Unfulfilled Promises: Reconstructing EU Constitutionalism in times of Crisis and Contestation

Jacob van de Beeten*

*European University Institute, Fiesole, Italy, email: Jacob.vandebeeten@eui.eu

Paul LINDEN-RETEK, *Postnational Constitutionalism: Europe and the Time of Law* (Oxford University Press 2023)
Armin VON BOGDANDY, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024)

INTRODUCTION: CRISIS AND CONTESTATION

Constitutionalism in the EU has known better days. What was once embraced as a blueprint for the future of Europe by legal and political elites across the continent has increasingly become an object of contestation and critique. In hindsight, the rejection of the constitutional treaty by referenda in France and the Netherlands in 2005 can be seen as the prelude to renewed and intensified challenges to the authority of EU law. On the one hand these challenges come from the member states: national constitutional court are increasingly vocal in opposing EU law orthodoxies; voters demand that their governments 'take back control'; and illiberal regimes undermine the independence of the judiciary to evade the reach of EU law altogether. On the other hand, EU institutions appear increasingly willing to circumvent the EU's constitutional framework when political expediency so demands. The use of inter se agreements, the rise of informal governance methods, and the creative reinterpretations of existing treaty provisions in response to the Covid-19 pandemic illustrate the EU's pragmatic

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approach to its own constitutional framework – an attitude that even the Court of Justice of the European Union on various occasions has condoned.[1]

In these circumstances an increasing number of legal scholars have turned away from EU constitutionalism. Over the years the EU constitution has been criticised for instituting a mode of public authority that unduly constrains political processes through legal institutions, privileges individual rights over collective decision-making processes and creates a bias of economic over social rights.[2] In its most extreme form, the EU's constitutional framework now appears as a form of 'authoritarian liberalism'.[3] Equally, legal scholars have questioned the emancipatory character of EU constitutional law by showing the manifold ways in which EU law perpetuates economic inequalities, social hierarchies, and cultural biases.[4] As a consequence, the constitutional framework is increasingly seen 'as an appendage to economic forces and governmental machines undermining the social structures of the member states, producing social commodification and cultural standardization'.[5]

The difficulty that EU constitutionalism faces today is thus not simply that the EU's 'constitution' does not adequately constrain political actors at a national and supranational level, but also that the very ideal of EU constitutionalism is under strain. This is visible, for example, in recent attempts to reconstruct EU law from the perspective of international or administrative law,[6] as well as in the emerging

[1]E. Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council', 2 *European Papers* (2017) p. 251; V. Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-Integration' EUI Working Paper LAW 2023/3; P. Leino-Sandberg, 'Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post -NGEU', in R. Weber (ed.), *EU Integration through Financial Constitution* (Hart Publishing 2023).

[2]*See* e.g. T. Isiksel, *Europe's Functional Constitution* (Oxford University Press 2016); D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', 21 *European Law Journal* (2015) p. 460; C. Joerges, 'Integration through Law and the Crisis of Law in Europe's Emergency', in D. Chalmers et al. (eds.), *The End of the Eurocrats' Dream* (Cambridge University Press 2016).

[3]M.A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

[4]*See* e.g. D. Kukovec, 'Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market', 38 *Michigan Journal of International Law* (2016) p. 1; G. Tagiuri, 'The Socio-Legal and Critical Potential of EU Economic Law', 15 *Transnational Legal Theory* (2024) p. 1; D. Ashiagbor, 'Decentring Europe in EU Social Law Scholarship', 2 *European Law Open* (2023) p. 479.

[5]L. Azoulai, '"Integration through Law" and Us', 14 *International Journal of Constitutional Law* (2016) p. 449.

[6]P. Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020); P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010).

body of work that exposes EU constitutionalism as an ideology.[7] The challenge for those who remain committed to a constitutional understanding of EU law is therefore not only to make sense of an increasingly fragmented and diffuse legal landscape in which the positive role of EU law can no longer be taken for granted, but also to articulate a renewed and reinvigorated understanding of EU constitutional law that responds to the EU's present shortcomings and failings. What is needed, in the words of Komárek, is 'a utopia that could give a sense of direction to those who cannot identify with the present state of affairs, but at the same time (still) hesitate to follow European constitutionalism's enemies'.[8]

Reconstructing EU constitutionalism

The two books under review each respond to this challenge by reconceptualising EU constitutionalism and providing a roadmap for its future development. In *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach*, Armin von Bogdandy reconstructs EU constitutional law based on the values contained in Article 2 TEU, which he postulates as the novel 'constitutional core' of the EU legal order.[9] He provides a theoretical grounding for the ongoing turn to 'value constitutionalism' in the case law of the Court of Justice by reimagining the legal integration project as a form of society building, arguing that this enables the EU to reaffirm the authority of EU law while respecting normative pluralism within the member states. The other book under discussion, Paul Linden-Retek's *Postnational Constitutionalism: Europe and the Time of Law*, takes a radically different approach. Although he does not engage explicitly with the Court's turn to Article 2 values, Linden-Retek articulates a profound critique of the attempt to articulate a fixed and immutable foundation for the authority of EU law. To truly constitute a *postnational* form of law, Linden-Retek claims, EU law needs to overcome a fixation on coherence and uniformity and devise legal tools and methods that maintain and uphold a plurality of perspectives and meanings *within* the framework of constitutionalism. Such a postnational approach to EU constitutionalism is premised on both *openness* towards others (including nationals from other Member States, asylum seekers

[7] *See* for example the various contributions to J. Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023); P.L. Lindseth, 'The Perils of "As If" European Constitutionalism', 22 *European Law Journal* (2016) p. 696.

[8] J. Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies, and the Other', in Komárek (ed.), *supra* n. 7, p. 4.

[9] For the most recent articulation of this argument *see* J. Bast and A. von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism', 61 *Common Market Law Review* (2024) p. 1471.

and migrants) as well as an attitude of *reflexivity* towards the foundations of legal-political authority to resist the impulse to make law speak in one voice from a single perspective.

These two books express a radically different perspective on the current state of the EU and its law. While von Bogdandy sees the EU's salvation in the Court's emerging value jurisprudence based on Article 2 and emphasises the role of legal scholars in asserting the Court in its order building project, Linden-Retek takes as a starting point that EU constitutional law should be harnessed by the Court and legal scholars alike to challenge and confront the moral failures of the EU and to give a voice to those currently marginalised. This contrast is exemplified by how each author interprets the meaning of the 12 golden stars that feature on the European flag. Emphasising the centrality of the number 12 in biblical scripture ('Israel was made up of 12 tribes; Christ had 12 disciples; celestial Jerusalem has 12 gates'), von Bogdandy claims that the 12 values of Article 2 TEU take up 'the European flag's symbolism, whose 12 golden stars, arranged in a circle against a blue background, promise salvation'.[10] Linden-Retek, in contrast, invokes a painting by an Italian artist known under the pseudonym Blu that depicts the 12 golden stars on the European flag 'as a ring of braided wire, with twelve sharp, golden barbs'. These barbs serve to keep out a large crowd of refugees seeking safety and asylum, while on the inside of the golden circle there is only 'blue emptiness, nondescript and indifferent – an impossible and hollow dream'.[11]

The purpose of this review is to draw out these contrasting interpretations of the current state of EU constitutional law, while also introducing these works to a future readership. By presenting the main claims of these authors in a comprehensive and accessible form[12] this reviewer hopes that many will find their way to these thought-provoking works. Specifically, this review focuses on the shared methodological orientation of von Bogdandy and Linden-Retek. Rather than offering an abstract normative blueprint for the EU's future constitution, both authors explicitly claim to operationalise normative resources already contained within the EU's legal-political framework. Such an approach is also

[10]A. von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024) p. 91.

[11]P. Linden-Retek, *Postnational Constitutionalism: Europe and the Time of Law* (Oxford University Press 2023) p. 40.

[12]For a more in-depth discussion of the theoretical dimensions and ambitions of these works, *see* e.g. F. Meinel, 'Auch keine Philosophie der europäischen Integration: Rezension zu "Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft" von Armin von Bogdandy', *Soziopolis: Gesellschaft beobachten*, 22 March 2022, https://www.soziopolis.de/auch-keine-philosophie-der-europaeischen-integration.html, visited 21 February 2025; J. Přibáň, 'Postnational Constitutionalism: Europe and the Time of Law', 15 *Jurisprudence* (2024) p. 441.

known as *immanent critique*, meaning a mode of criticism that derives the normative standard it deploys from the social practice it criticises, taking as a starting point that 'only those principles or ideals which have already taken some form in the present social order can serve as a valid basis for social critique'.[13] In other words, by deploying this mode of criticism both authors aspire to transform EU constitutionalism from within by identifying the untapped potential inherent to the law. A commitment to immanent critique thereby promises the possibility of reconstructing EU constitutional law in a way that is both (1) operationalisable in legal practice while simultaneously (2) critical of the premises and assumptions that currently underpin that practice. It offers a powerful methodological tool that harnesses the strengths of critical legal scholarship while retaining a reformist – rather than solely deconstructive – purpose. At a time when legal scholars in various fields are actively seeking to reconstruct legal frameworks and regimes, these books thus offer an example of how such reconstructions could proceed.[14]

To engage in immanent critique, however, is no easy task. It requires successfully resisting a completely *internal* perspective that simply reproduces the presuppositions and assumptions that underpin legal practice, as well as a completely *external* perspective that develops an abstract normative standard against which legal practices are assessed.[15] In other words, it requires taking sufficient distance from the status quo, while also providing practical suggestions for reform. By discussing the work of von Bogdandy and Linden-Retek in turn, this review will suggest that ultimately neither author successfully delivers on the promise of immanent critique. Von Bogdandy's value-based approach is too undemanding, essentially *redescribing* rather than *reconstructing* EU constitutional law and thus contributing to the demands of uniformity and centralisation that he sets out to overcome. Linden-Retek's postnational construction of EU law, on the other hand, is insufficiently *immanent*, articulating such a demanding account of EU constitutionalism that one wonders how it could be rendered operationalisable in practice. In conclusion, therefore, this review will suggest a different strategy to develop an immanent critique of EU law, namely one that is oriented to the Europe of the everyday.

[13]A. Honneth, 'Reconstructive Social Critique with a Genealogical Reservation: On the Idea of Critique in the Frankfurt School', 22 *Graduate Faculty Philosophy Journal* (2001) p. 6.

[14]*See* e.g. S. Moyn, 'Reconstructing Critical Legal Studies', 134 *Yale Law Journal* (2024) p. 77. Similarly, the next Annual Conference of the European Society for International Law (ESIL) is dedicated to the theme of 'Reconstructing International Law'.

[15]I. Venzke, 'The Practice of Interpretation in International Law: Strategies of Critique', in J.L. Dunoff and M.A. Pollack (eds.), *International Legal Theory* (Cambridge University Press 2022); T. Stahl, *Immanent Critique* (Rowman & Littlefield 2022).

European society through law

In *The Emergence of European Society through Public Law* von Bogdandy reconstructs the project of European legal integration as a form of society building through law. The book brings together many of the themes von Bogdandy has worked on over the past 25 years as a director of the Max Planck Institute of Comparative Public Law and International Law in Heidelberg. It is therefore not surprising that the book develops a highly ambitious argument, seeking to prove the 'transformation of European Public law from *the state-centred law of the European powers* to the normative structure of a *democratic European society*'.[16] The values of Article 2 TEU are central to this argument, being presented as 'the manifesto, identity, and constitutional core of a democratic society'.[17] The book thus has a double objective: it reconceptualides the project of European legal integration through the lens of the concept of 'society' while simultaneously presenting the values of Article 2 TEU as the normative core of that project.

This twofold aim is informed by von Bogdandy's vision of legal scholarship as 'doctrinal constructivism'. This form of scholarship not only purports to analyse and systematise the law based on 'an idea of the whole', but also aims to develop the law by proposing doctrinal innovations that keep the law 'in line with changing social relationships, interests, and beliefs'.[18] Von Bogdandy, therefore, explicitly distances his approach from both an *internal* critique of EU law, which critiques the law's coherence on its own terms, and an *external* critique, i.e. with use of 'standards developed in other disciplines, such as political theory or economics'.[19] Rather, he aims to transform the current practice of EU law by appealing to the inherent potential of its constitutional principles (he calls this a 'Hegelian' or 'reconstructive' approach) – a method which allows legal scholars 'to take on an independent critical role ... by pointing to democratic constitutions' unfulfilled promises'.[20] The objective of *The Emergence of European Society through Public Law* is therefore explicitly not to 'glorify the status quo', but to propose 'further transformations'.[21]

[16]Bogdandy, *supra* n. 10, p. 11.

[17]Ibid., p. 2.

[18]A. von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe', 7 *International Journal of Constitutional Law* (2009) p. 364 at p. 377.

[19]Bogdandy, supra n. 10, p. 278.

[20]Ibid., p. 279.

[21]Ibid., p. 2.

Structural transformation as conceptual innovation

The first part of the book sets out the conceptual transformation of public law in Europe. The main claim defended is that the aftermath of the Second World War marked both the demise of the old *ius publicum Europeaum* – premised on state sovereignty – as well as the emergence of a legal space in which EU law, the ECHR and national constitutional law together constituted a new 'European public law'. Von Bogdandy argues that this transformation led to the separation of public law from statehood and produced a new conceptual vocabulary to order the European continent. He describes the further evolution of European Public Law with reference to three critical junctures: first, the years after the Second World War and conclusion of the Treaty of Rome, which led to the creation of a '*Rechtgemeinschaft*' (Hallstein) and the emancipation of European law from international law; second, the end of communism and the conclusion of the Treaty of Maastricht, which transformed the legal community into a political union; and, finally, the period that began with the 2008 financial crisis and the 2010 election of Viktor Orbán, which calls for a reconceptualisation of the integration project from a political union to a European society, or so the argument goes.

Von Bogdandy's reconstructive efforts can thus be seen as an attempt to update our conceptual understanding of EU law at a critical time for EU constitutionalism. He persuasively argues that household concepts within EU legal studies such as *Rechtsgemeinschaft* and 'ever closer union' have lost their analytical and normative trust. The characterisation of the EU as a *Rechtsgemeinschaft* cannot explain ongoing developments such as the politicisation of the EU, the increasing turn to coercive instruments to achieve integrational objectives, and the contestation of law as a medium of integration.[22] The objective of 'ever closer union' no longer offers an inspiring normative ideal, because it remains too committed to legal harmonisation and unification.[23] In other words, the conceptual vocabulary of EU legal studies is in need of rejuvenation for both analytical and normative reasons.

To replace these worn-out concepts, von Bogdandy postulates the concept of European society as the new *idea* that provides an overarching framework to grasp the integration project as a whole and the values of Article 2 TEU as the new *ideal* to guide the ongoing transformation of EU law. He anchors this reconstructive approach in the text of Article 2 TEU, which describes the values on which the EU is founded as 'common to the Member States in *a society* in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women

[22]Ibid., p. 28-29.
[23]Ibid., p. 69-70.

and men prevail'.[24] The objective of the book is to draw out the potential of this provision by reconceptualising European integration as a form of society building. For von Bogdandy, the value of the concept of society lies in the fact that it forms a 'collective singular' that is similar to concepts such as state, people or nation and therefore can serve as the 'the ultimate social reference of European law'.[25] At the same time, he argues that the concept of society is less problematic than those other collective singulars, because it implies less homogeneity and identity, meaning that the EU can forgo 'a grand narrative or ideology' in order to legitimise itself.[26] Moreover, he suggests that the idea of society helps to reframe European integration from the viewpoint of interacting individuals rather than public authorities, thereby overcoming 'statist thinking' while also serving as a means to reframe ongoing conflicts in the EU as *within* a collective whole rather than *between* member states.[27] In sum, the idea of a European society is presented as the means to realise the EU's commitment to 'unity in diversity'.

This argument is not immediately obvious, because what exactly is the ontological status of this 'European society'? At times, von Bogdandy suggests that a European society 'exists' and is 'sociologically robust', but on other occasions he presents it not so much as a descriptive but rather as an aspirational concept.[28] The answer is found in the epistemological basis of this reconstructive project, which is explicitly not sociological, but legal in nature: the empirical material informing his analysis is limited to texts such as treaty provisions, regulations and judgments of the Court. This means that European society's mode of existence is not external to EU law, but rather becomes 'a reality in the many conflicts involving the terms of Article 2 TEU ... European society creates itself in these disputes'.[29] The starting point for von Bogdandy's argument is thus not that social reality should inform how we conceptualise the law, but rather that law should shape social reality, or, in his own words, it starts from the premise that 'legal structures express social structures'.[30]

Conceptualising European society in this way is both the key strength and key weakness of the book. One the one hand, framing European legal integration as a form of society building forms a highly creative and *operationalisable* reconceptualisation of EU constitutional law. If EU law forms the normative structure of a European society, then the values of Article 2 TEU appear as the normative core of that law, explaining and justifying their binding legal nature.

[24]Art. 2 TEU.
[25]Bogdandy, *supra* n. 10, p. 40 and p. 4.
[26]Ibid., p. 40.
[27]Ibid., p. 4.
[28]Ibid., p. 5 and p. 2.
[29]Ibid., p. 5.
[30]Ibid., p. 14.

Von Bogdandy thus provides a theoretical justification for the activation of Article 2 values to address the 'rule of law crisis' in Poland and Hungary. In his own words, his analysis can be used 'to tackle what is perhaps Europe's most serious problem: Member States that endanger European society's democratic character'.[31] This framing also enables a future vision of EU constitutional law in which the values of Article 2 TEU play an increasingly large role. It is therefore not surprising that the European Commission has already adopted the 'society' discourse in the ongoing infringement proceedings against the Hungarian 'anti-LGTBQ' law to argue that Hungary is violating the values of Article 2 TEU.[32]

On the other hand, the assumption that European society and the EU institutions are co-constitutive is highly problematic. This premise reflects a well-established pattern of thought in EU legal studies in which law is attributed a *constitutive* role and is seen as an instrument to shape and reshape the social reality on the European continent.[33] As von Bogdandy mentions twice: '[n]owhere Europe is more real than in the law'.[34] He thereby puts his faith in a continuation of 'integration through law' as a top-down and institutionally driven project of social engineering at a time when such an understanding of the role of law in European integration is increasingly problematised. Indeed, the wider literature is characterised by an ongoing search for new perspectives, methods and concepts with the aim of bringing 'EU law back down to earth'.[35] The underlying sentiment of this methodological turn is that – rather than constituting society – EU law remains 'blind to the crises of the everyday in domestic societies'.[36] Fundamentally, this turn therefore represents an ontological and epistemological shift in the way EU law is understood: not just as a coherent and

[31]Ibid., p. 68.

[32]The Commission opened its plea with the following statement: 'This is a frontal and deep attack against the … European society.' *See* L. Kaiser et al., 'European Society Strikes Back: The Member States Embrace Article 2 TEU in Commission v Hungary', *Verfassugsblog*, 26 November 2024, https://verfassungsblog.de/european-society-strikes-back/, visited 21 February 2025.

[33]T. Marzal, 'Between Integration and the Rule of Law: EU Law's Culture of Lawful Messianism', 24 *German Law Journal* (2023) p. 718.

[34]Bogdandy, *supra* n. 10, p. 8, 115, citing Comité de Réflexion sur le Préambule de la Constitution, Redécouvrir le Préambule de la Constitution. Rapport du comité présidé par Simone Veil (2008) p. 41.

[35]C. O'Brien, 'Bringing EU Law Back down to Earth', 18 *International Journal of Law in Context* (2022) p. 450; For some recent books on EU legal method, *see* M. Bartl (ed.), *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022); M. Rask Madsen et al. (eds.), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022); R. Deplona et al. (eds.), *Interdisciplinary Research Methods in EU Law: A Handbook* (Edward Elgar Publishing 2024).

[36]L. Azoulai, 'The Law of European Society', 59 *Common Market Law Review* (2022) p. 203 at p. 206.

abstract set of rules and legal principles, but as a social practice and lived experience.

Considering von Bogdandy's professed commitment to immanent critique, the exclusive focus on EU law 'in the books' is even more problematic. By assuming the congruence between social structures and legal structures, he forgoes any opportunity to juxtapose the abstract ideals contained in Article 2 TEU with the current social practices through which these ideals are to be realised.[37] Instead of using these values as a benchmark to assess the EU's capacity to realise these values in practices, von Bogdandy assumes that the values of Article 2 TEU are expressed *through* the EU's legal and political practice. As a result, the quest to render the EU's foundational values operationalisable as legal principles fatally undermines the critical thrust of von Bogdandy's reconstructive efforts.

European society: reconstruction or redescription?

This point can be elaborated by turning to the second part of the book, which shifts the focus from the structural transformation of European public law to the reconstruction of its foundational principles. The main argument in this part is that Article 2 TEU establishes the 'ultimate legal grounds of European society' and should therefore be understood as expressing the EU's 'constitutional core' or 'constitutional identity'.[38] While the idea that the values of Article 2 TEU are operative legal principles reflects the approach of the Court of Justice and the EU legislature over the last five years, this is by no means an uncontested practice.[39] Von Bogdandy therefore goes to considerable length to justify why these values should be considered at the core of EU law, explaining that they can play a significant role in the formation of a European identity while also safeguarding normative pluralism within the EU. This allows him to present the 'particular vagueness' of these values not as a weakness, but as a strength.[40] Specifically, he suggests that these values enable the mediation of competing identity claims, limit the capacity of EU institutions to impose a single constitutional blueprint on the member states, and provide a normative ideal to guide the further transformation of the EU's constitutional legal order.

Nonetheless, *The Emergence of a European Society through Public Law* remains remarkably silent about the concrete doctrinal reconstructions that Article 2 TEU demands. In fact, the purpose of von Bogdandy's 'reconstruction' is not to change

[37]Bogdandy, *supra* n. 10, p. 14.

[38]Ibid., p. 90.

[39]*See* e.g. F. Schorkopf, 'Value Constitutionalism in the European Union', 21 *German Law Journal* (2020) p. 956; M. Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', 118 *AJIL Unbound* (2024) p. 167.

[40]Bogdandy, *supra* n. 10, p. 112.

the way EU law operates, but rather to reframe the way the operation of EU law is justified. For this reason, his approach could have been better labelled as a 'redescription' rather than as 'reconstruction' of EU constitutional law. The two following examples are instructive in this regard. First, von Bogdandy argues that the ongoing transformation of the EU requires 'doctrinal reconstructions that imbue the Union's economic and monetary constitution with the principles of Article 2 TEU'.[41] He claims this means that a view of EU law as a 'liberal market constitution with a monetarist orientation' should be abandoned, but he does not clarify what should be put in its place. Instead, he argues that this reconstruction is already ongoing, because where in the past the fundamental freedoms 'mainly served economic integration; today, they also defend democratic essentials in the Member States'.[42] The function of Article 2 TEU is thus not to change the way the fundamental freedoms operate, but rather to reframe the fundamental freedoms as an instrument to counter illiberal tendencies in the member states. This is a very thin reconstruction to say the least: in contrast, Dimitrios Spieker – von Bogdandy's former student – at least suggested that Article 2 TEU demands the deconstitutionalisation of the fundamental freedoms.[43]

Second, von Bogdandy also argues that the systemic foundations of EU law – specifically the principles of autonomy, primacy and *effet utile* – 'must be reconstructed in the light of Article 2 TEU, as manifestations of its rule-of-law principle'.[44] Again, however, he does not articulate any practical consequences for the way in which these principles operate, but rather seeks to justify the instrumental role of Article 2 TEU values to defend the systemic or structural foundations of EU law. Unsurprisingly, the president of the Court of Justice has recently made a similar claim, arguing that the Court uses the values of Article 2 TEU to 'safeguard the structural tenets on which the EU is founded, since those tenets implement those values'.[45] In both cases the values of Article 2 TEU are presented as being expressed through EU law's constitutional framework, rather than as a benchmark that serves to assess the way in which that framework operates. As a result, the values of Article 2 TEU appear as 'a cover for government and a justification for it rather than something which acts as a counterpoint to it'.[46]

[41]Ibid., p. 156.

[42]Ibid., p. 157.

[43]L. Dimitrios Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023) ch. 6.

[44]Bogdandy, *supra* n. 10, p. 119.

[45]K. Lenaerts and J.A. Gutiérrez-Fons, 'Epilogue. High Hopes: Autonomy and the Identity of the EU', 8 *European Papers* (2024) p. 1495 at p. 1496.

[46]D. Chalmers and L. Barroso, 'What *Van Gend en Loos* Stands For', 12 *International Journal of Constitutional Law* (2014) p. 105 at p. 134.

Not only is the way in which von Bogdandy 'reconstructs' EU primary law disappointing in light of his ambition to promote further 'transformations', but so is his reconstruction of the values of the rule of law and democracy. These are the only values of Article 2 TEU that are addressed in any detail, meaning that the other 10 values contained in Article 2 TEU are left largely undiscussed, even though von Bogdandy himself claims that 'they all form part of one Treaty article' and therefore 'must not be interpreted in isolation from another'.[47] As a result, pressing issues such as the EU's questionable fundamental rights record, the existing socio-economic inequalities within member states and the question of solidarity between member states are conspicuously absent from this account of European public law. The book thus adopts the same legalistic frame that so far characterises the EU's response to the rule of law crisis in Poland and Hungary, prioritising concerns for judicial independence and the rule of law over socio-cultural inequalities, the protection of citizens' rights and the promotion of democratic institutions.[48]

The reconstruction of the rule of law will be discussed below, so here we will turn to the discussion of the value of democracy. Von Bogdandy's conception of democracy foregrounds the importance of compromise and mediation at the expense of immediacy, which he considers the hallmark of authoritarian regimes. His conception of democracy does not revolve around collective will formation and majoritarianism, but foregrounds processes that facilitate consensus and compromise in accordance with the common values of Article 2 TEU. Based on this reconstruction, the European Parliament is presented as equal to national parliaments, while the European Council appears as a virtuous compromise machine that forms the 'most powerful engine for ever-closer union'.[49] The argument reaches its pinnacle in defence of trilogues as a 'significant democratic innovation'.[50] While he notes the need to further strengthen the power of the Parliament, this 'reconstruction' thereby essentially embraces the current institutional status quo. This is because in von Bogdandy's work democratic institutions are vehicles to realise the values of Article 2 TEU; his concern is not primarily with process, but rather with outcome: 'if it meets the principles of Article 2 TEU, we should celebrate it as a sign of European democracy'.[51]

[47]Bogdandy, *supra* n. 10, p. 92.

[48]P.-A. Van Malleghem, 'Legalism and the European Union's Rule of Law Crisis', 3 *European Law Open* (2024) p. 50.

[49]Bogdandy, *supra* n. 10, p. 143.

[50]Ibid., p. 149.

[51]Ibid., p. 153.

Problematically, at no point does the argument engage in a sustained manner with the most powerful critiques of the EU's 'democratic deficit' that have been presented in the literature, namely those that point to the lack of political contestation, accountability and transparency.[52] As a result, his reconstructive project turns into an exercise that reframes and remoulds concepts and meaning to suit the *sui generis* nature of the EU. As von Bogdandy has written elsewhere:

> European society will only be fully at ease with itself once many citizens understand the trilogues of the EU as an integral aspect of their democracy, which both demands and consists of compromises. Until this insight is achieved, the problem of alienation will plague European society.[53]

In other words, the problem of European democracy lies not in the institutional configuration of the EU, but rather in misconceptions of what democracy is really about. Again, von Bogdandy's analysis turns out to be as a redescription rather than a reconstruction, reframing the idea of democracy in such a way to make it fit the current status quo.

The transformative role of apex courts and legal scholarship

The final parts of the book address the role of courts and legal scholarship in the construction of European society through law. The analysis focuses on the changing role of national constitutional courts in Germany, France, and Italy, and Europe's two supranational courts: the Court of Justice and the European Court of Human Rights. This is by far the best part of the book, because it provides a highly detailed and instructive analysis of the way in which these courts have transformed their own mandate and thereby acquired the final authority to interpret the foundational documents by which they were created. While von Bogdandy admits that 'neither treaty legislator nor any constitutional framer has explicitly conferred on any court the mandate they exercise today', he argues that this does not diminish the legitimacy of these courts.[54] On the contrary, he

[52]For a classic critique *see* P. Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013). For some of the many contributions in the EU legal literature, *see* e.g. F. De Witte, 'Interdependence and Contestation in European Integration', 3 *European Papers* (2018) p. 475; M. Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance', 53 *Journal of Common Market Studies* (2015) p. 976; P. Leino-Sandberg, 'Transparency and Trilogues: Real Legislative Work for Grown-Ups?', 14 *European Journal of Risk Regulation* (2023) p. 271.

[53]A. von Bogdandy, 'European Democracy: A Reconstruction through Dismantling Misconceptions', *ELTE Law Journal* (2022) p. 5 at p. 22.

[54]Bogdandy, *supra* n. 10, p. 233.

considers that Europe's apex courts play a key role in ensuring that public authority is exercised in accordance with standards articulated in Article 2 TEU.

To conceptualise and justify this development, von Bogdandy invokes the concept of 'transformative constitutionalism'. In the past this concept has been used primarily to explain the role of constitutional courts in (mostly) the Global South, but he claims it also forms an appropriate concept with which to understand the role of Europe's apex courts.[55] Specifically, he renders Europe's supranational courts as agents of transformative constitutionalism that have played a key role in 'forging European society'.[56] This means that he sees the primary role of these courts not so much in terms of checks and balances, i.e. as controlling the executive and legislative powers, but rather as fulfilling a transformative societal function. On such a reading, courts have become 'actors of societal mediation' that not only adjudicate individual disputes, but shape 'general structures between competing social forces'.[57] By describing the role of these courts in this way, von Bogdandy justifies their role in addressing the rule of law crisis as a way to protect 'Article 2 TEU in systematically deficient European contexts'.[58] While it is certainly refreshing that von Bogdandy presents the Global South as the vanguard of contemporary constitutionalism, with Europe lagging behind and slowly catching up with the practices of transformative constitutionalism, I am not convinced by this conceptual frame. One of the problems is that in von Bogdandy's account the values of Article 2 TEU do not serve a transformative but rather a *conservative* purpose: namely to protect the EU's legal-political framework *as it currently is* against illiberal threats from within, rather than to transform the socio-economic and political dimensions of European societies.

Moreover, the transformative role that is attributed to these courts creates a tension within the value of the rule of law that remains unaddressed throughout the book. The rule of law is presented as the most important principle of European public law because it encapsulates the concept of legality and thereby ensures that 'norms can fulfil their social function at all'.[59] This function – which flows from its generality, predictability and stability – makes it possible for law to operate as an autonomous normative force that shapes society. In other words, 'the principle of the *rule of law* demands that *law rules*', because it is only then that law

[55]For a similar argument that also points to the democratic risks inherent to the practice of transformative constitutionalism, *see* M. Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', 65 *The American Journal of Comparative Law* (2017) p. 527.

[56]Bogdandy, *supra* n. 10, p. 194.

[57]Ibid., p. 229.

[58]Ibid., p. 72.

[59]Ibid., p. 114.

can stabilize normative expectations among citizens.[60] But von Bogdandy presents transformative judicial decision-making also as an unpredictable process in which there are few legal constraints and in which courts exercise a large degree of autonomy in the interpretation of the law. He explicitly recognises that judicial law-making is 'political because it affects the general public, has tremendous leeway, and often connotes a specific world view'.[61] And – in the context of the transformation of national constitutional courts – he even argues that '[h]ardly any legal scholar will claim that legal texts, legal doctrine, or interpretive theories guided the courts' decision-making'; nor does von Bogdandy deem it possible 'to isolate individual factors and thereby explain judicial decision-making'.[62]

Despite the purported 'anti-Schimittian' orientation of the book, von Bogdandy presents legal decision-making in a highly decisionist ethos, creating a strong tension between transformative constitutionalism and the idea of legality. This tension is further heightened by the abstract and vague nature of the values of Article 2 TEU. As we have seen, these attributes are presented as a strength because they enable mediation and compromise, but while that might be true for the operation of values in public and political discourse, surely this is not the case in the courtroom, in which they form the basis to render concrete judgments?[63] The tension between an instrumental understanding of the rule of law and a commitment to formal legality culminates in the reconstructive proposal presented at the end of the book. To underscore the potential of his method of 'doctrinal constructivism', von Bogdandy advocates for the introduction of criminal sanctions for Article 2 TEU violations.[64] Importantly, the argument is not that the European and national legislators should introduce laws that criminalise violations of the common values. Rather, he proposes a creative reinterpretation and combination of existing provisions of national and European law to prove a doctrine of criminal liability for Article 2 TEU violations. This proposal is presented under the header 'fighting fire with fire', by which von Bogdandy seems to suggest that rule of law violations justify further violations of the rule of law in turn to address these initial violations. As such, his proposal reveals the moment in which *re*constructive scholarship *de*constructs itself. After all, when protecting the EU rule of law requires a disregard for the principle of

[60]Ibid., p. 115.
[61]Ibid., p. 177.
[62]Ibid., p. 180.
[63]Instructive here is Martin Loughlin's distinction between a framework constitution (a 'bargain struck by political forces at a particular historical moment') and a value constitution ('an arrangement of norms of an intrinsically ethical character'): *see* M. Loughlin, 'The Silences of Constitutions', 16 *International Journal of Constitutional Law* (2018) p. 922.
[64]Bogdandy, *supra* n. 10, p. 286-296.

legality (*nulle crimen sine lege*), the limits of law as a self-legitimating normative force surely have surely been surpassed.

This proposal also shows that rather than overcoming centralising tendencies within the EU or sustaining normative pluralism, the values of Article 2 TEU offer a rationale for the continuous expansion, centralisation and perfection of the EU legal order.[65] Indeed, so far, the main constitutional effect of the European Court of Justice's value jurisprudence has been to expand the powers of the EU into what were previously considered to be the reserved domains of the member states. This is a development that von Bogdandy welcomes and encourages – and which his theoretical framework legitimises – but which also leads him, in his own words, to 'glorify the status quo'.

The postnational promise

What, then, would an emancipatory and truly transformative form of constitutionalism look like? The answer is found in Linden-Retek's *Postnational Constitutionalism*, which provides an account of EU constitutionalism that seeks to profoundly alter the EU's current legal and political practices. The starting point of Linden-Retek's analysis is a concern not with the illiberal threat from within, but rather with the way in which the EU positions itself in relation to 'the other'. Questioning the 'false closure' of the integration project, Linden-Retek argues that a truly postnational form of law should be premised on the capacity to 'think beyond the horizons of our own interests'.[66] For that reason, he rejects the attempt to conceptualise EU law in light of an overarching unifying purpose or a core of ethical commitments, because this leads to a construction of the EU's legal-political identity in immutable and fixed terms. Instead, he foregrounds the idea of the EU as a political subject 'whose identity, history, purpose and legacy are always self-consciously the products of the polity's unpredictable political engagement *with others*'.[67]

In conversation with a wide range of authors from the tradition of critical theory, *Postnational Constitutionalism* develops a sophisticated critique of the various ways in which EU constitutional law sustains rather than challenges the legal-conceptual apparatus that underpins national sovereignty. Central to this critique is the notion of *reification*, a key concept in the vocabulary of critical theorists such as Georg Lukács, Theodor Adorno and Axel Honneth. This concept

[65]J. Zglinski, 'The New Judicial Federalism: The Evolving Relationship between EU and Member State Courts', 2 *European Law Open* (2023) p. 345. On perfectionism, *see* J. Bomhoff, 'Perfectionism in European Law', 14 *Cambridge Yearbook of European Legal Studies* (2012) p. 75.

[66]Linden-Retek, *supra* n. 11, p. 14.

[67]Ibid., p. 2 (emphasis added).

refers to a thought process whereby law objectivises contingent social relationships and presents these as natural, immutable, and unchanging.[68] With use of this concept Linden-Retek articulates a twofold critique of EU constitutionalism. First, he argues that EU constitutional law reifies – and thereby reproduces rather than challenges – the socio-economic and political status quo. In other words, he claims that EU primary law insufficiently acts as a counterpoint to the economic interests and political power of the member states and therefore fails to live up to its postnational potential. Second, and more fundamentally, he also uses the concept of reification to show how EU constitutional law itself remains too invested in a sovereign understanding of law. Specifically, he critiques the way in which both the Court of Justice and legal scholars construct EU law in terms of coherence and uniformity and as a result fail to do justice to the pluralism within European society. His concern is that processes of reification in EU law preserve 'a closed identity for some at the expense of the freedom of others'.[69]

Based on this diagnosis of EU constitutionalism's present shortcomings, Linden-Retek also provides a 'critical reconstruction' of EU constitutionalism in order to 'revive a certain potential' he 'continue[s] to see' in EU law.[70] Despite his reliance on critical theory, the objective of postnational constitutionalism is therefore explicitly reformist, visible in his professed commitment to integration through law as a 'vital institutional fixture of a postnational polity'.[71] Like von Bogdandy, Linden-Retek thus sees an unfilled promise contained within the EU's constitutionalism, namely that of a reflexive legal and political practice that remains critical of its own assumptions and presuppositions. Specifically, he argues that such an EU constitutionalism should be premised on an understanding of legal and political identity as changing over time rather than static, while remaining open to the other rather than being exclusionary. His account of EU law thus explores the 'possibilities *within* constitutionalism for pluralism and for dynamic political transformations'.[72]

Beyond the EU's solidarity deficit: anti-reification and fallibilism

The central importance that Linden-Retek affords to EU law's capacity to engage with the other explains why the first part of the book presents the principle of solidarity as central to the project of postnational law. It first provides a diagnosis of the EU's current 'solidarity deficit', revealing the limits of generating solidarity

[68] *See* for example T. Hedrick, 'Reification in and through Law: Elements of a Theory in Marx, Lukács, and Honneth', 13 *European Journal of Political Theory* (2014) p. 178.

[69] Linden-Retek, *supra* n. 11, p. 8.

[70] Ibid., p. ix.

[71] Ibid., p. 187.

[72] Ibid., p. 23 (emphasis added).

by 'integration through law' and then proposes an alternative conception of legal solidarity that corresponds to the key ambition of postnational constitutionalism: the construction of a non-sovereign mode of legal and political authority. Through a critical analysis of the EU's response to the Eurozone and asylum crisis, Linden-Retek argues that the legal principle of solidarity currently only plays a superficial role in EU law and 'remains in essential ways subordinate to existing, predominant interests – whether national or supranational/systemic'.[73] This argument is developed through an analysis of the Court's case law relating to the eurozone and migration crisis. Through an analysis of cases such as *Pringle* and *NS and ME*, he shows how the Court has sanctioned the creation of the European Supervisory Mechanism and the Dublin Regulation without questioning the structural imbalances between the EU's centre and periphery that these legal instruments institutionalise. As such, the Court treats EU law 'foremost as a system of social management, absent positive reflection on the common good and what it might demand'.[74] Problematically, this leads to a punitive use of legality, meaning that EU law *itself* forms an obstacle to solidaristic politics by imposing the burden of austerity and asylum on specific member states (Greece, Italy) rather than sharing responsibilities in a solidaristic fashion.

The lack of solidarity in EU law is further illustrated with a discussion of the principle of mutual trust in the Area of Freedom, Security and Justice. This principle is a judicial creation and obliges member states to assume the equivalence of each other's legal systems, including the adequacy and quality of fundamental rights protection. In this way, this principle sustains the operation of mutual recognition instruments *even* when such instruments fall short from the perspective of postnational solidarity. Specifically, Linden-Retek argues that the principle of mutual trust acts as a 'a veneer beneath which rights violations could be hidden and tolerated', because national courts are obliged to presume equivalence of fundamental rights regimes across the EU despite the widespread evidence to the contrary.[75] This, in turn, also affects those who are seeking asylum and hospitality in the EU, because they are the ones affected by the premise of formal equivalence. The principle of mutual trust thus sustains a twofold solidarity deficit: between EU member states as well as between the EU and those who seek asylum. While this analysis in itself is not novel, Linden-Retek skilfully shows how these two dimensions are interrelated, criticising the Court for failing to address the 'constitutive relationship between fundamental rights protection and the fairness with which systemic responsibilities are distributed under Dublin

[73]Ibid., p. 47.
[74]Ibid., p. 48.
[75]Ibid., p. 60.

among Member States'.[76] By insisting on formal trust, the Court of Justice leaves intact the structural background conditions and power imbalances that underpin the Area of Freedom, Security and Justice in its current form. In other words, he critiques the Court of Justice for its failure to assess EU legislation in light of the purported commitment to solidarity as a foundational value of EU primary law. The overall lesson Linden-Retek draws from this analysis is that the 'the demands of legal solidarity cannot be captured adequately by recourse to the formalism of rule-following alone'.[77]

This diagnosis forms the basis for a reconstruction of solidarity as a reflexive legal principle that renders explicit rather than obscures the background conditions and structural imbalances that underpin EU legislation. The novelty, creativity and complexity of this proposal cannot be underestimated. Effectively Linden-Retek advocates for a fundamental reframing of solidarity in EU legal thought by proposing a commitment to what the calls *anti-reification*. The idea of anti-reification can best be understood as a way of thinking – a mindset if you will – that takes into consideration both (a) the background conditions that structure legal relations of mutual dependency and responsibility in the EU and considers (b) the way such relations change over time and beyond one's own control. While von Bogdandy thus starts from the premise that 'legal structures express social structures', Linden-Retek foregrounds the way in which social, economic and political power dynamics shape EU law. Indeed, the overall ambition of a commitment to anti-reification is to emphasise 'long-neglected concerns about structure and domination and lived experience that the formal language of EU law tends to obscure'.[78]

By postulating solidarity as the key principle of the EU's *postnational* constitutionalism, Linden-Retek thus presents a highly demanding account of EU law that foregrounds the potential of EU law to question existing power dynamics and relations of domination that are sustained through the EU's legal-political framework. At a time where the principle of solidarity is invoked by the Court as an enabling device,[79] Linden-Retek effectively reimagines solidarity as a principle that *prevents* the EU legislature from adopting laws that inequitably distribute the obligation to provide asylum among the member states. Rather than taking a sovereign approach to EU law – in which the law forms the instrument wielded in the name of those political actors with the power to dictate its content – Linden-Retek encourages the Court of Justice to approach EU law in a *non-sovereign*

[76]Linden-Retek, *supra* n. 11, p. 69.
[77]Ibid., p. 103.
[78]Ibid., p. 107.
[79]ECJ 16 February 2022, Case C-157/21, *Poland* v *European Parliament and Council*, ECLI:EU:C:2022:98, para. 111. For a further analysis of how the principle of solidarity is invoked to justify certain actions previously thought impossible, *see* Leino-Sandberg, *supra* n. 1.

sense, taking as a starting point that 'the norms we author are in fact a product, not a settled frame or stable basis, of our unpredictable engagement with others'.[80] And this requires, he submits, first and foremost a sense of modesty or *fallibilism*:

> to have solidarity for others is in the first instance an act taken in light of knowledge of our own finitude, and thus of the limits of what our knowledge, about ourselves and others, can and cannot do for us ethically. One thing it cannot do is serve as the grounds for sovereign action, postured defensively against the future with an orientation of mastery or control.[81]

In other words, Linden-Retek understands the role of EU constitutional law as not simply to sustain the political project of integration, but rather to promote the creation of a reflexive postnational community. In this way he recasts the EU as a community that is premised on a fundamental openness towards the 'other', resisting the urge to articulate its own immutable and unchanging foundations. The aim of the EU as a postnational project then becomes 'to find greater recognition in our lives for the fates of others'.[82]

From legal coherence to narrative intelligibility

Realising such a vision of the EU would require profound changes to the interpretative practices of the Court, as the second part of the book makes clear. Here Linden-Retek argues that EU constitutional law not only fails to act as a counterpoint to member state sovereignty, but also remains *itself* too invested in 'Westphalian imageries' of law. He locates this Westphalian mindset in the various ways in which EU law has been constructed as a coherent, uniform, and indivisible whole. A search for legal coherence remains, in his own words, 'unhelpfully tied in crucial respects to the Westphalian sovereigntist mode of legal authority that reproduces reification and erases the reflexivity of identity'.[83] He therefore proposes to replace a commitment to law's coherence with a focus on law's *intelligibility*, which requires resisting the reification of legal subjects by regarding the law in a more modest and open-ended manner and allowing it to be 'reinterpreted over time by divergent and marginal voices'.[84]

In developing this argument, Linden-Retek first provides a critique of the way in which EU law has traditionally been constructed. By devising a typology of 'constitutional imaginaries' in EU law – which he calls *history*, *system* and

[80]Linden-Retek, *supra* n. 11, p. 78.
[81]Ibid., p. 81.
[82]Ibid.
[83]Ibid., p. 141.
[84]Ibid., p. 115.

principle – the book shows how the identity of the subjects of EU law has traditionally been construed from a single perspective and in a one-dimensional manner. As a result, the subjects of EU law appear as either members of a unified national people, market-citizens, or abstract rights-bearers. By constructing EU law as a coherent system through the lens of national sovereignty, technocracy or cosmopolitan right, each of these imaginaries is brought to life by 'the desire to speak in a single voice and to see others only in terms that are one's own'.[85] Linden-Retek's critique is that these imaginaries are based on an essentialist and static understanding of identity and therefore foreclose the possibility of creating a postnational identity that is more contingent and fluid in character. Even though he does not explicitly engage with the most recent turn to the value constitutionalism in the Court's case law, it is not difficult to see that Linden-Retek would also reject a constitutionalism that grounds the identity of the EU and its subjects in a select number of common values. His critique of such a 'false closure' substantiates concerns that have already been raised about the exclusionary effects of the recent value case law.[86]

Instead, Linden-Retek submits that EU law's postnational promise can only be realised 'when law begins to speak less holistically and thus admits the perspectives of those previously excluded'.[87] He therefore proposes to reorient the search for law's coherence towards law's *intelligibility*, which aims at 'understanding legal principles in light of the narratives that give them meaning'.[88] The point of this exercise is to no longer frame legal subjects *as they already are*, but rather to imagine them as members of a political community whose identity does not precede legal interpretation, but is formed through 'a process of contestation that is, in some measure, unpredictable'.[89] In other words, Linden-Retek argues that the authority of postnational law should not be derived from the fixed identity of its subjects, but rather from its capacity to sustain the changing and unstable character of political identity that is, at least in part, formed through an encounter with others. This means that a postnational perspective on EU law requires taking seriously the plurality of 'European society' and the legal meanings circulating among the individuals, communities and outsiders that constitute this society.

How would this work in practice? That question is answered in the most accessible, eloquent and impressive part of the book, which discusses the Opinion of Advocate General Paolo Mengozzi in Case C-638/16, *PPU X and X* v *Belgium*. This case concerned the question of whether Belgium was required under the

[85]Ibid., p. 143.
[86]Azoulai, *supra* n. 36.
[87]Linden-Retek, *supra* n. 11, p. 147.
[88]Ibid., p. 154.
[89]Ibid., p. 148.

Charter of Fundamental Rights to issue a short-term Schengen visa on humanitarian grounds to allow the applicants to travel from Syria to Belgium to request asylum. Unlike the final judgment, Mengozzi found that such an obligation did indeed exist, using the concrete legal dispute on visa provisions to reflect on the EU's wider responsibilities in the migration crisis. Linden-Retek constructs with great detail and care how Mengozzi: (1) rejects abstract legal reasoning in favour of a detailed analysis of the particularities of the case and the specific circumstances of the individuals; (2) shows an awareness of the wider historical processes that inform the current state of EU law; and (3) remains attuned to the possibilities that the individual cases might steer the EU legal-political framework towards a better, more emancipated, future. In doing so, Linden-Retek presents Mengozzi's Opinion as an example of postnational judicial decision-making in the EU, which should 'not be seen only as a goal-oriented means to an end, but as an effort to articulate the meaning of law in the language of a postnational, heterarchical, constitutional culture'.[90]

While his argument is impressive, one wonders whether a single Opinion of an Advocate General can sustain the whole of the argument that *Postnational Constitutionalism* presents. Linden-Retek submits that the Opinion forms a practical example of anti-reification, thereby showing how it is not 'fanciful but can, at least in part, be glimpsed in existing judicial doctrine'.[91] This might be true, but the dominant formalist-legal culture in EU law forms a serious obstacle to operationalising such a postnational approach in practice. It is telling that Linden-Retek draws on an Advocate General's Opinion rather than judgments of the Court itself to illustrate the potential of postnational interpretative practices. While he is not alone in urging the judges of the Court to adopt a more discursive form of legal reasoning, there are various historical, legal-cultural and institutional reasons that explain the contrast between the discursive character of Advocate Generals' Opinions and the terse and cryptic style of the Court's judgments.[92] Unfortunately, the book remains silent on the question of how these obstacles are to be addressed in order to make a postnational form of legal reasoning a reality.

This silence points to a larger problem in the book from the perspective of *immanent* critique: Linden-Retek's critical reconstruction of EU law is informed by a wide range of artists, philosophers and writers, whose insights are opposed to the political decisions of the European Council, the case law of the Court of Justice and the speeches of former Commission President Jean-Claude Juncker. While this approach enables Linden-Retek to develop a highly critical and

[90]Ibid., p. 154.

[91]Ibid., p. 176.

[92]*See* e.g. M. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009).

convincing case to think of and do EU law differently, it also means that his argument acquires a utopian rather than reformist bent. He insufficiently points to resources already contained within EU law that could be mobilised to advance his project of postnational constitutionalism and, consequently, the question of how to operationalise postnational constitutionalism in practice remains mostly unanswered. This is where he could have taken the work of von Bogdandy as an example: Linden-Retek's reframing of the principle of solidarity shows that it would be perfectly imaginable to advance doctrinal re-interpretations of Article 2 TEU that at least go some way in the postnational direction he advocates for. A sustained doctrinal analysis would also have helped to render his work more accessible to legal scholars unfamiliar with the tradition of critical theory and would therefore have been a welcome addition to this theoretical reframing of EU constitutional law.

In whose name? Postnational rule of law and democracy

The lack of 'immanence' that characterises Linden-Retek's critique can be further illustrated by the final part of the book, which discusses the question of postnational constituent power. The overall objective of this part is to offer a non-sovereign account of constituent power, in which 'the measure of freedom is not the degree of mastery, but the degree of critical awareness of what is done, with what effect, to whom, and why'.[93] This account develops primarily through a sophisticated and somewhat abstract critique of various theoretical accounts of sovereignty, targeting Habermas' theory of *pouvoir constitute mixte* in particular. While Linden-Retek ultimately retains a version of this theory to construct his own account of postnational authority, he critiques Habermas for reproducing the perspective of national sovereignty on a postnational plane, failing to address 'how postnational participants are to engage in a process of legitimation differently than as they did as citizens of a national polity'.[94] Instead, a non-sovereign account of EU constituent power should consider how one's own exercise of agency impacts the agency of others. To that end, Linden-Retek proposes the idea of a *pouvoir constituent narratif*, meaning a form of political authority that derives its authority from institutionalising a reflexive legal and political processes. This would mean that 'legitimation no longer attaches to the coherent unfolding of commitments on the basis of norm or decision but instead to keeping alive narratives whose meanings are fragile, complex and interdependent'.[95]

[93]Linden-Retek, *supra* n. 11, p. 232.
[94]Ibid., p. 201.
[95]Ibid., p. 243.

In developing this account, Linden-Retek examines the EU's current constitutional structure in which 'agency is arbitrarily predetermined for others in ways that deform or confuse any otherwise desired expression of agency'.[96] He illustrates this point by turning to the 'rule of law crisis', rejecting the idea that the rise of illiberal political authority is the result of the failure of individual member states to live up to the values embedded in Article 2 TEU. In his view, such a diagnosis 'accepts far too little self-critique in its reading of political history' and 'exhibits too little solidarity', suggesting instead that the crisis 'is also a mirror that indicts the West as well as the East'.[97] Particularly convincing is his argument that the 'backsliding' paradigm obscures the political economy of the rule of law crisis by separating the economic from the moral and thereby reifying the relationship between West (progressive) and East (backward). Rather than seeing in the values of Article 2 TEU a means to reconstruct the European continent by creating a 'European society', Linden-Retek's analysis illustrates how the appeal to values reproduces existing socio-economic hierarchies between the member states, while failing to illuminate the background conditions of the turn to illiberalism in the EU.

Instead, he argues that the rule of law should not be regarded simply as an instrument to shape European society, but rather a means 'to disclose the relations of dependency and the arbitrary exercise of freedom'.[98] Concretely, he suggests that there is a task for legal scholars to examine the way in which economic ties between the West and East sustain illiberal regimes. This is a very powerful suggestion. Take, for example, the May 2024 shareholders' speech by Oliver Zipse – CEO of the German car manufacturer BMW – who in anticipation of the European Parliament's election urged his employees to exercise their vote and 'raise their voice to stand up for democracy' while simultaneously celebrating the €2 billion production plant that BMW is currently constructing in Hungary.[99] This car manufacturer is but one of many Western companies in Hungary that benefits from the 'overly flexible regulations introduced to strengthen

[96]Ibid., p. 215.
[97]Ibid., p. 219.
[98]Ibid., p. 216.
[99]Statement of Oliver Zipse, Chairman of the Board of Management of BMW AG,104th Annual General Meeting of BMW AG on 15 May 2024, https://www.press.bmwgroup.com/global/article/detail/T0442059EN/ statement-oliver-zipse-chairman-of-the-board-of-management-of-bmw-ag-104th-annual-general-meeting-of-bmw-ag-on-15th-may-2024-livestream-from-bmw-welt-in-munich?language=en, visited 21 February 2025.

employers' – especially multinational corporations' – unilateral will' while increasing the 'employees' vulnerability and powerlessness'.[100] In other words, illiberalism is not only a threat to the EU's value order, but is also good for business. By pointing to the intertwining of the economic, legal and cultural ties between the EU's member state in the West and the East, Linden-Retek illustrates the shortcomings of framing the on-gong turn to illiberalism as a 'rule of law crisis' and rightly concludes that one should see 'democratic backsliding as a matter of *European* legality and culture, not only as a national failing'.[101]

The question remains how such an awareness could be institutionalised. Linden-Retek's answer is that the EU needs a legal-political framework in which a multiplicity of national and supranational perspectives can be debated and co-exist. He thus conceives of democracy as a mode of government that is deliberative in nature and sustains a reflexive engagement about the question of who should be included in the deliberative process. Rather than praising the EU for being a compromise machine, Linden-Retek details how the EU's current institutional configuration fails to even begin to reflect on those questions, problematising the role of the European Council in particular. While Linden-Retek seeks to develop a form of constituent power that does justice to the various interdependencies within the EU, his account also raises the question of *in whose name* postnational constituent power is exercised. By foregrounding the need to engage with the 'other', it remains unclear who is the 'we' that speaks through the law. Again, here the work of von Bogdandy is instructive, because it proceeds from the premise that 'an idea of the whole is indispensable' for the future of European legal integration.[102] While I think that Linden-Retek is right to reject the idea of EU law as a systemic and coherent whole,[103] I wonder why it is possible to construct a legal-political identity that foregrounds its own contingency and thereby abandons any reference to what von Bogdandy calls a 'collective singular'?

This scepticism partly results from the various reform proposal that are presented in the final chapter. First, Linden-Retek advocates for the creation of a periodically elected constitutional assembly whose composition reflects both the national and supranational perspective. The point of this institution would be to both engage in higher law-making (i.e. treaty reform), but also to engage in debate and publish reports to promote an iterative and deliberative legal-political culture

[100]S. Hungler, 'Labor Law Reforms after the Populist Turn in Hungary', 47 *Review of Central and East European Law* (2022) p. 84 at p. 113.

[101]Linden-Retek, *supra* n. 11, p. 225.

[102]A. von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* (2010) p. 95 at p. 98.

[103]*See* J. van de Beeten, 'In the Name of the Law: a Critique of the Systemic Rationality in EU Law' (PhD thesis, London School of Economics and Political Science 2024).

in the EU that sustains the plurality and multiplicity of political perspectives in the Union. Second, Linden-Retek advocates for the introduction of referenda with a narrative character; the point of such referenda would not be to give expression to a majoritarian will, but to institute a form of decision-making that remains open to future revisions. Concretely, this would take the shape of a series of successive referendum polls over a prolonged period to sustain rather than foreclose conversation and political debate. While these proposals are both highly provocative, they are also presented in a tentative manner – Linden-Retek describes them as 'impressionistic sketches' – rather than as concrete and actionable reforms. These reform proposals lay bare the unresolved tension at the heart of *Postnational Constitutionalism*: while this work convincingly shows the shortcomings of EU constitutional law from a postnational perspective, these shortcomings also form formidable obstacles to realising the EU's postnational promise in practice.

Conclusion: reorienting immanent critique to the Europe of the everyday

In a recent publication, the president of the Court of Justice declared that the 'the next phase of European integration must not be built on unstable foundations but must rather be based on secure and solid values, in particular, respect for the rule of law'.[104] But how solid can such a foundation really be? While the work of von Bogdandy shows the potential of Article 2 values to reconstruct EU constitutional law as a value order, such a reconstructive effort does nothing to address the socio-economic and political challenges the EU is currently facing. The project of value constitutionalism presented in *The Emergence of European Society through Public Law* remains unconcerned with the material and existential questions that European societies face today and instead reproduces an institutional agenda that maintains the socio-economic and political status quo. It continues to present EU law as an instrument to shape society and create social order, but as a result it solely engages with social reality in systemic, functional, and institutional terms. It creates a European society on paper.

The main message from the work of Linden-Retek seems to me to be that the real challenge for the EU – and for EU legal scholars – is to reposition the law within social practices by developing a mode of critical self-reflexivity. Rather than

[104]K. Lenaerts, 'New Horizons for the Rule of Law Within the EU', 21 *German Law Journal* (2020) p. 29 at p. 29.

postulating EU law as playing a constitutive role in the integration process, as a shaper of social reality, this would first and foremost require articulating the gap between EU law's promises and purported ideals and the way these play out in practice. Such a research agenda would adopt the sensibility that Linden-Retek foregrounds in his thoughtful plea for a postnational constitutionalism, but remain more modest in scope and ambition, and potentially more operational as a result. Instead of proposing reforms of the EU's legal-political framework as a whole in light of abstract theory or principle, an immanent critique of EU law should proceed through a detailed analysis and engagement with the way EU law operates in the 'everyday'.[105] To that end, it would first be necessary to address what Vauchez has termed the 'reality deficit' of EU law and map the contrast 'between the grand discourse of the ever-increasing reach of EU law and the far more complex and modest reality "on the ground"'.[106] This analysis would lay the groundwork for a critical analysis of the contradictory premises underpinning existing EU law, which in turn would form the basis for proposing legal reforms and novel interpretations of the law.[107] Taking its distance from mainstream doctrinal scholarship as well as the EU's institutional agenda, this approach is premised on the idea that legal scholarship can only pave the way for future reform by demonstrating the manifold ways in which EU law's inherent contradictions prevent the law from living up to its own aims, ideals, and promises.

In fact, I would argue that such a repositioning of legal scholarship is already well under way: legal scholars are using critical theory to point to the shortcomings of EU law,[108] rely on legal geography to examine how EU law is shaped by social practices,[109] engage with the idea of 'local meanings' to imagine

[105]Azoulai, *supra* n. 36.

[106]A. Vauchez, 'The Map and the Territory: Re-Assessing EU Law's Embeddedness in European Societies', 27 *Maastricht Journal of European and Comparative Law* (2020) p. 133.

[107]F. De Witte, 'You are what you ate: Food heritage and the EU's internal market' 5 *European Law Review* (2022) p. 647.

[108]I. Isailović, 'Introduction: Critical Legal Approaches in EU Law – Reflections on New Research Directions', 15 *Transnational Legal Theory* (2024) p. 493.

[109]F. de Witte, 'Here Be Dragons: Legal Geography and EU Law', 1 *European Law Open* (2022) p. 113.

EU law beyond a uniform legal order,[110] explore the material and existential dimensions of EU law[111] and write 'bottom up histories' of EU law to reveal the multiplicity of motivations and meanings that lead individuals to invoke EU law in national courts.[112] In these works one can find the intimations of a critique of EU law that is both self-reflexive – questioning the assumptions and presuppositions underpinning EU legal thought – while remaining sensitive to the question of how EU law should be reformed in practice. Such an approach to the study of EU law does not aim to tear down the project of European integration but is motivated – as are von Bogdandy and Linden-Retek – by a profound concern for the future of the integration project and the promise it might yet still hold.[113]

Dr Jacob van de Beeten is a Max Weber Fellow at the Department of Law of the European University Institute, Fiesole, Italy.

[110]*See* the workshop 'Local Meanings of EU Law' organised at Paris Creteil on 10-11 December 2024.

[111]L. Azoulai, 'Reconnecting European Law to European Societies' (European University Institute 2024) Working Paper 2024/05, https://cadmus.eui.eu/handle/1814/76799, visited 21 February 2025.

[112]M. Loth 'Helen Marshall goes to Court. State Retirement, the ECJ, and the History of Law from Below' (on file with author).

[113]M. Fernando, 'Critique as Care', 2 *Critical Times* (2019) p. 13.