The Formation of the EU Legal System

Giulia La Torre*
Université de Genève, Geneva, Switzerland and
Université libre de Bruxelles, Brussels, Belgium
giulia.la.torre.garcia@gem-diamond.eu

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

* PhD student at Université de Genève (Geneva, Switzerland) and Université libre de Bruxelles (Brussels, Belgium); MSCA Doctoral Fellow within the Horizon Europe GEM-DIAMOND project. The author would like to thank the editors of the *Heidelberg Journal of International Law*, the editors of this Special Issue, two anonymous reviewers, and the participants in the conference '70 Years of EU Law: Continuity and Discontinuity' for their helpful comments on earlier drafts of this paper. The author alone remains responsible for any errors or omissions.

DOI 10.17104/0044-2348-2026-1-133 ZaöRV 86 (2026), 133-166

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.

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].

---

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.

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.

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'.

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.

 DOI 10.17104/0044-2348-2026-1-133

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

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.

 DOI 10.17104/0044-2348-2026-1-133

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.

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.

 DOI 10.17104/0044-2348-2026-1-133

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.

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.

 DOI 10.17104/0044-2348-2026-1-133

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).

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.

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).

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.

 DOI 10.17104/0044-2348-2026-1-133

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).

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).

 DOI 10.17104/0044-2348-2026-1-133

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.

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.

 DOI 10.17104/0044-2348-2026-1-133

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.

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.

 DOI 10.17104/0044-2348-2026-1-133

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.

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

 DOI 10.17104/0044-2348-2026-1-133

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).

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.

 DOI 10.17104/0044-2348-2026-1-133

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

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.

 DOI 10.17104/0044-2348-2026-1-133

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.

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

 DOI 10.17104/0044-2348-2026-1-133

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.

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).

 DOI 10.17104/0044-2348-2026-1-133

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.

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.

 DOI 10.17104/0044-2348-2026-1-133