



EDITORIAL

Taking on the structural weakness of EU law's general principles

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(Received 21 February 2024; accepted 22 February 2024)

After almost two decades of crisis-induced turbulence, the beginning of the accession negotiations with Ukraine and Moldova at the end of 2023 marked another step in the EU's perennial 'journey to an unknown destination',¹ and tested, once again, its commitment to the cherished values it is so proud of.² Whichever Europe is in the process of being rebuilt and reformed, it is a very distant Europe from the epoch when the conceptual pillars with which many generations of EU lawyers 'grew up' were elaborated and consolidated. The legal edifice of general principles of law, built between the 1960s and the late 1990s through the well-known interaction between the courts and legal scholars, seems to survive all storms.

Voices for the re-foundation of EU law and of its scholarship have been coming from different corners: from the critical tradition of EU law that arguably remains still in the fringes, from the 'transformative law of political economy' which takes as one of its anchors the material structures of EU law,³ from the tradition of doctrinal constructivism now heavily relying on Article 2 TEU,⁴ from social law scholars who call for "new forms of knowledge production" and for a "commitment to critique and skepticism of legal orthodoxies" (also in the pages of this journal).⁵ They even come from the Court itself, with its centralising conception of primacy cum supremacy, and with a new association of primacy and equality of Member States.⁶ The directions of the proposed change are, to put it mildly, disparate. One may note that this is an exciting period for legal scholars, despite (or because of?) the sense of a crumbling world around us. Yet, none of this can take root without facing the inheritance of the general principles of EU law that, as framers of EU law, continue to base judicial-led developments and positive law conceived as a common legal order. Pescatore may be largely unknown to the newer generations of non-Francophone EU lawyers, but he continues to

¹J Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' 31 (1993) *Journal of Common Market Studies* 417–46.

²T Pavone, 'The EU's Faustian Bargain: The EU Betrays Ukraine and the Rule of Law – and We Will Live to Regret It' *Verfassungsblog*, December 2023 <<https://verfassungsblog.de/the-eus-faustian-bargain/>> accessed 21 February 2024.

³A Beckers, KH Eller and PF Kjaer, 'The Transformative Law of Political Economy in Europe' 1 (4) (2022) *European Law Open* 749–59. C Joerges, 'Why European Legal Scholarship Should Become Aware of Karl Polanyi: The Great Transformation and the Integration Project' 1 (4) (2022) *European Law Open* 1067–79.

⁴A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16 (2) (2010) *European Law Journal* 95–111; A Von Bogdandy, 'The European Renaissance of Republicanism: On the Future of EU Law in Light of Article 2 TEU' Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-02.

⁵D Ashiagbor, 'Decentering Europe in EU Social Law Scholarship' 2 (3) (2023) *European Law Open* 479–83.

⁶Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para 249.

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inspire the legal service of the European Commission.⁷ And his spirit does seem to hover over the Lenaerts Court, as it engaged in what is arguably one of the most fundamental re-foundations of the EU legal order since *Van Gend en Loos* and *Costa* in early 2022.⁸

General principles of EU law, under the guise of either constitutional or administrative law,⁹ were the humus that enabled the Court and legal scholars alike to build a coherent whole – an order – from the various fragments of EU law scattered in sector specific Treaty bases and laws. They provided a conceptual apparatus to support the authority of the law, in “a powerful perfection-seeking internal dynamic . . . to make the European legal order ‘the best it can be’”.¹⁰ Most concealed a deep ambivalence, a structural weakness, that is well-known but hardly ever elaborated upon. On the one hand, they were built on the assumption of functional equivalence: the transfer of legal categories from laws of the Member States to the European Union was deemed possible because of the premise – never contested – that the problems in want of a solution were the same in the national and in the European setting. On the other hand, those principles needed, of course, to be suited to the specificity of the European Union, however identified and defined. Long before European citizenship, this reasoning created ‘citizens’ whose rights must be protected before the unilateral exercise of public power by the EU institutions and the Member States.¹¹ Long before the surge of European constitutionalism in the early 2000s, those principles anchored the tenets of liberal constitutionalism in EU law, from a perspective of negative protection rather than positive intervention.¹²

How to address that ambivalence in 2024? Unlike positive law, they do not evolve through the political and bureaucratic processes that have been redefining EU law in the last decades. And, as the rise of ‘digital constitutionalism’ shows, conceptual frames are hard to ditch. To the advocates of the grander narratives of EU integration and of EU law, this concern may come across as a minor detail of legal-dogmatics, if not out-right passé or irrelevant given the challenges the EU and its law face today. However, it is important to bear in mind the role that these principles have had in EU law. In a rather circular process, they have grounded the authority of the law on law itself and have anchored the legitimacy of the EU in the authority of the law. The values-based jurisprudence of the court is a continuation of the same process. Without examining the structural weakness of the conceptual and ‘constitutional’ foundations of *existing* EU law, a process of reconstruction will have missed an important first step: de-construction. Crucially, because of the ‘methods turn’ we have been witnessing, legal scholars can today engage with these principles with the distance that the overwhelming majority of scholars did not have in the 1960s–2000s to their object of analysis. Far from a methods fetishism, the richness of the current scholarship, much fueled by a generation of scholars formed during and since the 2010s, can provide more solid scholarly foundations to those principles than those that supported their emergence and development until the late 1990s. While general legal principles are a fundamental part of EU law, their doctrinal legal content must be scrutinised in view of their genetic ambiguity, of how they have shaped EU law, at different stages of integration and in different policy fields, of how they continue to enable the court to allocate or enshrine power when invoking those principles in support of judgements of legality or illegality and of its interpretation of EU law. Which meanings and normative consequences do they continue to carry in filling in the purported lacunae and

⁷European Commission, Legal Service, ‘70 Years of EU law – A Union for Its Citizens’ (Publications Office of the European Union, 2022) <<https://data.europa.eu/doi/10.2880/02622>> accessed 21 February 2024.

⁸Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97. In this seminal -judgment- *Hungary v Parliament and Council*, the full court stated the following: ‘Article 2 TEU is not merely a statement of policy guidelines or intentions’, the values it names ‘are an integral part of the very identity of the European Union as a common legal order’ and ‘are given concrete expression in principles containing legally binding obligations for the Member States’ (para 127 and 232).

⁹A von Bogdandy, ‘Founding Principles’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2011) 11–54; J Schwarze, *European Administrative Law* (Sweet & Maxwell 1992 [2006]).

¹⁰J Bomhoff, ‘Perfectionism in European Law’ 14 (2012) Cambridge Yearbook of European Legal Studies 75–100.

¹¹J Schwarze, *European Administrative Law* (Sweet & Maxwell 1992 [2006]) 433–1434.

¹²M Dani, ‘Activist Government Redux: Exceptional or Structural?’ 2 (1) (2023) *European Law Open* 1–7.

weaknesses in EU law? How far are those meanings tenable, if they may conceal the diversity of national legal contents that, possibly, may provide views and understandings in support of the renewal of EU law that is now called for? Such analyses will be an important contribution to the disparate projects that try to make sense of the new transformation of Europe, seeking direction in the midst of the fog of what might follow.

In this issue

Sensitive legal-political questions are a rich source of academic elaboration and the ones where judge-made law is perhaps the most controversial. Taking cue from judicial cases weighing in on inclusion in the workplace, housing and climate change, and from the role courts assumed as these matters unfolded in transnationalised private legal settings, Mak proposes a theory of European private law adjudication that explains and justifies the allocation of politically sensitive legal questions to civil courts. She argues that judicial processes can contribute to the inclusion of underrepresented groups in transnationalised private legal settings and create spaces for public deliberation leading to inclusive legal solutions for societal problems. By complementing theories on social justice and constitutionalism with Harbemasian public sphere theory, Mak explains the changing role of the judiciary in Europe and concludes that adjudication can have important advantages over legislative processes in devising legal solutions when politically sensitive problems mobilise national, European and transnational law.

Louis, in turn, throws new light on two of the most hotly debated rulings in the jurisprudence of the European Court of Justice, *Viking* and *Laval*, by revisiting the judgements from a new angle: he considers in detail how trade union and academic actors have contributed to determine the legal meaning of these two rulings, both in the run up to the ruling and in its aftermath. Louis concludes that the understanding of the judgements that has now become common sense – that economic freedoms fatally undermine ‘social Europe’ – emerged not just inevitably and naturally from the legal reasoning of the Court, but it was in large part also the product of careful and deliberate framing by a wider legal community. And that independently of the intentions that moved them. Whether or not readers agree with the substantive implications of the Article (and the specific historical trajectory leading to the ruling that it assumes), it is hard to downplay the importance of considering the role played by the community of legal actors as a whole in the interpretation and construction of ECJ judgements (and for that matter, all EU legal norms).

If the young Marx were to write ‘On the Jewish Question’ today, it is likely that his references to the positive law of ‘bourgeois’ property would pay considerable attention to Article 16 of the Charter of Fundamental Rights, which affirms the freedom to conduct a business as one of the fundamental rights of Europeans. Hogan offers a dissection of the history of how the Article came to be part of the Charter (an account which questions the claim that the drafters merely codified a pre-existing right) and an analysis of how the Court of Justice has weakened, through its case law, the limits that seemed to stem from the literal tenor and structure of the Charter, turning the freedom to conduct business into a powerful instrument with which to push the normative balance of law in the European field – a shift that has led to the weakening of the rights and the socio-economic position of workers.

Krajewski proposes a new way of analysing the much-discussed issue of the intensity of judicial review in complex specialist assessments of a non-legal technical nature performed by generalist courts and by specialised administrative appeal bodies. He focuses on the nature of epistemic knowledge to explain why judicial deference to the technical assessments made by expert bodies may be inevitable. The crucial point is control for non-arbitrariness of the technical assessments made by decision-makers. It is then essential to understand how far courts, within institutional, procedural and legal constraints, evaluate *independently* the probative value of complex and uncertain evidence and the substantive correctness or plausibility of specialist reasoning.

Krajewski argues that lack of even ‘tacit knowledge’ – a form of specialist knowledge – compromises that capacity. Lengthy judicial analyses of files may, in reality, amount to ‘complete concealed deference’ which eschews a genuine check that a demanding conception of the rule of law would require. That does not mean, however, that specialised adjudication by appeal bodies is the solution. At the end, adjudication has important limitations when it comes to securing the rule of law as non-arbitrariness.

One of the areas where complex and uncertain specialist assessments abound is the regulation of pesticides. Aside from the challenges that it poses to adjudication, this is usually a neglected body of law and yet, it is without doubt one of the pillars of the Common Agricultural Policy (CAP) and of the European food system. It is also an element defining the terms in which we relate to nature. This is the object of García-Caro’s contribution. Seen from this perspective, which is the perspective which she rightly encourages us to adopt, the subject matter calls for a new way of doing legal research, one that instead of being partisan to simplification, manages to capture the systemic, dynamic and interconnected character of agroecosystems.

Ouyang’s analysis focuses on servitisation – a process whereby services are added to, or replace, products to create financial value – and, specifically, on servitisation where contractual access to services replaces ownership. He addresses this process through Hegel’s personality theory of property. ‘We are what we own’, so he starts (and concludes, as servitisation means that ‘we are not only what we own but also what we can access’). From this perspective, servitisation can no longer be approached as a contractual arrangement. It becomes ‘functionally equivalent to formal property’ and legal frameworks should be shaped to reflect such equivalence. In his analysis, Ouyang notes the potential impacts of this perspective on the possibilities of European harmonisation and on the scope of existing EU legislation on unfair terms in consumer contracts.

In Issue 1 (2), we were pleased to publish a conversation with Rein Müllerson, a truly remarkable European whose life- and career trajectory gives him a unique perspective on international law and politics. In our Dialogue and Debate section in this issue, we are equally pleased to publish his wide-ranging take on *E Pluribus Unum* in present conditions. As the end of history has now clearly ended, we need to re-engage with dialectics and contradictions, and learn new (or old?) ways to agree to disagree. It is perhaps unavoidable that much of the legal and political literature on the EU is centred on the EU, but that is not a good reason for it to be Eurocentric, or for that matter, Western-centric. And indeed, the answer to the question of what is and what is not a proper topic for European jurists to engage with remains far too determined by the inability to consider the effects and impact that our worldviews have on the rest of the world. With two wars raging in Europe or in the very close vicinity of Europe, it seems extremely pertinent to consider what vision of the world and of international relations should be at the core of European law.

Competing interests. The author has no conflicts of interest to declare.