system'[85] provides another boost to a republican reading as the Court decided against a transactional, market-liberal understanding of citizenship. European republicanism helps us to understand this idea of European citizenship better than its contenders.

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82 Michael Ioannidis, 'Between Responsibility and Solidarity. COVID-19 and the Future of the European Economic Order', HJIL 80 (2020), 773-783.

83 Council Regulation 2020/672/EU of 19 May 2020 establishing a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE), OJ L 159; Council Regulation 2020/2094/EU of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I.

84 ECJ, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, judgement of 20 September 2001, case no. C-184/99, ECLI:EU:C:2001:458, para. 44. The development of this principle is not straightforward, See in particular ECJ, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, judgement of 11 November 2014, case no. C-333/13, ECLI:EU:C:2014:2358.

85 ECJ, *Commission v. Malta*, judgement of 29 April 2025, case no. C-181/23, ECLI:EU:C:2025:283, para. 93. See in detail Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds Without Belonging? The *Genuine Link* in International, Union, and Nationality Llaw', YBEL 43 (2024), 56-94.

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The tenets of Art. 2 TEU have become the dynamic focus of countless legal, political, and everyday discourses. In 2022, the novelist Robert Menasse published his novel 'Die Erweiterung' (The Enlargement), which makes this republican manifesto its key point.[86] The European Central Bank is considering printing the values of Art. 2 TEU on the next generation of banknotes.[87] To add to this, there is a geopolitical dimension.

The dominant European discourse presents Russian aggression as a threat to 'our values' – that is, the values enshrined in Art. 2 TEU. On this point, politicians as diverse as Annalena Baerbock, Ursula von der Leyen, and Giorgia Meloni agree. 'Our values' serve to justify confronting an aggressive nuclear power, providing Ukraine with billions of euros in support, and welcoming millions of refugees. These are existential issues, so it is relevant that this political stance enjoys much support.[88] Since 2025, the Second Trump administration has turbocharged all this.

The regular criticism of Brussels' output as representing the lowest common denominator is yet more proof of how deeply European republicanism is embedded in European discourse. A republican understanding of the common good, unlike a transactional one, requires more than just the reconciliation of different interests. Republicanism gives true meaning to the Treaty when it states that there is a 'general interest of the Union', Art. 17 para. 1 TEU, i. e. it is this interest that defines the Commission's and hence its Legal Service's mandate.

To appreciate the recent dynamics of the republican manifesto, it is helpful to compare it with the White Paper on the Future of Europe, published by the Juncker Commission in 2017.[89] It responded to the euro crisis, the migration crisis, the Brexit referendum, the first election of Donald Trump, and predictions that EU-sceptical parties would gain strength in the next European Parliament. The Commission sketched five scenarios for 2025. The first scenario was: 'Carrying on', i. e., further muddling through without any qualitative leaps. The second scenario, 'Nothing but the single market', projected a retreat, the third scenario 'Those who want more do more', differentiated integration in response to growing heterogeneity. The fourth scenario, 'Doing less more efficiently', aims at focusing on and strengthening agencies with executive powers. Finally, the fifth scenario is about 'Doing much more together', which, I contend, involves 'republican deepening'.

86 Robert Menasse, *Die Erweiterung* (Suhrkamp 2022).

87 See <https://www.ecb.europa.eu/pub/pdf/other/ecb.tagreportbanknotes2023~67a9b1739c.en.pdf>, last access 23 February 2026.

88 European Commission, Standard Eurobarometer 103, Spring 2025, First Results: Public Opinion in the European Union, Survey of May 2025, 11, 33.

89 European Commission (n. 30).

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Though the Commission pretends to be agnostic about the five scenarios, the paper's structure (such as placing the scenario 'Doing much more together' as the final one), its framing (such as the role of the Ventotene Manifesto), and many arguments (such as the European 'we') reveal the Commission's thrust that also guides the final chapter of *70 Years of EU Law.*

The juxtaposition of *70 Years of EU Law* and, more generally, the Union in 2025 with the 2017 White Paper illuminates how much the operationalisation of the republican manifesto has solidified European society and the Union's republican thrust. Take the values. The White Paper's sparse and somewhat vacuous references to these values stand in stark contrast to the burgeoning EU constitutionalism that emerged shortly thereafter. The entire first part of *70 Years of EU Law* is dedicated to the values. This is not an isolated phenomenon, but resonates with the developments previously outlined. When viewed through the lens of the White Paper's scenarios, the Union of 2025 aligns closely with the fifth scenario, indeed transcending many of the anticipations set in 2017.

This evolution develops and even shifts the Union's trajectory beyond mere policy adjustments. It transforms the Union's constitutional ethos as the principles of the republican manifesto have moved from the periphery to the core. This reshapes European integration and the Union's role on the global stage. The operationalisation of the republican manifesto marks the Union's history.

4. The Institutional Development

Many provisions of the Treaties develop the republican manifesto, including those on the institutions. This assertion might be surprising as republican authors often require parliament to play the leading role, which is not the case in the European Union. Yet again, my argument is not that the European Union is a model republic. I only claim that republicanism provides a key to interpret its path.

In the early period, integration seemed to be moving towards a regulatory agency deliberately removed from citizens and democratic processes.[90] Today's provisions on the EU institutions are far more responsive to republican thought. The Treaties prescribe that EU institutions govern the common affairs of equal and free citizens (Art. 9 TEU) through a power-sharing setup, including a power-sharing federal structure (Art. 1 para. 1, Art. 4 f. TEU). The Treaties establish a democratic (Art. 2 TEU) and representative (Art. 10

90 Ipsen (n. 60) and Lindseth (n. 60).

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para. 1 TEU) institutional system that provides for government (Art. 15 TEU), legislation (Arts 14 and 16 TEU), administration (Art. 17 TEU), and justice (Art. 19 TEU).[91] All this must be 'as open and as close as possible to the citizens' (Art. 1 para. 2 TEU) as well as participatory and dialogical (Art. 11 TEU). These provisions fit republican thought and support the thesis that it informs the Union's path.

If we find evidence for republicanism in the texts of EU law, the question remains how the Union's institutional practice responds to that. Such responsiveness is a tall order, as is shown by the debate on the Union's democratic credentials. There is no agreement on how the institutions can be 'as open and as close as possible' to 450.000.000 citizens. *70 Years of EU Law* largely avoids this thorny issue.[92] This is a pity, but one cannot expect the Commission's Legal Service to make a statement on the other institutions' democratic credentials, nor on what its leadership should do.

Others make such statements. Some, following Jean-Jacques Rousseau, simply do not see any republican path for a diverse union of 450.000.000 citizens. While I understand their scepticism, giving up is not an option for legal scholarship that aims at substantiating democratic decisions. In that spirit, other republican authors militate for increasing the European Parliament's powers.[93] While I agree that European parliamentarism needs development, I think that there is a greater problem in the European Council.

For many decades, the European Council's role for the Union was reminiscent of the late Roman potentates who prompted Cicero to write his *de re publica*.[94] It was set up outside the Treaties and removed from all supranational accountability.[95] It has responded to republican concerns by turning into an EU institution. Yet, its accountability towards EU citizens remains weak, being mostly mediated through national elections and publics. Another

91 In detail Christoph Möllers, 'Demokratie und Gewaltenteilung. Art. 10-12, 13 EUV' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen in Artikel 1 bis 19 EU-Vertrag* (Nomos 2024), 795-859.

92 The only treatment is in Calleja and Ladenburger (n. 2), at 388, proposing to 'giv[e] citizens' panels an opportunity to formulate recommendations before key legislative initiatives are proposed'. This follows in the footsteps of the Conference on the Future of Europe and the Lisbon Treaty's commitment to participatory democracy, which the book recapitulates at 378 f.

93 Thiel (n. 46); Dawson and de Witte (n. 19).

94 Malcolm Schofield, *Cicero* (Oxford University Press 2021), 7.

95 In detail, see Armin von Bogdandy and Giacomo Rugge, 'Der Europäische Rat – Regieren in der europäischen Gesellschaft' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen in Artikel 1 bis 19 EU-Vertrag* (Nomos 2024), 935-986.

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problem is that the European Council supports Member State-centred understandings of the Union – this also fails European citizenship.[96]

These problems would contradict any argument that proposes the Union as a model republic. But again, this is not the argument here: I do not even present the Union as a republic. What I show is that republicanism (or republican constitutionalism) serves to illuminate the Union's overall evolution, and that it does so better than its main contenders: state-centred approaches and market-centred liberalism. It also provides a forward-looking lens for the Commission president's new role within the European Council and new forms of its operation.[97]

IV. Objections

Part III presented evidence for republicanism as a meaningful approach to EU law and politics. Nevertheless, this approach would prove to be weak if it contradicted core tenets of republicanism such as republican self-determination, republican virtue, and a republican forum. Engaging with these tenets serves to deepen the argument.

1. Republican Self-Determination

Res publica res populi. Few things are as important to republicanism as the authorisation of political power by those subject to it. Many republican approaches give this an idealistic twist. Kant, an important authority on republicanism, sees legitimate legislation ultimately as collective self-legislation.[98] Along these lines, many (though not all) republican theories articulate understandings of democracy that the Treaties do not fulfil.

96 Markus Jachtenfuchs and Mark Dawson, 'Autonomy Without Collapse? Towards a Better European Union' in: Markus Jachtenfuchs and Mark Dawson (eds), *Autonomy Without Collapse in a Better European Union* (Oxford University Press 2022), 3-20.

97 Franz C. Mayer, 'Die Europäische Union als Präsidialregime – aus polnischen Verfassungserfahrungen lernen?' in: Jakub Urbanik and Adam Bodnar (eds), *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis: Studies Offered to Mirosław Wyrzykowski* (C. H. Beck 2021), 485-497; Jan-Herman Reestman and Leonard F. M. Besselink, 'Editorial: *Spitzenkandidaten* and the European Union's System of Government', Eu Const L. Rev. 15 (2019), 609-618 (610).

98 Immanuel Kant, 'Die Metaphysik der Sitten' in: Wilhelm Weischedel (ed.), *Werkausgabe Band VIII. Die Metaphysik der Sitten* (Suhrkamp 1977), 303-634 (§ 52). For a thoughtful critique of my approach, see Claudio Bartmann, 'Repräsentation statt Selbstbestimmung – Die Zukunft der unionalen Demokratie' in: Alexander Heger, Sascha Gourdet and Moritz Malkmus (eds), *Zur Zukunft der Demokratie in der Europäischen Union* (Baden-Baden 2023), 47-84.

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Political self-determination does not square with the Treaties. The republican 'We the People' of the American constitution is on the minds of European policymakers, but it is not in the EU Treaty. Instead, it begins with His Majesty the King of the Belgians, followed by Her Majesty the Queen of Denmark. It is the 'High Contracting Parties' who establish the Union, not its citizens (Art. 1 para. 1 TEU). Neither the EU Treaties nor EU legislation postulate a European 'we', 'self' or people. Thus, some republican approaches, similar to communitarian and state-centred approaches, observe a systemic deficit of the European Union, articulated as the no-demos thesis.[99] These approaches consider that the Union itself is not democratic, only its Member States are. Accordingly, the assertion that the Union operates as a representative democracy (Art. 10 para. 1 TEU) is untenable.

Yet, the lack of a European 'we' does not preclude a republican reconstruction of Union law. The Treaty's conception of democracy can be reconciled with the republican tradition. One way to do so is to rely on theories that do not conceive of authorisation in terms of self-legislation of *a* people, but stress that equal and free citizens provide their peers with a mandate for political rule.[100]

In order to deepen this understanding of European republicanism, I suggest an additional step that relates the facticity of Union law to the normativity of neo-Kantian republicanism, as represented by Rainer Forst. Forst deduces the need for self-determination from the idea of autonomy,[101] so autonomy is the key standard. Art. 2 TEU requires every act of the Union to comply with the principles of pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men, respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. All these tenets serve autonomy. Moreover, the Union institutions must be able to justify any act in the light of Art. 2 TEU in political proceedings, in judicial proceedings, in public, and ultimately vis-à-vis any person concerned, and Forst substantiates the idea of self-determination with the right to justifica-

99 Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019); from a state-related perspective, Kirchhof (n. 24); from a communitarian perspective Joseph H. H. Weiler, 'The State "über alles". Demos, Telos and the German Maastricht Decision' in: Ole Due, Marcus Lutter and Jürgen Schwarze (eds), *Festschrift für Ulrich Everling. Band 2* (Nomos 1995), 1651-1688.

100 Sellers (n. 7), 28 f., 38 f.; Pettit, *Republicanism* (n. 10) and Pettit, *On the People's Terms* (n. 42).

101 Forst, *Die noumenale Republik* (n. 9), 39 ff.

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tion.[102] EU authority is then legitimate under neo-Kantian republicanism if it satisfies those twelve principles.[103]

Such a reading of republicanism also serves as a theoretical approach. Rather than only being a critical theory, it becomes constructive within European society. This reading also avoids the dilemma that republican thought centred on self-determination must declare the Union to be undemocratic, even though democratic processes have qualified it as democratic: the ratification of Art. 2 TEU and Art. 10 TEU by the parliaments of all Member States fulfils all democratic standards.

2. Republican Virtue

The iconography of republicanism is rich in depictions of citizens who virtuously serve the common cause, and a perceived lack of virtue has haunted republicanism since Cicero.[104] There is the well-known adage that the First Republics in Austria and Germany were republics with excellent republican constitutions yet devoid of republican virtue, foreshadowing their eventual failure. The tenet of virtue underscores the social significance of loyalty, of duty, and of practicing values. Various republican theories advocate for a citizenry dedicated to the common good, the *res publica*, which is essential for societal stability and personal fulfilment.[105]

David's painting *Le Serment des Horaces* stands as a cultural icon of this ideal.[106] This might be why Larry Siedentop cloaked his sceptic book *Democracy in Europe* with the *Serment des Horaces*: even its cover suggests that EU democracy is a fantasy.[107] With a Davidian understanding, EU republicanism seems indeed absurd: there are no significant manifestations of European virtue akin to the young men in David's *Serment*, who are happy to defy death for the common cause.

Yet, European society functions, as do many national societies, without Davidian virtues. Are these societies precarious or even doomed? Such a

102 Rainer Forst, *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp 2007).

103 The concept of *non-domination* could have a similar thrust. It adheres to the idea of autonomy but seeks to avoid the pitfalls of the idea of *self-government*.

104 Schofield (n. 94), 147 ff.

105 See Hannah Arendt, *The Human Condition* (The University of Chicago Press 1958).

106 Although the painting was commissioned by Louis XVI and depicts an event of the Roman monarchy, it became an icon of French republicanism, Christine Tauber, 'Neue Identitäten – neue Genealogien: Jacques-Louis Davids künstlerische Selbstdarstellung nach dem 9. Thermidor 1794', Zeitschrift für Kunstgeschichte 79 (2016), 331-364 (336 f.).

107 Larry Siedentop, *Democracy in Europe* (Allen Lane 2000).

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conclusion seems to me more ideological than empirically grounded. Indeed, the European Union demonstrates that a society can thrive without such virtue: its constitutional law has proven to be a surprisingly stable framework amidst numerous crises. In any event, the Union has confounded the many who expected its disintegration. Rather, the Union has responded to its challenges, from the sovereign debt and refugee crises to Brexit, authoritarian tendencies in some Member States, the pandemic, and the war in Ukraine.[108] This resilience underscores the current legal and political significance of EU constitutional law, calling for thicker theories than just constitutionalism.

Hermann Heller, a republican constitutional scholar (and an authority referred to by the German Federal Constitutional Court on questions of social cohesion) shows what is key for modern European republicanism.[109] Heller observed that the Weimar Republic's survival hinged not on virtuous citizens but on the ruling classes allowing the working class to improve their situation under the Weimar constitution's procedures and principles[110], a position close to French republicanism.[111]

Heller even anticipates a move towards European republicanism. Back in 1928, he wrote 'that in post-war Europe the idea of the sovereign nation state has lost much of its persuasive power among all classes. For the ruling class itself, the question has become highly problematic as to whether today's nation state serves the self-preservation of the nation better than a European federal state. For this reason, too, the national idea will very soon prove to be insufficient to legitimize democracy'.[112] According to Heller's thought, a European federation could be viable if it realises the democratic and social rule of law.[113] After experiences with fascism, National Socialism, Iberian and Greek authoritarianism, and Soviet communism, Christian democratic, liber-

108 See Jörn Axel Kämmerer, Markus Kotzur and Jacques Ziller (eds), *Integration und Desintegration in Europa* (Nomos 2019); Hans Vollaard, *European Disintegration: A Search for Explanations* (Palgrave Macmillan 2018); Luuk van Middelaar, *Pademonium. Saving Europe* (Agenda Publishing 2021).

109 BVerfGE *Maastricht* (n. 5); on Heller's republicanism Marcus Llanque, 'Politik und republikanisches Denken: Hermann Heller' in: Hans J. Lietzmann (ed.), *Moderne Politik: Politikverständnisse im 20. Jahrhundert* (VS Verlag für Sozialwissenschaften 2001), 37-61.

110 On this nexus of democratic stability and material situation Daron Acemoglu and James A. Robinson, *Why Nations Fail. The Origins of Power, Prosperity and Poverty* (Profile Books 2013).

111 On the Weimar concept of republic Emanuel Richter, '6.3 Republik' in: Rüdiger Voigt (ed.), *Aufbruch zur Demokratie: Die Weimarer Reichsverfassung als Bauplan für eine demokratische Republik* (Nomos 2020), 159-170.

112 Hermann Heller, 'Politische Demokratie und soziale Homogenität (1928)' in: Martin Drath and Christoph Müller (eds), *Gesammelte Schriften. Band 2* (Sijthoff 1971), 421-434 (433).

113 Hermann Heller, *Rechtsstaat oder Diktatur?* (Mohr Siebeck 1930), 9, 26.

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al, and socialist politicians laid down these principles in Art. 2 TEU and tasked the Union with their realisation in Art. 3 TEU.

Davidian republican virtue is dispensable for a viable society[114] and sits uneasily with the ethos of free societies.[115] Moreover, an operative democratic constitution serves as a functional equivalent to virtue as the leading human motive. Republican thought can still mobilise for practicing public freedom, including lively debates, civic engagement, or a strong opposition that provides for accountability.[116] Indeed, *70 Years of EU Law* proposes taking on the Conference on the Future of Europe's model of 'citizens' panels' in the context of legislative initiatives.[117]

The practice of public freedom has solid foundations in the Union Treaties, starting with Art. 1 para. 2 TEU. These foundations are more than law in the books. The politicisation of the Union has been transforming the meaning of civic action by involving citizens as Union citizens. Many conflicts now appear as European conflicts because they concern people throughout European society and involve issues of *European* rights, *European* democracy, the *European* rule of law or *European* solidarity. Of course, the concrete meaning of these terms is often disputed. However, disputes regarding their meaning strengthen republican dynamics if they occur in a European republican forum.

3. Republican Forum

Republicanism requires a forum (or, as synonyms, an agora, a public, a public space or sphere) where citizens freely interact. Such a communicative space has intrinsic value, as it creates a place to practice freedom, and also serves the process in which the common good is determined. The requirement of such a forum, triggers an important objection to European republicanism: the alleged absence of such a space at the European level.

114 On the need of democratic education, Kris Grimonprez, *The European Union and Education for Democratic Citizenship. Legal Foundations for EU Learning at School* (Nomos 2020).

115 This point is key to Böckenförde's dictum, see Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation' in: *Säkularisation und Utopie. Ebracher Studien. Ernst Forsthoff zum 65. Geburtstag* (Kohlhammer 1967), 75-94 (93).

116 For such proposals see Frankenberg (n. 17), 32 ff., 133 ff., 213 ff.; Thiel (n. 46), 240 ff.; Alexander Somek and Elisabeth Paar, 'Europe's Political Constitution', European Law Open 2 (2023), 484-510 (§ 9).

117 See n. 92. See further the results of the Conference on the Future of Europe (n. 57); Council of the European Union, 'Presidency Conclusions on Strengthening EU Democratic Resilience', 9463/25, 27 May 2025.

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The Union's democratic character has been challenged because it allegedly lacks a European public space.[118] This objection, dating from the 1990s, has lost much of its force due to the Union's politicisation. The vibrant communication within European society today can be conceptualised as a European public space, though not one that can be squared with theories of the 1960s.[119]

A public space, as here understood, is a communicative setting where actors engage over collective decisions in the presence of an affected audience. For a European public space to materialise, three elements are essential: a mobilising topic requiring a collective decision that impacts people across Member States; the presence of actors and audiences from across European society; and shared meaning,[120] also understood as a common *frame*[121] or a common *world*.[122]

In Europe, such a public space has solidified around the crises mentioned earlier. There are many mobilising topics requiring a collective decision. Today, even routine politics unfold within this space, whether it's the debate over phasing out combustion engines, classifying nuclear energy as 'green', or border security at the Evros river. This European public space often builds upon and connects various national public spaces. From a republican perspective, these diverse spaces coalesce into a singular European space when they interact in pursuit of the common good.

As to actors and audiences from across European society, various mechanisms provide for that interaction. The most obvious is provided by the European Council. It links the various national spaces in one European space, acting as a crisis manager, *impasse-breaker*, *strategist*, *shaper* or collective head of state.[123] Its meetings process pressing issues in the public eye. They generate mass media publicity, even though that coverage is framed with reference to national concerns (III. 3.).

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118 See in the republican tradition Dieter Grimm, 'Braucht Europa eine Verfassung?', JZ 50 (1995), 581-591 (587 ff.).

119 The following relies on Thomas Risse, 'European Public Spheres, the Politicization of EU Affairs, and Its Consequences' in: Thomas Risse (ed.), *European Public Spheres. Politics Is Back* (Cambridge University Press 2015), 141-163.

120 Thomas Risse, 'Introduction' in: Thomas Risse (ed.), *European Public Spheres. Politics Is Back* (Cambridge University Press 2015), 1-26 (10 f.).

121 Rens Vliegenthart and Liesbet van Zoonen, 'Power to the Frame. Bringing Sociology Back to Frame Analysis', European Journal of Communication 26 (2011), 101-115.

122 In the footsteps of Hannah Arendt, Somek and Paar (n. 116), § 12.

123 Luuk van Middelaar and Uwe Puetter, 'The European Council: The Union's Supreme Decision-Maker' in: Dermot Hodson, Uwe Puetter, Sabine Saurugger and John Peterson (eds), *The Institutions of the European Union* (5th edn, Oxford University Press 2022), 51-77 (66 ff.).

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While the European Council and mass media have been the focus of most studies on the European public space, other fora, such as legal journals and blogs, also play a role, as does discussing *70 Years of EU Law*. Such discussions influence collective decisions because they often impact decision-making processes. Public engagement with the law shapes concepts as well as legal and political structures. Tracing the Europeanisation of legal academia helps tracing parts of a larger European public space.

Today, the *Common Market Law Review*, the *European Constitutional Law Review*, the *International Journal of Public Law*, the *German Law Journal, European Law Online, European Law Live* provide European fora, and the *Heidelberg Journal of International Law* has the ambition to join that group. They form a European public space because they publish articles read across Europe on shaping, interpreting, or questioning collective decisions that affect European society.

This brings us to the third element, the common frame. The authors of articles in those journals, though employed in national legal academia, are Europeanised not only for their topics, but also for their *frames*: scholars who only refer to and speak to their compatriots are unlikely to be published. To be published, an author must refer to discourses that connect people across Europe and thus provide a *common world* in Arendt's sense.[124]

European public spaces develop even more dynamically for blogs such as *Strasbourg Observers* or *Verfassungsblog*. This is because a typical blog post takes a stance on a controversial issue,[125] which corresponds to the agonistic moment of public spaces. It is concise and appears quickly when the issue is still in the public eye. It reacts almost as quickly as an article in the mass media and comes with academic authority. We now have concise, pointed and current contributions on conflictual topics of European interest on platforms followed throughout Europe. In this way, national academics feed European public spaces.

Of course, such academic fora are but a tiny part of the public space. And, more broadly, it is beyond doubt that the European public space is not as developed as the national space. It is also apparent that the European public space has flaws, including many asymmetries in the voice it lends to different social groups. But discussing the deficiencies is not the issue here.[126] What

124 A common world in Arendt's sense does not require a consonance of perceptions and views (homogeneity), Somek and Paar (n. 116).

125 Max Steinbeis, 'How to Write a Blog Post. The Most Important Thing is a Clear, Sharp Thesis', Verfassungsblog, 10 June 2023, doi: 10.17176/20230609-231112-0.

126 Jürgen Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Luchterhand 1962).

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matters is the evidence for the European public space as a condition of European republicanism to be meaningful.

V. Making It Practical

European republicanism is a useful paradigm for legal work. It helps practitioners and scholars to advance the ongoing republican transformation (or 'citizen-centred' transformation, as *70 Years of EU Law* puts it).[127] Their contribution is important, not least for the obstacles to Treaty reform, that is to keep EU constitutional law in sync with societal and geopolitical challenges.

Such forward-looking lawyering is legitimate: the constitutional project manifested in Articles 1 to 19 TEU identifies EU constitutional law as an unfinished project that can be advanced, within the limits of legal hermeneutics, through interpretation.[128] The key to this interpretation is the European constitutional core (Art. 1, 2, and 3 para. 1 TEU). This core informs the entire EU legal order,[129] as Art. 2 TEU states that its principles 'characterize' European society.[130] The Court of Justice has emphasised the principles of Art. 2 TEU as the Union's identity.[131] All interpretations must align with its 'constitutional framework' or 'constitutional structure',[132] following many apex courts.[133] The CJEU describes that *concretization* as follows: the principle of representative democracy in Art. 10 para. 1 TEU 'concretizes' the value of democracy in Art. 2 TEU, and Art. 14 para. 3 TEU 'implements' this principle.[134] Similarly, the value of the rule of law is a fundamental premise of Union law, which is 'concretized' by the guarantee of judicial independence in Art. 19 TEU.[135] With the same logic, the constitutional core impacts secondary law and even the law of the Member States. Such interpretations can address republican demands, such as enhancing transparency,

127 Calleja and Ladenburger (n. 2).

128 In detail Bast and von Bogdandy, 'The Constitutional Core' (n. 78).

129 Bast and von Bogdandy (eds), *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen in Artikel 1 bis 19 EU-Vertrag* (Nomos 2024).

130 So explicitly the French, Italian, Spanish etc. versions of the Treaty.

131 See ECJ, *Hungary v. Parliament and Council* (n. 40), 127, 232.

132 ECJ, *ECHR Accession II*, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paras 158, 165.

133 Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023), 90 ff.

134 ECJ, *Criminal Proceedings against Oriol Junqueras Vies*, judgement of 19 December 2019, case no. C-502/19, ECLI:EU:C:2019:1115, paras 63 ff.

135 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 74), paras 30, 32.

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accountability, contestability, or solidarity, wherever methodologically feasible.

Three caveats to conclude:

First, this contribution does not categorise the EU as a republic.[136] It only shows European republicanism as a possible approach to EU law. Applied to *70 Years of EU Law*: the Legal Service's republicanism does not imply pursuing a European federal republic by stealth.

Second, republicanism is but one of several legitimate approaches to EU law, next to State-centred and market-centred (liberal) approaches.[137] The future of the EU and its law, as its past, will be a compromise between different social groups and forces.[138] While there is no room for republican fundamentalism, it helps to navigate negotiations towards meaningful compromises.

Third, European republicanism should be critical of some problems caused by 70 years of EU law, such as bureaucratisation, alienisation and even threats to individuals.[139] Since *70 Years of EU Law* conveys the impression that EU law is just fine, it misses the full meaning of 'A Union for Its Citizens'. But how could it be otherwise? The Commission's Legal Service has no mandate to publicly critique EU law and policy. One way out is to invite academics to engage with its book, and to suggest with its very title what kind of critique might be particularly helpful for advancing with the mandate of 'ever closer union', read in light of the Union's constitutional core.

136 For that, see Michael Anderheiden, 'Europäische Union – europäische Republik' in: Katharina Gräfin von Schlieffen (ed.), *Republik – Rechtsverhältnis – Rechtskultur* (Mohr Siebeck 2018), 127-140 (137 f.); van Middelaar (n. 108); I was of this opinion with respect to the European Constitutional Treaty, Armin von Bogdandy, 'The Prospect of a European Republic. What European Citizens are Voting for', CML Rev. 42 (2005), 913-941.

137 On these and further understandings, see the 5 Scenarios of the Commission's White Paper, European Commission (n. 30). Elaborating them by competing theories is an academic contribution to democratic society. For the academic debate see Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Routledge 2010); Matej Avbelj (ed.), *The Future of EU Constitutionalism* (Hart Publishing 2023).

138 For a view on the main groups of actors over the last 30 years, Dermot Hodson, *Circle of Stars. A History of the EU – and the People Who Made It* (Yale University Press 2023).

139 From the contributions to this volume, see in particular van de Beeten (n. 1), Leino-Sandberg (n. 1), Thönnes (n. 4), and de Waele (n. 4).

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Buchbesprechungen

***Dunoff, Jeffrey L./Hakimi, Monica/Ratner, Steven R.*: International Law: Norms, Actors, Process: A Problem-Oriented Approach.** Burlington MA: Aspen Publishing, 6th edn. 2025. ISBN 979-8-8890-6281-3 (Connected eBook with Study Center + Hardcover). xxxi, 872 pp. US$ 313.95

1. Prominent international law cases in recent years involving (artificial) islands include the controversy surrounding the Chagos Archipelago and the dispute between China and the Philippines over the South China Sea. The two matters implicate distinct international legal regimes, including decolonisation and self-determination on the one hand and issues of the law of the sea on the other. A synthesis of these cases, which at first glance appear to have little in common, can be found in the first chapter of the sixth edition of the work by Jeffrey L. Dunoff, Monica Hakimi and Steven R. Ratner. The selection of these opening cases follows the book's stated objective, already signalled by its title: 'International Law: Norms, Actors, Process. A Problem-Oriented Approach'. The authors are highly regarded scholars whose reputation extends well beyond the United States (US).

In the foreword, they emphasise that the book is not centred on 'law as a set of detailed rules or doctrines', but on enabling readers – especially students – to understand the processes of 'making, interpretation, and application of international legal norms' (p. xxiii). In legal-realist terms, the focus is on 'law in action' (p. xxiii). Against this backdrop, the choice of the two introductory cases can be explained: They are characterised by decades of international legal disputes in which various actors ('not only states') raised claims under international law in different fora with reference to various 'international instruments' of 'varying degrees of legal authority' (p. 19).

The process-oriented framing of the two above-mentioned disputes – as well as the other 'problems' addressed throughout the book – is complemented by thorough contextualisation. With respect to the South China Sea, the chapter outlines the region's strategic and economic significance (including a map), the historical background of the dispute, relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS), and the arbitration between the Philippines and China before the Permanent Court of Arbitration (PCA); it also summarises third-State reactions to the 2016 award (pp. 4-10). The Chagos conflict is explained in a similarly multilayered manner, including a reprint of the relevant passages from the International Court of Justice's (ICJ) 2019 advisory opinion as well as a report in which Liseby Elysé (who is now well-known due to Philippe Sands' recent

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book *The Last Colony*) describes the expulsion of the Chagossians from their homeland (pp. 10-19).

2. The landscape of international law teaching materials – textbooks and casebooks – is diverse.[1] Beyond basic differences such as length and language, a potential national or geographical orientation is another factor. While some books are used worldwide as reference works or for teaching purposes, many are primarily used within one jurisdiction or language community. Precisely for that reason, textbooks and casebooks are well suited for analysing national traditions in the understanding and teaching of international law – an approach often associated with the term 'comparative international law' as popularised by Anthea Roberts.[2]

National orientation may manifest itself in different ways: by addressing the relationship between international and domestic law within a given legal system; by highlighting a State's international legal practice; or by approaching international law in line with a particular scholarly tradition. In this context, two risks merit attention: disproportionate emphasis on domestic practice beyond what is necessary to explain domestic foreign relations law, and, at the extreme, the tendency to present domestic positions as if they were international law – a criticism sometimes directed at US international law scholarship.[3] The work under review avoids these pitfalls. With the exception of Part III, which addresses the relationship between international and domestic law in the US legal system, it adopts a decidedly international focus – both as concerns the choice of 'problems' addressed in the book as well as the domestic case law it draws upon. At the same time, its methodological approach – process orientation and 'law in action' – is characteristic of certain US approaches to international law, to which we will return.

A further distinction concerns the design of the work as either treatise/textbook on the one hand and casebook on the other hand (hybrid forms are conceivable).[4] Treatises and textbooks present a systematic account – treatises typically more comprehensive, textbooks more directly geared to teaching –,

1 See James Summers, 'Writing an International Law Textbook' in: Peter Hilpold and Giuseppe Nesi (eds), *Teaching International Law* (Brill 2023), 406-421 (409-413).

2 Anthea Roberts, *Is International Law International?* (Oxford University Press 2017); Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Mila Versteeg (eds), *Comparative International Law* (Oxford University Press 2018); see also Robert Schütze and Mathias Siems (eds), *Comparative International Law. Foundations and Critique* (Hart 2026).

3 James Crawford, 'International Law as Discipline and Profession', *Proceedings of the ASIL Annual Meeting* 106 (2012), 471-486 (484): '[M]uch that passes for the study of international law in the United States academy is at best foreign relations law […].'

4 See Richard Dören, Business and Human Rights in den USA und in Deutschland (Nomos 2024), 60-62.

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whereas casebooks largely avoid a continuous presentation (of 'the law as it stands') in favour of the additional inclusion of excerpts from international and domestic decisions and other materials (including International Organisation/Non-Governmental Organisation [IO/NGO] documents and law review articles).[5] The present work belongs to the canon of US international law casebooks.[6]

3. The book is organised into six parts comprising fourteen chapters: Part I ('Introduction to International Law and Lawmaking'); Part II ('Participants in the International Legal Process'); Part III ('International Law and Domestic Law'); Part IV ('The Protection of Human Dignity'); Part V ('Interdependence and Integration: The Challenge of Collective Action Problems'); and Part VI ('Challenges to International Law'). Most chapters proceed from one or more real-world constellations – termed 'problems' – through which the respective topic is developed. Consistent with the book's approach, the aim is not a conclusive doctrinal survey of the relevant sources and rules, but to present a full account of the plurality of processes that constitute the issue.

Part II, treating 'traditional actors' (Chapter 3) and the participation of 'non-state actors' (NSAs) in international legal processes (Chapter 4), may illustrate this orientation. From a traditional standpoint, these chapters might be framed under the heading of 'subjects of international law'; unlike many textbooks, for example in Germany, however, the part does not begin with the doctrine of international legal subjecthood/personality. In that doctrinal framework, a distinction is commonly drawn between original and derivative subjects (persons) of international law. Yet the definition of subjects of international law as bearers of international legal rights and/or obligations, and the resulting classification of, for instance, private corporations as 'partial subjects of international law' (bearers of some rights and even less, if any, obligations), do not play a prominent role in the casebook under review.

By contrast, the introduction to Chapter 3 conceptualises the State as a 'participant in the legal process' (p. 97), thereby echoing former ICJ Judge – and renowned European representative of the New Haven School – Rosalyn Higgins' preference for 'participants' over the 'subjects/objects' dichotomy. In *Problems and Process* (1995), Higgins criticises that '[…] the whole notion of "subjects" and "objects"' has no credible reality and, in my view, no functional purpose. We have erected an intellectual prison of our own choos-

5 See Helge Dedek, 'Recht an der Universität: „Wissenschaftlichkeit" der Juristenausbildung in Nordamerika', JZ 64 (2009), 540-550 (547: 'Materialkompendien').

6 See generally David J. Bedermann, 'Recent Books on International Law', AJIL 98 (2004), 200-214 (209-211).

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ing and then declared it to be an unalterable constraint.'[7] It would be, according to Higgins, more effective to focus on the flexible notion of 'participants'.[8]

Following this approach, the book only refers to (the concept of) subjects of international law or international legal personality in passing, for example when addressing the legal status of IOs (pp. 147 et seqq.) or, in the chapter on NSAs, in order to highlight the concept's limitations: with regard to NSAs, the book argues that '[t]raditional international lawyers and scholars rejected the notion that these actors could ever be true subjects of international law […]. This mythical construct never really corresponded to the way non-state actors and states interacted' (p. 179).

Whether the 'subjects' framework or a 'participants' lens is preferable remains contestable;[9] however, the book's flexible framing permits a wide range of issues to be examined from multiple angles without becoming arbitrary. Chapter 3, for instance, focuses on 'traditional actors' – States and IOs – and is divided into four sections. It analyses the emergence and collapse of States using the example of 'Catalonia's Secessionist Claims', the concept of State responsibility using the example of 'malicious cyber conduct', and the role of IOs as global actors, addressing the United Nations' (UN) handling of apartheid in South Africa and IO accountability with regard to 'sexual abuse by UN peacekeepers'.

4. Designed as a 'teaching tool' (p. xxiii), the book's primary objective is not to offer definitive answers to the issue in question. Instead, by combining introductory and summary texts by the authors with additional materials, it aims to stimulate reflection and prepare readers for the – Socratic – discussions that take place in law school. Accordingly, the book regularly includes 'notes and questions' addressed to readers, particularly students. Often using the 'law as it stands' as a springboard, these sections address various perspectives and viewpoints on international law and its use in practice; due to their scope, which goes far beyond positive law, they can also engage non-student readers.

Regarding the topic of business and human rights, for example, after referencing case law on the civil enforcement of human rights violations by corporations in various countries, the book asks whether the cited decisions imply corporate international legal obligations or whether liability (still) arises solely from domestic law. Furthermore – bearing in mind the many

7 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995), 49.

8 Higgins (n. 7), 50.

9 See Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010).

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facets of international legal practice –, it asks to what extent this distinction is of relevance for the legal counsel of a defendant corporation (e. g. Shell) or the respective human rights lawyers (p. 219). Chapter 5, devoted to US practice ('International Law in the Domestic Arena'), discusses the Alien Tort Statute, on the basis of which US courts for several decades have allowed human rights lawsuits brought by foreign plaintiffs with no connection to US territory (pp. 279 et seqq.). The accompanying 'questions' section invites readers not only to consider, among others, which international law principles might be invoked to support such proceedings, but also asks what 'interest' the US might have in such proceedings before US courts (p. 283).

5. One of the many strengths of this comprehensive volume, which are impossible to fully reference here, is its topical breadth. The book addresses Artificial Intelligence (AI) (pp. 416 et seqq.), the Covid-19 pandemic (pp. 836 et seqq.), climate change (pp. 632 et seqq.), the Israel-Gaza conflict (pp. 447 et seqq.) and the Russian aggression against Ukraine (pp. 340 et seqq., 728-729); there is hardly a topic that has preoccupied the world, and thus also international law, in recent years that is not covered.

The book also repeatedly addresses structural problems and challenges of the international legal order, such as postcolonial critiques and related North-South challenges. It gives particular importance to questions of 'compliance' and – increasingly pressing today – to allegations of 'double standards'.[10] Interestingly, the prohibition of the use of force and its violations by the military operations of Western States (thus) appears in the final part of the volume (Part VI), which is devoted to current *challenges* of international law. Once again, the questions raised are pertinent, for instance: To what extent do military operations by the US and other North Atlantic Treaty Organisation (NATO) States that violate international law (as discussed in the book – for example, the 2003 Iraq War) affect the credibility of Western States' condemnation of Russia's invasion of Ukraine (p. 729)?

Another strength of the book is its dense contextualisation of the addressed 'problems', including the incorporation of diverse materials such as maps and photographs. In the chapter on environmental law (Chapter 11), for example, the reader, in the part on international waters and disputes concerning the Nile, learns that only 2.5 per cent of all water on Earth is fresh water and that only a fraction of this is suitable for human use (only 0.007 per cent of all water on Earth, p. 593). The reproduction of a picture from the

10 See Anne Peters, 'The Double Effect of "Double Standards". Both Erosion and Strengthening of International Law', Verfassungsblog, 12 September 2025, doi: 10.59704/40f892bd65da8797.

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Abu Ghraib prison in Iraq underscores that engagement with international law may entail confronting psychologically difficult matters (p. 482).

In the foreword to the volume, the authors state that 'only through an examination of international law's principal actors, methods of lawmaking, and key subjects can a student fully understand what it means to have law in a context that lacks a single legislature, executive, or judiciary' (p. xxiii). The book readily puts this approach into practice, focusing on processes, actors, and fora, as well as the (at times) interest-driven mobilisation of (international) legal argument. While this lens certainly prepares the reader for many facets of international legal practice, one may nevertheless gain the impression that international law appears, to a certain extent, to be contingent not just on context, but also on the absence of an internal logic that would compel a specific result. This understanding undoubtedly contains an element of truth: a sole, unreflective focus on *lex lata* (as a system of interrelated rules) may obscure reality. Nevertheless, particularly given the book's US context, one is inclined to ask: To what extent does such a framing (also) empower those totally denying (international) law's status as (binding) law and effectiveness or instrumentalising it opportunistically?

This, of course, draws attention back to the intention of the book: to prepare readers for discussions in law school. In international law courses at US law schools, countless international law professors expertly familiarise students with international law while promoting its values and preservation, as this reviewer experienced first-hand at the University of Michigan Law School with two of the book's authors, Steven Ratner and Monica Hakimi. The American Society of International Law repeatedly stresses its commitment to international law, most recently in its statement from January 2026 regarding the US's action in Venezuela.[11]

6. Examining national approaches to international law can – much as comparative law more generally – sharpen awareness of the contours and presuppositions of one's own legal perspective. This holds true for the present work: although aimed at US students, it can certainly also be engaging for European readers, not least because its questions invite reflection going far beyond positive law. Overall, it is an excellent new edition of a work that has, for good reason, long been regarded as the most widely used casebook on the subject in the US.[12]

11 See <https://www.asil.org/sites/default/files/pdfs/ASIL_2026_Venezuela.pdf>, last access 26 February 2026.

12 José E. Alvarez, 'Are Corporations "Subjects" of International Law?', Santa Clara Journal of International Law 9 (2011), 1-35 (5).

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Much as in the US, German-language international law scholarship can count itself fortunate to draw on a broad landscape of teaching materials, including works that are tailored to the case law of the ICJ and the Permanent Court of International Justice (PCIJ).[13] However, there is no prominent US-style casebook, even though the textbook by Peters/Petrig[14] formulates questions directed at its (student) readers which are to a certain extent similar to the ones in the book reviewed here; there are also no prominent works of this kind in constitutional law[15]. The combination of the doctrinal and systematic German approach to international law, which is still prevalent today for good reason, with contextualising and process-oriented considerations, as exemplified by the work discussed here, appears to be a valuable endeavour that has yet to be explored.

Richard Dören, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

13 See Wolff Heintschel von Heinegg, *Casebook Völkerrecht* (C. H. Beck 2005); Oliver Dörr, *Kompendium völkerrechtlicher Rechtsprechung* (2nd edn, Mohr Siebeck 2014).

14 Anne Peters and Anna Petrig, *Völkerrecht. Allgemeiner Teil* (7th edn 2026, on file with the author).

15 According to the foreword to the first edition, Ingo Richter and Gunnar Folke Schuppert, *Casebook Verfassungsrecht* (C. H. Beck 1987), is not a US style casebook. Instead, it provides a systematic presentation of German constitutional law alongside detailed reprints of decisions by the Federal Constitutional Court; this also applies to the current edition, see Christian Bumke and Andreas Voßkuhle, *Casebook Verfassungsrecht* (9th edn, Mohr Siebeck 2023).

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***Neumann, Volker*: Demokratie und Völkerrecht.** Tübingen: Mohr Siebeck 2023. ISBN 978-3-16-162572-5. XVII, 174 S. 39,- €

Seit den frühen 1990er Jahren werden die beiden Schlagworte Demokratie und Völkerrecht vermehrt zusammen diskutiert. Die von Francis Fukuyama in den späten 1980er aufgestellte Transitionsthese[1] und die daran orientierte Praxis einiger Staaten veranlasste einige Völkerrechtler*innen dazu, dem Völkerrecht in dieser Transition eine Rolle zuzuweisen. Thomas Franck beobachtete als Erster ein „emerging right to democratic governance".[2] Die Frage, ob dieses nun tatsächlich „emerged" sei, hat die Völkerrechtswissenschaft der vergangenen 35 Jahre fortlaufend beschäftigt.[3] Die sich verstärkende Globalisierungskritik ab den späten 1990er Jahren hat hingegen eine andere Dimension in der Beziehung von Demokratie und Völkerrecht eröffnet. In der Proliferation völkerrechtlicher Regelungen sahen einige Stimmen eine zunehmende Einschränkung der Staaten in ihrer Regelungshoheit. Diese Debatte wird im Kontext des Interventionsverbots unter der Frage diskutiert, ob sich die *domaine réservé* der Staaten bis zur Unkenntlichkeit verkleinert hat. Aus einer demokratietheoretischen Sicht wird hingegen die Frage aufgeworfen, ob die zunehmende Regelungsdichte des Völkerrechts zu einer bedenklichen Einschränkung nationaler Demokratien führt.

In seinem 2023 erschienenen Buch „Demokratie und Völkerrecht" nimmt sich Volker Neumann dieser drei Fragen an, wobei die letztere Frage den Schwerpunkt bildet. Das Buch ist ausweislich des Vorworts eine Fortsetzung seines 2020 erschienen Werks zum „Volkswillen".[4] Neumann betrachtet die Beziehung zwischen Demokratie und Völkerrecht durchweg kritisch. Im ersten Abschnitt zur Demokratie im Völkerrecht (S. 5-34) spricht er sich gegen eine Verpflichtung zur Demokratie im Völkerrecht aus und attestiert, dass die seit den 1990er Jahren vorgebrachten „pragmatische[n] und politische[n] Argumente […] für den Nachweis eines völkerrechtlichen Demokratiegebots nichts hergeben" (S. 33).

Der zweite Abschnitt (S. 35-56) widmet sich sodann dem Zusammenspiel des Völkervertragsrechts und der Demokratie aus Perspektive des deutschen und schweizerischen Verfassungsrechts. Der Transformationsmechanismus des Art. 59 Abs. 2 GG wird dabei als vorbildlich eingeordnet, weil er eine

1 Francis Fukuyama, 'The End of History?', The National Interest 16 (1989), 3-18.

2 Thomas M. Franck, 'The Emerging Right to Democratic Governance', AJIL 86 (1992), 46-91

3 Gregory H. Fox and Brad R. Roth, *Democracy and International Law* (Edward Elgar 2020); Gregory H. Fox and Brad R. Roth, *Democratic Governance and International Law* (Cambridge 2000); Jean D'Aspremont, 'The Rise and Fall of Democracy in International Law: A Reply to Susan Marks', EJIL 22 (2011), 549-570

4 Volker Neumann, Volkswille – Das demokratische Prinzip in der Staatsrechtslehre vom Vormärz bis heute (Mohr Siebeck 2020).

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demokratische Billigung von völkerrechtlichen Verträgen ermöglicht. Besonderes Lob erhält das Urteil des Bundesverfassungsgerichts bezüglich des „Treaty Overrides", weil hierdurch das Primat der nationalen demokratischen Entscheidung über völkerrechtliche Regeln fest etabliert wird (S. 40 ff.).

Der dritte Abschnitt (S. 57-122) untersucht die Transformation des Völkergewohnheitsrechts in das deutsche nationale Recht nach Maßgabe des Art. 25 S. 1 GG und den dabei von Neumann diagnostizierten Gefahren für die Demokratie. Schwerpunkt ist eine methodische Untersuchung des Völkerrechtgewohnheitsrechts und eine Kritik neuerer Ansätze zur Ermittlung von Völkergewohnheitsrecht (S. 63-105). Neumann ist der Auffassung, dass fundamentale Defizite in der Ermittlung von Völkergewohnheitsrecht bestehen und diese Defizite durch moderne Methoden vertieft werden. Insbesondere würden Gerichte und wissenschaftliche Beiträge äußerst selten die Praxis aller Staaten untersuchen, sondern eklektisch bei der Begründung von völkergewohnheitsrechtlichen Regeln vorgehen. Modernere Ansätze würden zudem deduktiv vorgehen und damit die Bedeutung der Staatenpraxis noch weiter zurückdrängen. Aufgrund dieser Dynamik könnten nach der Auffassung Neumanns völkergewohnheitsrechtliche Regelungen entgegen des Willens eines Staates und seiner demokratisch legitimierten Organe entstehen (S. 105 ff.).

Dieses Ergebnis bereitet eine grundsätzliche Kritik des Völkerrechts aus Perspektive der nationalen (deutschen) Demokratie vor, die im vierten Abschnitt erfolgt (S. 127-144). Neumann vertritt dabei die Auffassung, dass es eines Schutzes der Demokratie gegen das Völkerrecht bedürfe, um eine „Fremdbestimmung durch Völkerrecht zu verhindern" (S. 130). Demokratische Strukturen jenseits des Nationalstaats und damit auch innerhalb völkerrechtlicher Mechanismen und internationaler Organisationen seien nicht möglich. Die zunehmende Globalisierung und Expansion völkerrechtlicher Normen „schwäche" daher die nationalstaatliche Demokratie (S. 137). Das Buch schließt dabei mit einer Fundamentalkritik der „Eliten", die das Völkerrecht maßgeblich gestalten. Diese als „frequent travellers" bezeichnete „globale Klasse" (S. 142-143), die sich aus Angehörigen Internationaler Organisationen, Nichtregierungsorganisationen und internationaler Finanz- und Wirtschaftskonzerne zusammensetze, verfolge das Ziel, das Völkerrecht zu seinem eigenen (persönlichen) Nutzen umzugestalten. Der letzte Satz des Buches bringt dabei Neumanns Verständnis von „Demokratie und Völkerrecht" durchaus auf den Punkt (S. 144):

> „Und sie [die ‚frequent travellers'] wissen und wollen natürlich auch, dass auf diese Weise die nationale Demokratie als egalitäre, marktkorrigierende und auch einmal protektionistische Demokratie stillgelegt wird."

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Neumann formuliert mithin eine Kritik am Völkerrecht als Instrument von wenigen „Eliten", die nationale, demokratische Entscheidungsmechanismen durchbrechen oder umgehen wollen, um sich hierdurch selber einen Vorteil zu schaffen. Diese Kritik ist bereits aus den sogenannten „Critical Legal Studies" und „Third World Approaches to International Law" bekannt. Diese sehen im gesamten Völkerrecht oder in einigen seiner Regime, wie dem Welthandelsrecht und dem Recht der internationalen Finanzinstitutionen, vordergründig ein Beherrschungsinstrument zulasten der Staaten des Globalen Südens[5] und benachteiligter Gruppen.[6] Ihre Kritik bezieht sich dabei sowohl auf die hegemonialen Staaten des Globalen Nordens (zu denen auch Deutschland und die Schweiz gehören) als auch auf die Individuen, die als „globale Elite" das System steuern. Ein Bezug zu diesen Kritiken erfolgt in Neumanns Werk nicht.

Die fehlende Einbettung in die kritischen Zugänge zum Völkerrecht sind jedoch nicht der einzige Kritikpunkt an Neumanns Buch. Bereits der erste Abschnitt kann nicht überzeugen. Zwar wirft der Autor viele berechtigte Fragen auf und setzt sich mit den wichtigen Konfliktfeldern zwischen Demokratie und Interventionsverbot auseinander. Seine pauschale These, dass es keine Nachweise für ein völkerrechtliches Demokratiegebot gibt, ist jedoch nicht tragfähig.

Erstens zieht Neumann die Entwicklungen innerhalb der Menschenrechtsregime nicht in Betracht. In ständiger Rechtsprechung interpretiert der Europäische Gerichtshof für Menschenrechte die Europäische Menschenrechtskonvention (EMRK) und ihre Zusatzprotokolle dahingehend, dass nur ein demokratisch organisierter Staat, den Anforderungen der EMRK genügen kann.[7] Der Inter-Amerikanische Gerichtshof für Menschenrechte hat auf Grundlage der Amerikanischen Menschenrechtskonvention und der Inter-Amerikanischen Demokratiecharta von 2001 eine parallele Rechtsprechungslinie entwickelt.[8] Die Entscheidungen beider Gerichtshöfe sind ohne Zweifel

5 Bhupinder S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', EJIL 15 (2004), 1-37; Sigrid Boysen, *Die postkoloniale Konstellation* (Mohr Siebeck 2021).

6 Martti Koskenniemi, 'Enchanted by the Tools? An Enlightenment Perspective', Am. U. Int'l L. Rev. 35 (2020), 405-426.

7 EGMR, *Socialist Party v. Turkey*, Urteil v. 25 Mai 1998, Nr. 26482/95, Rn 41-45, siehe Johannes Hendrik Fahner, 'Revisiting the Human Right to Democracy: a Positivist Analysis', International Journal of Human Rights 21 (2017), 321-341 (326); Anne Peters, 'Dual Democracy' in: Jan Klabbers, Anne Peters und Geir Ulfstein (Hrsg.), *The Constitutionalization of International Law* (Oxford University Press 2009), 263-341 (275).

8 Zuletzt IAGMR, *Case of Capriles v. Venezuela* (Preliminary Objection), Merits, Reparations and Costs, Urteil v. 10. Oktober 2024, Series C No. 541, Rn. 104.

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verbindlich und bilden eine autoritative Interpretation der jeweiligen Menschenrechtsverträge.

Zweitens haben zehn internationale Organisationen in ihren Gründungsstatuten die demokratische Organisation ihrer Regierungen als verbindlich vereinbart und hierfür auch Durchsetzungs- und Sanktionierungsmaßnahmen etabliert.[9] Diese nimmt Neumann teilweise zur Kenntnis. Mit Bezug auf demokratiebezogene Verträge innerhalb der Afrikanischen Union (AU), wie der African Charter on Elections, Democracy and Governance von 2007, erklärt Neumann pauschal, dass es sich um „kaum mehr als politische Versuche zur Stabilisierung defizitärer afrikanischer Demokratien" handele (S. 11). In der Tat funktionieren die Demokratieschutzmechanismen der AU nicht einwandfrei, zumal die Zahl der Autokratien die Zahl der Demokratien innerhalb der AU deutlich übersteigt.[10] Die Durchsetzungsschwierigkeiten und die Abweichung der Praxis von der Norm bewirken jedoch nicht, dass die völkerrechtliche Verbindlichkeit der Demokratienormen entfällt. Die Verbindlichkeit einer vertragsrechtlichen Norm bestimmt sich allein nach den Regelungen der Wiener Vertragsrechtskonvention (WVK). Folglich kann ein völkervertragsrechtliches Demokratiegebot durchaus bestehen, selbst wenn keine der Vertragsstaaten als Demokratie organisiert sind. Abweichende Praxis kann allenfalls eine Abänderung der Norm herbeiführen, soweit es sich um eine nachträgliche Übung im Sinne des Art. 31 Abs. 3 lit. b WVK handelt. Eine nachträgliche Übung der Mitgliedstaaten der AU entgegen einer Demokratieverpflichtung besteht jedoch nicht. Der AU Peace and Security Council und die hierin vertretenen Staaten betrachten die Förderung von Demokratie innerhalb der AU als eine ihrer wichtigsten Aufgaben und setzen sich aktiv für die Durchsetzung des regionalen Demokratiegebots ein. Eine Reinterpretation der Demokratienormen ist nicht anzunehmen. Weiterhin wird den Demokratienormen innerhalb der AU auch empirisch eine positive Wirkung in der Reduzierung von Coups d'État zugeschrieben.[11]

Drittens zieht Neumann aus der hohen und wachsenden Anzahl autokratisch organisierter Staaten, den apodiktischen Schluss, dass es keine völkergewohnheitsrechtliche Demokratienorm geben könne (S.12). Die innerstaatliche Organisation eines Staates kann zwar als relevante Staatenpra-

9 Tom Ginsburg, *Democracies and International Law* (Cambridge University Press 2021), 22.

10 Erika de Wet, 'The African Union's Struggle Against "Unconstitutional Change of Government": From a Moral Prescription to a Requirement under International Law?', EJIL 32 (2021), 199-226.

11 Issaka K. Souaré, 'The African Union as a Norm Entrepreneur on Military Coups d'État in Africa (1952-2012): an Empirical Assessment', J. M. A. S. 52 (2014), 69-94.

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xis herangezogen werden. Es ist jedoch nicht die einzige Quelle für Staatenpraxis in diesem Feld. Sofern autokratisch regierte Staaten Wahlorganisationshilfe oder Wahlbeobachtungen zulassen und sich mit den dafür verantwortlichen Organisationen auf gemeinsame demokratische Prinzipien festlegen, kommt hierdurch jedenfalls zum Ausdruck, dass diese Staaten ein wichtiges Element der repräsentativen Demokratie nach internationalen Maßstäben gestalten wollen. Die Electoral Assistance Division der Vereinten Nationen, die Wahlunterstützung nach internationalen demokratischen Maßstäben anbietet, hat in den vergangenen Jahren in über 100 Staaten die Organisation von Wahlen unterstützt.[12] Darüber hinaus kann eine relevante Staatenpraxis darin gesehen werden, wie Staaten auf Transitionen oder demokratische Rückschritte in anderen Staaten reagieren. Sofern sie hierbei fordern, dass sich die jeweiligen Nationalstaaten in Demokratien wandeln oder diese ihre Demokratie wiederherstellen und diese Auffassung aus völkerrechtlichen Bezügen herleiten, kann dies als Staatenpraxis oder entsprechende Rechtsüberzeugung gewertet werden. Illustrativ ist das Beispiel der venezolanischen Proteste von 2019. In mehreren Sicherheitsratssitzungen stritten ca. 40 Staaten über die Lage in Venezuela. Dabei forderten jedoch alle Staaten, dass Venezuela aufgrund von internationalen Grundsätzen eine demokratische Regierung benötige.[13] Gerade autoritär regierte Staaten, einschließlich Russlands und China, sahen in der Demokratie auch ein völkerrechtliches Prinzip.[14] Dies zeigt zwar auch die Schwäche dieses Arguments. Schließlich bestehen divergierende Verständnisse davon, was eine Demokratie ist und welche Merkmale sie auszeichnen. Dennoch wird hierdurch deutlich, dass es innerhalb der Vereinten Nationen und der internationalen Gemeinschaft der Staaten eine gewisse Erwartungshaltung gibt, dass Transitionsprozesse demokratisch gestaltet werden und antidemokratische Veränderungen umgekehrt werden. Einige Autor*innen sehen hierin Anhaltspunkte für eine Staatenpraxis und opinio juris zugunsten eines völkerrechtlichen Demokratieprinzips oder -gebots.[15]

12 The Electoral Knowledge Network, United Nations Electoral Assistance Division, 2020, abrufbar unter: <http://aceproject.org/about-en/ace-partners/UNEAD>, zuletzt besucht 26. November 2025).

13 Florian Kriener, *Proteste und Intervention – Die staatliche Unterstützung gewaltfreier Protestbewegungen im Völkerrecht* (Nomos Verlagsgesellschaft 2024), 552.

14 Kriener (Fn. 13), 551-553.

15 Peters (Fn. 7), 275.

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Der erste Abschnitt des Buches kommt daher zu einem durchaus vertretbaren Ergebnis, das von zahlreichen anderen Stimmen geteilt wird.[16] Allerdings werden diese auf methodisch fragwürdige Weise erreicht und zeugen gerade mit Blick auf die Demokratieschutzmechanismen in Afrika und Amerika von einer zu starken Pauschalität. Dabei fällt insbesondere auf, dass überwiegend alte Literatur aus den frühen 2000er und späten 1990er Jahren und fast ausschließlich deutsche Literatur rezipiert wird. Die Debatte hat sich jedoch deutlich dynamischer gezeigt und hat sich in viele Teilbereiche untergliedert.[17] Kim Lane Scheppele spricht angesichts dieser Differenzierung bereits von einem Right to Democratic Governance 2.0.[18] Es wäre daher wünschenswert gewesen, wenn der erste Abschnitt nicht nur als Präludium für die darauf folgende Völkerrechtskritik konzipiert worden wäre. Dies hätte vielleicht das Gesamtergebnis nuanciert oder zumindest dessen Herleitung stärker gemacht.

Schließlich bereitet der im ersten Abschnitt gezogene Schluss, dass das Völkerrecht keine Demokratieverpflichtung kenne und die Rechtserzeugung im Völkerrecht auch fundamental undemokratisch sei, die These vor, dass das Völkerrecht grundsätzlich als Bedrohung für die nationalstaatliche organisierte Demokratie verstanden werden müsse.

Der Transformationsmechanismus für völkerrechtliche Verträge des Art. 59 Abs. 2 GG wird dabei als vorbildlich zum Schutz der Demokratie vor dem Völkerrecht eingeordnet. Probleme sieht Neumann insbesondere in der automatischen Eingliederung völkergewohnheitsrechtlicher Normen in das Bundesrecht nach Art. 25 S. 1 GG. Zwar ist Neumann darin zuzustimmen, dass die Ermittlung von Völkergewohnheitsrecht nach den Maßstäben des Art. 38 Abs. 1 lit. b des Statutes des Internationalen Gerichtshofs (IGH) sehr aufwendig ist und daher nur selten – nicht einmal durch den IGH[19] –

16 Sigrid Boysen, 'Remnants of a Constitutional Moment, The Right to Democracy in International Law' in: Andreas von Arnauld, Kerstin von der Decken und Mart Susi (Hrsg.), *The Cambridge Handbook of New Human Rights, Recognition, Novelty, Rhetoric* (Cambridge University Press 2020), 465-480; D'Aspremont (Fn. 3).

17 Jan Klabbers et al., 'International Law and Democracy Revisited: Introduction to the Symposium', EJIL 32 (2021), 9-15; Samantha Besson, 'The Human Right to Democracy in International Law, Coming to Moral Terms with an Equivocal Legal Practice' in: Andreas von Arnauld, Kerstin von der Decken und Mart Susi (Hrsg.), *The Cambridge Handbook of New Human Rights, Recognition, Novelty, Rhetoric* (Cambridge University Press 2020), 481-490; Fahner (Fn. 7); Olena Sihvo, *The Right to Democracy in the Age of Global Constitutionalism* (Abo Akademi University Press 2019).

18 Kim Lane Scheppele, 'Restoring Democracy Through International Law', Am. U. Int'l L. Rev. 39 (2024), 629-679.

19 Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion', EJIL 26 (2015), 417-443.

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umfassend ermittelt wird. Dabei ist jedoch zu bedenken, dass die Zahl völkergewohnheitsrechtlicher Regeln gering ist. Zudem begründet die grundsätzlich undemokratische Entstehungsform von völkergewohnheitsrechtlichen Regeln nicht automatisch eine Gefahr für staatlich organisierte Demokratien. Für diese Annahme führt Neumann kein einziges Beispiel an, weshalb seine Bearbeitung an dieser Stelle abstrakt bleibt. Zumindest aus der deutschen Perspektive, die Neumann zuvorderst einnimmt, führt die Spannung zwischen (vermeintlich) undemokratischem Völkerrecht und demokratischem deutschen Recht kaum zu tatsächlichen Problemen und Widersprüchen. Deutsche Gerichte verwenden Art. 25 S. 1 GG nur äußerst selten.[20] Im Juni 2024 hat der Bundesgerichtshof in einem strafrechtlichen Urteil gegen einen ehemaligen Offizier der afghanischen Armee eine völkergewohnheitsrechtliche Regel herangezogen, um den Grundsatz der funktionalen Immunität für schwere völkerrechtliche Verbrechen (in dem zugrundeliegenden Fall Folter) zu durchbrechen.[21] Dabei widmete sich der BGH umfassend der relevanten Staatenpraxis und opinio juris.[22] Der BGH wertete eine beeindruckende Zahl an Quellen aus und arbeitete daher methodisch sorgfältig, entgegen den Befürchtungen von Neumann. Auch vom Ergebnis her kann in der Durchbrechung der funktionalen Immunität für schwere völkerrechtliche Verbrechen keine Umgehung des deutschen demokratischen Willens gesehen werden: Der Bundestag hat im Juli 2024 die Durchbrechung der funktionalen Immunität im Gesetz zur Fortentwicklung des Völkerstrafrechts für alle künftigen Verfahren vorgeschrieben.[23] Dieser Fall zeigt daher, dass sowohl in methodischer Hinsicht wie auch vom Ergebnis her die Befürchtungen von Neumann, dass Richter*innen durch die Verwendung von Art. 25 S. 1 GG und völkergewohnheitsrechtlichen Regelungen den demokratisch legitimierten „Volkswillen" unterlaufen würden, zu pauschal sind.

Volker Neumann nimmt mit seiner Monographie zu Demokratie und Völkerrecht zu wichtigen Debatten Stellung. Seine zentrale These, dass das Völkerrecht eine Bedrohung für die staatlich organisierte Demokratie darstellt, ist jedoch zu pauschal, verkürzt die relevanten Debatten und ist mit wenigen bis gar keinen Beispielen unterlegt. Daher kann das vorgetragene Argument nicht überzeugen. Zumindest aus deutscher Perspektive besteht sehr geringer Anlass, im Völkerrecht eine Gefahr für die Demokratie zu

20 Das BVerwG hat seine Anwendung jüngst mit Blick auf die Rosneft-Treuhand abgelehnt, BVerwG Urt. v. 14. März 2023 – 8 A 2.22, Rn. 38.

21 BGH, Urteil v. 28. Januar 2021 – 3 StR 564/19.

22 BGH, Urteil v. 28. Januar 2021 – 3 StR 564/19, Rn. 17-49.

23 Gesetz zur Fortentwicklung des Völkerstrafrechts vom 30. Juli 2024, BGBl. 2024 I Nr. 255.

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sehen. Einen fundamentalen Widerspruch zwischen dem vom deutschen Volk durch seine repräsentativen Institutionen geäußerten Willen und der völkerrechtlichen Rechtslage hat es in den Jahrzehnten seit 1990 nicht gegeben. Deutschland hat vielmehr wie kaum ein anderer Staat von einer mehr oder weniger stabilen Völkerrechtsordnung profitiert und diese auch entschieden mitgestaltet. Eine Gefährdung der deutschen Demokratie durch eine derzeit drohende Abschwächung der Völkerrechtsordnung[24] ist daher erheblich wahrscheinlicher als die Bedrohung der deutschen Demokratie durch das Völkerrecht.

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24 Monica Hakimi and Jacob Katz Cogan, 'The End of the U. S.-Backed International Order and the Future of International Law', AJIL 119 (2025), 279-290.

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***Offor, Iyan*: Global Animal Law from the Margins: International Trade in Animals and Their Bodies.** London and New York: Routledge – Taylor & Francis Group 2024. ISBN 978-1-032-22699-6 (Softcover). XV, 295 pp. €59,80

Iyan Offor's *Global Animal Law from the Margins* is a utopian work. Offor is frank about this. His program is to articulate a 'utopian vision' (p. 187). The utopian vision is ambitious, even for utopia: not merely to 'revolutionise the fundamentals' (p. 187) of animal oppression and to abolish 'trade in animals and their bodies' (p. 201), but also to dismantle other kinds of oppression, including 'coloniality', to improve the situation of all oppressed and marginalised groups both human and animal. Offor aims to progress towards this utopia by changing animal law scholarship, in particular international animal law scholarship, shifting the focus to marginalised and oppressed scholarly voices and rejecting approaches to scholarship that fail to focus on various forms of oppression of marginalised human beings that intersect with animal oppression.

Offor's book is a fresh contribution to international animal law scholarship. There is no other book-length work in international animal law scholarship I am aware of with such an uncompromisingly idealistic approach to this field. While Offor's approach in the small field of international animal law scholarship is novel, it can also be placed in a tradition of utopianism in international law, reflected in Martti Koskenniemi's dichotomy of apology and utopia in his classic *From Apology to Utopia*.[1] Apology versus utopia is an opposition that came to mind repeatedly for me as I read Offor's book. Koskenniemi understood international law as stuck between two contradictory impulses: on one side 'apology', the acceptance of the imperfect nature of human society and of international law and the tendency to explain or justify existing state behaviour and power relationships; on the other 'utopia', the aspiration to transcend politics by reaching for normative desiderata. 'Apology' and 'utopia' also map well onto the work of animal lawyers. Most of us struggle with the tension between the inherently compromised and limited work of advocating small legal reforms for animals, usually little more than crumbs from the table, and our grander but less realistic hopes of fundamental change.

From the 'apologetic' standpoint, it makes sense that World Trade Organisation (WTO) law, and in particular the 2014 *EC – Seal Products*[2] case, has a

1 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Law* (reissue, Cambridge University Press 2005, originally published 1989).

2 WTO, Appellate Body, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, report of 22 May 2014, WT/DS400/AB/R, WT/DS401/AB/R.

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significant presence in international animal law scholarship. *EC – Seal Products* involved a challenge by Canada and Norway to the European Union's ban on products of commercial seal hunting, and in its decision the WTO Dispute Settlement Body interpreted a treaty provision that permits trade restrictions based on 'public morals' to be capable of applying to concerns about animal welfare. International trade law does not have that much to say about animals, but most of international law has nothing at all to say about animals. This is so although the field of international animal law scholarship has grown in recent years, a development ably covered in Offor's book. Nonetheless, at least there is something in trade law for animal law scholars to seize on. And *EC – Seal Products*, while decidedly not an animal rights case, is a rare example of international law paying some attention to animal welfare and treating it as a serious matter with legal significance. Apologists do not expect much from international law (nor do we expect much from law generally when it comes to improving the lot of animals), and will work with what they can find. Utopians expect everything and are critical when what little does exist is compromised and limited, as the *Seal Products* case was.

Offor offers strong criticism of *EC – Seal Products* and some of the scholarly discussion of it, from an uncompromisingly utopian stance. For example, he accuses the WTO Appellate Body of moral hypocrisy for evaluating the EU's opposition to seal hunting as a matter of public morals without addressing the morality of animal suffering that the EU permits, in factory farming for example (152-153).

In defence of the WTO Appellate Body, one could say that, conscious as it was of its institutional constraints both legal and diplomatic, it was in no position to comment on the morality of all human exploitation of animals, and certainly could not have abolished trade in animals and their bodies. One might also say that if the Appellate Body had accepted the arguments that were put before it about moral hypocrisy – the EU could not legitimately object to seal hunting if it was OK with hamburgers – then it would have agreed with the positions of Canada and Norway and found the EU ban to be an unjustified violation of WTO law. What the practical outcome would have been in that eventuality we cannot know, but it is likely that it would have meant more seal hunting, certainly not less factory farming – and a continuation of the pre-*EC – Seal Products* view of many WTO members that they could not adopt trade measures to protect animal welfare because it would put them offside of their WTO obligations.

But that is the kind of thinking Koskenniemi identified as 'apology,' which can be little more than a justification of power relations. From Offor's standpoint, the WTO Appellate Body's institutional carefulness is not an adequate response to the moral horror of animal exploitation (amplified, as

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Offor argues, by global trade in animals). He challenges us to name and to attack the domination of animals by humans and not just accept it: to revolutionise the fundamentals, to look for utopia.

All that said, the strongest part of Offor's book is not so much about the revolutionary march towards the abolition of trade in animals, but, rather, the minutiae of international law-making. This is the explanation and discussion of trade negotiations and committee work mainly in Chapters Seven and Nine, which is well informed and valuable. Offor has deep expertise in these processes, honed through his experience working on the frontlines of lobbying in trade negotiations. Most animal law scholars who write about trade do not have this kind of insight from inside trade law-making. Instead, scholarly writing about WTO law and animals tends to focus on the more court-like dispute settlement process, with something of a blind spot when it comes to the at least equally important practices of negotiation and committee work. Offor's explanation of these aspects is perceptive and enlightening.

The theoretical parts of the book have some weaknesses. The heart of Offor's argument is that we need a 'second wave' of animal ethics incorporating attention to intersecting oppressions. One shortcoming is that the idea of marginalised scholarship, which is central to Offor's reform program, is not clearly or consistently defined. In Chapter Four, for example, Offor evaluates the 'second wave' bona fides of teams of animal law scholars associated with certain institutions by counting which continents the contributors 'stem from' or 'hail from,' based on 'online biographies and personal connections' (pp. 101-104). There is no further explanation of the methodology here. The reader is thus left wondering whether 'stem from' means where contributors live now or where they were born or something else, whether there is any verification of the information from online biographies and personal connections, or which continental origins count as the marginalised ones. Whatever second-wave or marginal scholarship means, surely it cannot be captured in this kind of dubious demographic head-counting – and surely it should have at least something to do with the content of the scholarship. Another problem is that the overview of theoretical ideas in the first four Chapters covers a lot of territory in a small amount of space (Chapter Two, for example, is only ten pages long excluding the endnotes, although it covers an enormous sweep of history in animal law scholarship), and as a result it tends to skate over the surface of the ideas under discussion.

Furthermore, although Offor argues we should be working 'towards' a second wave (the title of Chapter One is 'Towards a Second Wave of Animal Ethics'), to a large extent what he calls for appears already to have arrived. Second-wave animal ethics is that which is not first-wave animal ethics, and

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first-wave animal ethics means the work of Peter Singer, Tom Regan, and Gary Francione (p. 15). The truly important work of Singer, Regan and Francione dates mainly to the 1990s, the 1980s, and even the 1970s – half a century ago. To understate considerably, a lot has happened in animal rights philosophy and in animal law since then. Arguing that first-wave animal ethics 'has been developed exclusively by white, able-bodied, cisgendered, heterosexual men', Offor proclaims, '[t]his must change' (p. 21). It has.

Certainly Offor engages with more recent writing, including the work of postcolonial scholars like Maneesha Deckha that overlaps significantly with his own approach. But not infrequently the book reads as if the 'second-wave' program it advocates for is a new vanguard, and as if the 'first wave' remains entrenched and unchanged. There are missed opportunities to engage more with the continuing evolution of this field since the foundational 'first wave' works, and to situate Offor's own approach as part of an ongoing intellectual conversation.

There is also a missed opportunity to delve into the thorny ethical and intellectual problems that arise when principles that Offor champions in the book, notably animal rights and anti-colonialism, are not neatly aligned but in tension. *EC – Seal Products* is a case in point. One of the most difficult issues in the WTO case and in the controversy over seal hunting more generally was traditional Inuit seal hunting. There is a direct opposition between the interests of Inuit seal hunters, who want to protect their traditions and way of life, and those of animal welfare proponents who seek to reduce animal suffering. As the WTO Appellate Body observed, traditional Inuit hunting methods are not more protective of animal welfare than non-Indigenous commercial hunting. Offor argues that in the Seals dispute '[p]aying regard to Indigenous perspectives would have […] potentially led to solutions' (p. 179). But there is a difficult reality here: solutions that would have been acceptable to Inuit hunters would have meant less protection for the seals.

To minimise this trade-off is to indulge in what Will Kymlicka and Sue Donaldson have called the 'strategy of avoidance'[3] of the fact that animal rights and Indigenous people's rights sometimes do clash. As Kymlicka and Donaldson argue, the strategy of avoidance is both incoherent and unstable. It romanticises Indigenous peoples in a way that undercuts their full and complex humanity.

3 Will Kymlicka and Sue Donaldson, 'Animal Rights and Aboriginal Rights' in: Peter Sankoff, Vaughan Black and Katie Sykes (eds), *Canadian Perspectives on Animals and the Law* (Irwin 2015), 159-186.

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Offor positions himself as an intersectional scholar, describing intersectionality as 'a tool […] to identify the mutual operation and exacerbation of various inequalities' (p. 23). He analyses the connection between animal rights and anti-colonialism from that standpoint. This intersectional approach involves both an opportunity and, I would argue, a responsibility to grapple with the full complexity of different inequalities and the different interests of those who experienced them. All 'marginalised' positions cannot simply be conflated with one another, and they do not always line up conveniently on the same side.

Offor's uncompromising perspective provides a valuable contribution to international animal law. For my part I think it is very unlikely that, if we ever really change the profound tragedy of our relationship with other animals, it will be the law that solves the problem, still less international law, and even less international law scholarship. It would take far-reaching changes in social organisation, economics, and shared moral ideas – so far-reaching as to be difficult to imagine. But law does have a part to play. As Jessica Eisen has argued, law reform and public discourse about law contribute to an 'evolving ethic' where shifts in both the law and public consensus gradually and reciprocally build towards sustainable social change.[4] In that context, it matters that some voices argue for more radical change than seems likely to happen any time soon. Idealistic legal scholars like Offor help expand the boundaries of what it is possible for us to imagine by conjuring utopia.

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4 Jessica Eisen, 'Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act', U. Mich. J. L. Ref. 51 (2018), 469-547 (borrowing the concept of an 'evolving ethic' from the work of Lawrence Tribe).

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***Nissel, Alan Tzvika*: Merchants of Legalism: A History of State Responsibility (1870-1960).** Cambridge UK: Cambridge University Press 2024. ISBN 978-1-009-37864-2 (hardback). 418 pp. £105.00

To the lawyers and students of the 21st century, the law of state responsibility is an integral and indispensable branch of general international law. Yet writing its history, or even tracing how this branch of law has taken shape, is an enormously challenging task. Any attempt to trace its development quickly reveals a story that is non-linear, discontinuous, and deeply entangled. There is no definitive moment marking the 'birth' of state responsibility, nor a stable consensus on what 'state responsibility' denotes. Even the codification of the 2001 Articles on State Responsibility – often treated as a milestone – emerged from a long contested process.

Against this backdrop, Nissel's *Merchants of Legalism* makes a remarkable intervention. The book does not assume a single, pre-ordained doctrine of state responsibility waiting to be discovered; rather, it reconstructs the diverse historical contexts in which lawyers, institutions, and states gave meaning to the term across the 19th and 20th centuries. As Nissel reminds us, 'there is no objective thing called "state responsibility."' (p. 5) Rather than presenting a single genealogy, the author identifies three episodes that have been instrumental in shaping what is known today as state responsibility: '(1) the US arbitral practice in the New World; (2) the German theorization of public law in the setting of its national unification and (3) the institutional effort to codify state responsibility within world bodies.' (p. 4)

What unites these otherwise distinct strands is the pivotal role of lawyers. As the title of the book shows, lawyers acted as 'merchants' of legalism – figures who 'purvey[ed] legitimacy on behalf of their clients' and promoted 'expansive view of international law' (p. 27). Through the work of practitioners, philosophers, and publicists (pp. 20, 27), distinct but converging visions of state responsibility emerged. This focus on the agency of lawyers and legalism gives the book a highly novel perspective.

The first episode, developed in Chapters 2 and 3, focuses on the the turn of the United States (US) to arbitration to protect foreign investment in the 19th century. In this context, state responsibility was 'a technical term they [i.e., practitioners] invoke when it is appropriate to address international claims – especially international investment disputes' (p. 21). Since the first half of the 19th century, international arbitration was conducted between the US and Latin America to address disputes about protection of foreign commerce. For the US, arbitration was a tool to curtail British influence and expand its own commercial reach (p. 56); for Latin American states, arbitration signalled recognition of their sovereignty, independence from European domination, and access to much-needed capital (p. 64). However, this balance changed in the second half of the 19th century: the increased presence of US entrepreneurs and corporations in Latin America, combined with the instable

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domestic politics in this region led to more international claims brought to the US State Department (pp. 52, 64-66). Under Hamilton Fish's tenure as Secretary of State from 1869, the Department adopted 'bureaucratic professionalism' (p. 69) and began systematically favouring arbitration as a mechanism for alien protection.

The Lieber Tribunal, created between the US and Mexico, epitomised this turn. It processed over 2,000 claims and articulated early standards regarding causation, attribution, recognition, and the 'international minimum standard' (pp. 156-163). Yet its jurisprudence was inconsistent (pp. 80-86), and its deeper legacy lay in the imposition of the 'standard of civilization': sovereignty for Latin American states became conditional upon their ability to safeguard foreign property (pp. 62-63). As such, the author considers state responsibility in this context as 'a mask for US power in the region' (p. 107).

The US legalism underlying this 19th-century practice had distinctive features: reliance on third-party tribunals, professional lawyers, binding arbitral awards, and decision based on legal rules (pp. 87-89). The US embrace of arbitration reflected its complex, pragmatic attitude towards international law, its endorsement of legalism, and its assertion of regional hegemony over Latin America (pp. 110-111). This attitude continued towards the establishment of the Permanent Court of Arbitration at the end of the 19th century.

Chapter 3 reflects on two consequences of intra-American arbitration: the legalisation of alien protection and the creation of state responsibility. Before 1870, the US protected citizens abroad mainly by domestic law enforcement and international diplomacy. Institutionalised arbitration transformed such claims into international disputes resolved technically by courts and tribunals (pp. 122-123). The development of the standard of civilisation crystallised the legal, political, and cultural confrontation between the US and Latin America (pp. 130-131). For the US, property rights and civilised protection to all aliens were integral to the law of nations and necessitated the international minimum standard (p. 132). In contrast, Latin Americans considered such a standard as 'offend[ing] their sense of national pride' (p. 144); they argued that 'so long as states provided the same level of protection to both, no denial of justice claim could arise' (p. 145). Their repulsion against international standards of protection overlapped with their rejection of state responsibility itself (pp. 147-148). Arbitration in this period also displayed a strong indemnification approach, emphasising damages and injuries (pp. 164, 167), as well as analogies drawn from domestic law (p. 172). Yet the international minimum standard was unevenly applied: new states were held responsible more expansively than old powers (p. 183). By the end of the century, disillusioned by this inequality, Latin America had become a determined opponent of international arbitration.

The second narrative turns to German-speaking legal scholars of the same period, who approached international responsibility through the lens of

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domestic public law. For them, state responsibility was 'primarily an iteration of state liability under *domestic* public law', which they sought to systematise as a coherent field (p. 31). The author distinguishes between two successive waves of German jurists. The first, represented by August Wilhelm Heffter, Johann Kaspar Bluntschli, and Heinrich Triepel, held that 'the reality of sovereignty left little room for a robust conception of state responsibility' (p. 187). They made the first efforts to conceptualise state responsibility as 'a legal category of its own' focusing on the conditions of attribution, rather than associating it with the ability to enforce against the alleged breach (p. 188). The second wave of lawyers, including but not limited to Georg Jellinek, Hans Kelsen, Karl Strupp, and Hersch Lauterpacht were inclined to impose more legal constraints on states, and even held that the law of the international community preceded the will of states. The views of this intellectual community were shared also by lawyers beyond the German-speaking scholarship, including William Edward Hall, Dionisio Anzilotti, and Lassa Oppenheim.

This German intellectual tradition was distinctive in the sense that it 'conceived of international law as a genus of public law' (p. 218), and eventually produced a systematic vision of state responsibility as 'a general regime of international enforcement actions' (p. 248). Unlike the US arbitral tradition, which bound responsibility to national interests and regional hegemony, the German jurists were more concerned with preserving sovereignty through legal abstraction and systematisation (pp. 241-242). Strikingly, the two traditions developed in near isolation: German theorists rarely invoked the American practice of alien-protection arbitration in their doctrinal writings (e. g. pp. 205, 230).

The author's discussion is attuned to contemporary readers: it highlights themes that remain familiar – such as reparation, the balance between sovereignty and responsibility, and the sources of rules. At the same time, the discussion also draws comparisons with elements that have shifted, such as whether fault and attribution constitute inherent parts of state responsibility. This mode of presentation is particularly helpful, given how much the conceptualisation of responsibility has evolved. At times, Nissel's interventions come at particularly apt moments in the historical narrative – for example, in his reflections on the hegemonic dimensions of arbitral practice, and on the ways German scholars' understandings of responsibility transformed during the World Wars.

At the same time, the public/private law dichotomy outlined in this chapter invites reflection. Nissel's contrast between the private-law orientation of US arbitration and the public-law framework of German theorists is both illuminating and provocative (pp. 273-277). Yet, the boundary was not always clear-cut. Some German theories rested on the assumption of a horizontal international society in which enforcement of state responsibility

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occurred among formally equal states – a premise that itself bears a 'private' character. Indeed, the author notes Heffter's reference to state responsibility as 'internal private responsibility' (p. 191), and Lauterpacht's conceptualisation of state responsibility as a twin discipline to tort law (p. 237). These examples suggest that the boundary between public and private was always relative rather than categorical.

The third story concerns the rivalry over the codification of state responsibility in the 20th century. By this time, the US arbitral tradition and the German public-law conception coexisted, and the latter had gained traction among jurists from Latin America and other semi-peripheral regions. The 'move to international institutions' and the attempt to codify the law of state responsibility brought a fundamental question to the forefront: should codification rest on the precedents of alien-protection practice, or should it be oriented toward 'the future needs of the international community' (p. 250)? The former approach was supported by economically advanced states that had frequently been claimants in arbitral proceedings, while the latter was championed by Latin American and other developing states keen on abolishing the legacy of alien protection. This competition played out in successive codification initiatives, including the work of the Committee of Experts for the Progressive Codification of International Law in the 1920s, the Harvard Law School drafts, the Institut de Droit international and other professional bodies, as well as the 1930 codification conference of the League of Nations. Figures such as José Gustavo Guerrero, Green Hackworth, Edwin Borchard, and Walther Schücking emerge in Nissel's account as emblematic actors in this contested terrain. Yet none of the above initiatives succeeded: Latin American resistance to codifying rules on alien protection prevented any consensus from being reached.

The decisive stage came with the International Law Commission (ILC), where codification efforts were both constrained by earlier disputes and destined to shape modern doctrine. The first Special Rapporteur, García Amador, framed the protection of individuals and human rights as the central aim of the regime. While conscious of the critiques of alien protection, he pursued an incremental approach by continuing to elaborate rules in this area. This provoked fierce resistance within the ILC (p. 275), particularly from members representing Latin America, the Soviet bloc, and other semi-peripheral states who were eager to reflect postcolonial realities. Among the critics was Italian lawyer Roberto Ago, whose proposal to codify the '*general* rules governing the international responsibility of States' (p. 289) quickly gained overwhelming support. The changing composition of the Commission in the 1960s, when Third World states achieved a majority, made Ago's project politically feasible (pp. 290-291). His success was further bolstered by a shift in Latin American legal thinking towards universalism and formalism (p. 293). For Latin American states, this turning point represented the chance

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to 'finally avenge the disgrace of their earlier losses in the fora of international arbitrations' (p. 288).

In the epilogue, Nissel situates the three narratives of state responsibility within a broader historical trajectory, which he captures in three stages. The first is pre-legalism, when, prior to the 19th century, findings of responsibility were 'either unilaterally asserted […] or bilaterally negotiated […]' (p. 303). The second is ad hoc legalism, represented by 19th-century arbitral practice in the Americas, where responsibility was determined case by case, without reference to a general legal framework (p. 305). The third is institutional legalism, shaped in the 20th century by German theorists who 'envisioned an international law that was complete and completely necessary', one in which any breach necessarily triggered responsibility (p. 306). This vision was realised through the institutional consolidation of international law, particularly the codification efforts of the ILC after the two World Wars. Yet, the author points out in a thought-provoking way that institutional legalism did not replace ad hoc practice. Instead, the two have long coexisted: US-driven arbitration persisted well into the 21st century, creating a 'duality of state responsibility' between general rules of state responsibility and investment arbitration (pp. 307, 315).

Despite their differences, the three traditions share certain unifying themes. Across contexts, state responsibility has been framed surrounding the consequences of breach, the reliance on legalism as method, the embedding of political interests within legal discourse, and the recognition that the field remains 'more a doctrine of exceptions than of general rules' (pp. 308-311).

The analysis in this part functions as a strong recap and conclusion to the study. It gives the reader a clear sense of the historical depth of state responsibility, while also showing how varied traditions have interacted and coexisted across centuries. At the same time, the epilogue gently opens the door to further questions. Readers may be curious about how these trajectories continue to shape the contemporary law of state responsibility, or how the different legacies interact in today's doctrinal and institutional frameworks. These are questions that Nissel has raised in other work,[1] and gesturing to them here might have added yet another layer of richness. But even without such an extension, the epilogue closes the historic study on a fitting note: one that is reflective, synthetic, and suggestive of new paths for research.

Overall, this book presents an exceptional historical narrative: nuanced, engaging, and richly contextualised. It deftly balances historical reconstruction with analytical insight, illustrating how legalism intertwined with broader social, political, and cultural developments. As the author notes in the first chapter, the work weaves together biological, chronological, critical,

1 Alan Nissel, 'The Duality of State Responsibility', Columbia HRLR 44 (2013), 793-858 (in particular 845-854).

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diplomatic, epochal, geological, political, and sociological threads (pp. 18-19). Inevitably, any summary provided in this review would have to leave out significant subtleties and rich details.

The book's major contribution is its illumination of the history of state responsibility. While some episodes, such as 19th-century arbitration for alien protection or the failed codification attempts of the early 20th century, were not previously unknown or unexamined,[2] Nissel's achievement lies in connecting these strands and mapping their genealogies, iterations, causal relationships, and divergences in the most comprehensive way achieved to date. The book clearly shows how contemporary conceptualisation of state responsibility has been constructed by multiple groups of lawyers, blending practice, theory, and institutional innovation. The narrative is strengthened by a wide array of sources: archival documents, arbitral awards, codification drafts, writings of publicists, and modern commentary, in English, French, and German.

Minor points could be noted. The continuity between the three episodes might be emphasised more; for example, the statement that Latin American and semi-peripheral lawyers inherited the German public law tradition (p. 248) – a key point that links Chapters 4 and 5 – is not fully substantiated. Some threads across chapters, such as the Lieber Tribunal's reliance on intent behind domestic legislation (p. 81) and German theories that exclude fault in triggering responsibility (p. 212), could have been more clearly compared and connected.

Moreover, Roberto Ago's contributions might benefit from more emphasis. While his theoretical work is noted in Chapter 4, the discussion is relatively brief (pp. 219, 241). Given Ago's distinctive approach to constraining sovereignty with state responsibility,[3] a bit more elaboration could have helped highlight its originality. In Chapter 5, the narrative understandably emphasises the role of the ILC's changing composition (p. 297) and appears more sympathetic to García Amador, though more attention to Ago's proposal itself would have further enriched the account.

These are minor observations on an otherwise outstanding work. Nissel offers a sophisticated, multi-layered intellectual history that convincingly shows state responsibility as a product of centuries of practical and theoretical engagement by lawyers. This book is strongly recommended for anyone seeking a deep understanding of the evolution of state responsibility in international law.

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2 For example, Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (Cambridge University Press 2021).

3 See for example, Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations', EJIL 13 (2002), 1083-1098.

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