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EDITORIAL

A few remarks on the role of Europe and European scholarship in a world of extremes

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Dear friends,
This is a goodbye editorial. After three wonderful years, I will be stepping down as a managing editor of the *European Law Open* and continue as a 'simple' editor of this already great journal. The main reason is that I have committed to help launch another project that I hope will serve the European academic community equally well: *European Law Unbound*, a new scholarly Society, about which more in one of the upcoming editorials. In this last editorial as a managing editor, meanwhile, I wanted to share some of my concerns and hopes about the perspectives of European law and scholarship after the June 2024 elections.

As Europeans, we have recently faced one of the most consequential European Parliament elections ever. While predicted large gains for the far and extreme right did not fully materialise (the overall seat increase is somewhere around 3%), the extreme right has done particularly well in important European countries. The weeks of turmoil in France that have followed the European elections have ended with a resounding 'non' to Le Ressemblement national, but the urgency to deal with the cost of life crisis – the main fuel of anger – is likely to be hampered by the divided parliament and the unheeding president. The extreme right has also dealt a blow (if smaller than predicted just a couple of month ago) to German governing parties, while the Italian far right has remained stable, with the elections nonetheless strengthening the grip on power by the prime minister, whose attemps at a 'majority prize' alla the 1923 Acerbo Law,[1] and the increasing supression of media freedom, are highly concerning. The extreme and far right did well in many other European countries, coming first in five EU member states, and second and third in many others. Thus while perhaps not a heavy earthquake, the shivers are felt across the European Union (EU).

As scholars of European law and integration, many of us have already started asking how the changing political landscape, in Europe and nationally, may transform our field of study. Some fear that the progress towards sustainability booked under the European Green Deal may be arrested or even reversed. Others warn that the return to austerity after a short period of public extravaganza during the corona crisis, successfully pushed through by the smallest German coalition party, will not only undermine investment into crumbling infrastructures or sustainability but also further escalate economic and cultural polarisation within and among the Member States – driving even more people into the embrace of the far and extreme right. This in turn, others warn, will bring the rule of law and democracy in Europe under additional strain.

[1]E Caterina, 'Prize and Premiership, Verfassungsblog' (28th November 2023), available at <https://verfassungsblog.de/prize-and-premiership/> accessed 11 July 2024.

While there are certainly many reasons to be concerned – as the present day in many respects may be painfully reminiscent of the 1920s and 30s – here is a note of careful optimism: what is different to the Weimar period is that there *is* the European Union. The EU, I would like to suggest, remains the greatest obstacle to full-scale dominance of tribalism in Europe, with all the (historically) imaginable consequences that that may have. The far and extreme right also instinctively understands this: during the most recent Conservative Political Action Conference (CPAC), convened in Budapest by Viktor Orbán and prominently featuring politicians such as Geert Wilders and Donald Trump (in an online address), speaker after speaker suggested that the greatest problem plaguing the(ir) world, apart from 'woke ideology' and George Soros, is the EU.[2] Not the EU's political left or the EU's political right, not the EU's neoliberals or the EU's socialists, not the EU's technocrats or its politicians, but the EU *an sich*.

The reason, I argue in a forthcoming book,[3] is that the EU's constitutional design, centred around questions of political economy rather than identity, makes it far more difficult – if it is possible at all – to shift its axis of the Political to the cultural and identity issues that are the main breeding ground for the far and extreme right. That is to say, unlike at the national level, where, say, a scarcity of housing can be simply blamed on immigrants, the problems caused by the excesses of neoliberal policies in the EU cannot be easily translated into generalised xenophobia. For that, the EU is too diverse a polity on the one hand and its institutions too pluralist and technocratic on the other. Instead, in response to the excesses of neoliberalism, the EU has had to start rethinking its approach to political economy. We have witnesseded this in its hesitant attempts to shift away from the neoliberal conception of prosperity under the European Green Deal.

Starting in 2018, Brussels-speak has proliferated with the language of 'Deals', first, the 'New Deal for Consumers'[4] and then – more importantly – the 2019 'European Green Deal'.[5] The European Green Deal makes sustainability the 'new growth strategy', which requires us to change the ways in which we 'produce and consume'.[6] There is much still to be criticised about the European Green Deal, which continues to place a lot of trust in the growth paradigm and sees the (financial) markets as the main partners, while rendering more social aspects peripheral.[7] But what the implementation of the European Green Deal did and still does, is that it starts chipping away at the neoliberal background understanding of political economy. The EU institutions have started to embrace a more institutionalist view of the economy, going beyond "win-win" politics of common interest, increasingly understanding the government (including themselves) as responsible also for distributive outcomes and using the normative power of law to reshape them.[8]

No question, these efforts at rethinking political economy are still immature, both in terms of their credibility and of their social inclusivness. But the EU's lack of, or slow progress on, these matters changes little about the fact that the EU *an sich*, with its supranational character and a particular institutional setup, cannot but remain oriented toward the questions of political economy (rather than identity), searching in one way or another for a path to shared prosperity. This, in turn, makes the EU the central *problem*, and *obstacle*, for the far and extreme right globally, given that their identitarian agenda cannot outright dominate the institutional and discursive environment of this powerful block. This is also then, as the founders may have anticipated, the main *peace potential* behind the European project.

[2]NPO, 'Nieuwsuur' (26th April 2024, minute 20ff), available at <https://npo.nl/start/serie/nieuwsuur/seizoen-2024/nieuwsuur_4710/afspelen> accessed 3 May 2024.

[3]See the upcoming book, M Bartl, *Reimagining Prosperity: Toward a New Imaginary of Law and Political Economy in the EU* (Cambridge University Press 2024). Also available in Open Access.

[4]European Commission, A New Deal for Consumers, COM(2018) 0183 final.

[5]European Commission, The European Green Deal, COM(2019) 640 final.

[6]European Green Deal 2019, p. 4.

[7]See for both critiques 'EuroMemorandum 2020', EuroMemo Group, <http://www.euromemo.eu/euromemorandum/euromemorandum_2020/index.html> accessed 3 May 2024.

[8]Bartl (n 4).

There are three reasons for the EU's greater resilience to tribalism and identity politics. First, the EU is a highly diverse polity, with pluralist and technocratic institutions. Take, for instance, the decried failure of the *Spitzenkandidat* process in the EU, which has left the EU democracy *less* similar to that of the nation state. But is this so problematic, even democratically speaking? In many Member States, it is broadly recognised that one of the big problems with representative democracies today is that national parliaments do not sufficiently push back against the executive power. In the EU, this is not the case: the Commission and its President do not have guaranteed support in the European Parliament, even if they may be supported by the biggest party, which in turn enhances the quality of political debate and strengthens the legislator's watchdog function. At the same time, having the President of the Commission chosen by the Council yields another type of democratic legitimacy to the President, having been sanctioned by the heads of all EU Member States' governments. This is then also a compromise candidate, rather than a candidate with a clear political profile, which may ultimately be better suited to lead the EU's relatively technocratic, 'evidence-based' executive.[9] Together, with all its shortcomings, one could argue that the EU's triumvirate makes up one of the democratically more sound governing constellations at present, with a greater resilience to the far and extreme right, which, by the way, has historically taken and entrenched power usually with only minority backing.[10]

Second, as a *European* political force, the far and extreme right has no real 'use' for the EU. This group will experience major problems coming up with any meaningful shared project for the Union – except for inaction.[11] To start, any such common project would very likely bolster the EU's competencies and resources, something that the group strongly rejects. Furthermore, and more importantly perhaps, any such attempt would expose large rifts in interests and positions among the far and extreme right in Europe. These are often diametrically opposed: some of the members of this group want to get more money from the EU, others want to give less money; some want more European borrowing, whilst others don't want to finance the spendthrift of the peripheries; some want common defence, others are entirely against it – and certainly none of them wants any migrants, which makes any specifically far and extreme right common action in this area possible only with such extreme human rights violations that we would anyway find ourselves long past anything resembling liberal democracies. Also, the failure to put forward a 'Spitzenkandidat' for the European elections, by either the Identity and Democracy Group (ID) or European Conservatives and Reformists (ECR) parliamentary groups, makes this lack of consensus abundantly clear.[12] After the elections, two new groups (Patriots for Europe and Europe of Sovereign Nations) will only add to the shades of brown in the European parliament. In turn, the *only truly shared European project* of this political force can be the demise of the EU, *real* or *factual*, as this at least nominally promises to untie their hands in whatever nationalism and xenophobia drive them to pursue.

Third, in the face of the announced far and extreme right onslaught on the EU,[13] the task of the EU institutions and its Member States, but also scholars working on the EU, is to remain calm

[9]This is a comparative remark: I have myself criticised the degree to which this is the case in absolute terms. M Bartl, 'Contesting Austerity: On the Limits of EU Knowledge Governance' 44 (2017) Journal of Law and Society 150.

[10]As we learn from the Weimar period, the extreme right parties in Italy or Germany – not unsimilar to postwar extreme left – needed to win (with parliamentary minority!) only one election: the rest is history. Today, the question is whether the existing institutions (including the EU) can prevent this from happening.

[11]The lingering problem of the lack of shared 'political affinities' among far and extreme right parties in the European parliament has been observed by the Parliament and the European Court of Justice already more than 20 years ago. See the instructive Case C-486/01 P, Front National v. Parliament, of 29th June 2024.

[12]See EUobserver, 'Far-right picks Danish MEP as token "lead candidate"' (7th March 2024), available at <https://euobserver.com/eu-elections/158193> accessed 3 May 2024.

[13]Sam Jones, "European far-right leaders gather ahead of EU elections" *The Guardian*, 20 May 2024, available at <https://www.theguardian.com/world/article/2024/may/19/european-far-right-leaders-gather-ahead-of-eu-elections> accessed 24 May 2024.

and focused on understanding, articulating and instituting a credible and inclusive route to prosperity. The wave of extremism will slowly reach its peak and pass away, with some very real socio-economic concerns remaining after the fear-driven generalised xenophobia has run its course. If, in the meanwhile, the EU and its Member States have done a good enough job in removing the excesses of neoliberalism, addressing the most glaring problems and setting grounds for a safe and liveable future, we may have withered the tribal swelling – without a total war this time around.[14]

This is not an obvious outcome, however, on two fronts. Already before the elections, the ministers started discussing the 'competitiveness deal', to complement the 'green deal',[15] awaiting the report of the ever-current Mario Draghi on how to address the most urgent economic problems in the EU today.[16] The central task for this new European agenda must remain the search for a route to sustainable and shared prosperity that tackles the collective 'loss of control', which neoliberalism has made endemic, and addresses many of the socio-economic problems (from the housing crisis to (health)care crisis and faltering public services) that drive people to the far and extreme right. Concurrently, to prevent a full scale tribalisation of Europe, before the far and extreme right succeeds in dismantling the EU in real or factual terms, it will be crucial that the centre-right European Peoples Party (EPP) and, to some extent the Left (GUE-NGL) in no way play into the cards of this destructive political force.[17]

Finally, a particular responsibility lies with legal scholars and practitionaires, who have to keep reminding political and other actors, at all levels of governance, of the dangers of sacrificing basic constitutional rights and principles in the pursuit of an ever more polarized electorate. Ultimately, the EU's pluralist supranational structure can only go so far in shoring up the crumbling constitutional foundations of its member states against the eventually spreading decay.

In this issue

Goldoni and *Solana* explore the meaning, legal nature and legal status of 'market neutrality'. The concept and turn of phrase have become key in the implementation of monetary policy by the European Central Bank (ECB), very especially, but not exclusively, on what concerns its 'non-conventional' policies. At first sight, the topic may seem rather esoteric, perhaps only of interest to ECB actors and (keen) ECB watchers. Such a conclusion could not be more wrong for three related reasons. First, the authors undertake a thorough empirical analysis to clarify what is meant by 'market neutrality'. Two are its chief meanings: the minimisation of the interference with the price discovery mechanism and the mirroring of market choices. Second, they offer the reader a careful legal-theoretical reconstruction of the material to show that, in the first meaning, 'market neutrality' is the way in which the ECB characterises the 'principle' of the open market economy, as can be reconstructed from the treaties, while in the second sense, market neutrality operationalises that very same principle. This is in itself a major contribution with immediate implications for the review of the actions of ECB policies: market neutrality 1 is part of the primary law of the EU, while market neutrality 2 is to be regarded as part of secondary law. But that is not the end of the matter. Third, the debate on market neutrality is bound to be decisive when

[14]In the book, I argue that the rise of collectivism follows the periods of prolonged privatisation of power and resources. This however can go in two directions towards collective or shared prosperity or towards tribalism of one sort or another. The latter, however, often ends up in a (civil) war, if cultural identity becomes the main axis of politics.

[15]EUobserver, 'EU summit pledges "new competitiveness deal" to counter China and US' (18th April 2024), available at <https://euobserver.com/eu-political/ar5a183787> accessed 3 May 2024.

[16]Euronews, 'Draghi's report holds the key to Europe's future competitiveness: "Radical change needed"', (16th April 2024), available at: <https://www.eunews.it/en/2024/04/16/draghis-report-holds-the-key-to-europes-future-competitiveness-radical-change-needed/> accessed 3 May 2024.

[17]Politico, 'Von der Leyen opens the door to Europe's hard right' (30th April 2024), available at <https://www.politico.eu/article/von-der-leyen-hard-right-maastricht-debate-giorgia-meloni-viktor-orban-schmit/> accessed 3 May 2024.

discussing what the independence of the ECB does and could mean once the ECB regards to be central to the proper execution of its mandate the environmental implications of its policies. Solana and Goldoni thus furnish the readers with the legal basis with which to engage in an informed way in the coming debate on the role, purpose and legitimacy basis of the ECB.

The case law of the Court of Justice on the rule of law, stemming from the *Juízes Portugueses* (the 'Portuguese Judges') ruling, marked a constitutional transformation of EU law. By interlacing of Articles 2 and 19(1) of the Treaty on European Union (TEU) and the fundamental right to effective judicial reviews, the court established an EU norm of judicial independence and made the rule of law legally enforceable against attacks on national courts' independence. *Van Malleghem* argues that this represented a 'radical constitutional' approach – one of other possible alternatives – to the erosion of the rule of law and, in the process, shaped the Union's identity. Moving beyond the debate between critics and defenders of the court, he asks: on whose hands could and should have been such constitutional transformation and why did this specific approach happen? This inquiry leads him to legalism. Drawing on the work of Judith Shklar, he distinguishes its institutional and substantive dimensions and identifies legalism's distorting effects on EU politics. The Union chose to address the rise of authoritarianism in the form of a 'rule of law crisis', but other paths could have been legally possible. To make the argument, Van Malleghem rehearses the counterfactual: how could EU law, and the Union's identity, look like today had the court chosen a different path to counter authoritarianism? He places judicial independence against other vectors of authoritarianism to shed light on those possible paths. Analysing economic inequality, identity politics (reproductive rights, LGBT rights and migration) and democratisation, he shows how similar arguments to those used in *Juízes Portugueses* could have applied to issues other than judicial independence and how substantive values that the Union also places at the core of its identity have been neglected in the type of constitutional transformation that the Court designed.

We suspect that quite a few people would consider the argument that the wall between Poland and Belarus in the Białowieza forest is in breach of the Habitats Directive to be both obvious and irrelevant. Moving from questions of law to political theory and ethics, *Błaszczyk*, *Bernet Kempers* and *Burgers* consider the impact of the wall on non-human animals in the forest and achieve two remarkable things. First, they make a strong case that the wall is, from a non-human perspective, illegal, unjust and unethical. As importantly, second, in so doing, they show the extent to which Agamben's 'anthropological machine' is at work in our own political and legal imagination. In other words, defending the rights and interests of non-human animals here is also an exercise in interrogating the construction of categories and hierarchies that allow for the humanisation of (very few) animals and the animalisation of humans.

Access to documents has been one of the pillars of transparency in the EU, despite the many limitations of a legal regime that has endured more than two decades unchanged in wording, if not in practice. *Heikonnen* sheds light on an important dimension thereof: the technological design of document registers may expand or limit the effects of the legal regime and, therefore, be an essential element of its scope. She digs into the depths of the Commission's register of documents to show how the choices of the register creators, the guidelines on relevant data to be included and the administrative capacity to treat vast swaths of documents all have an impact on concealment and visibility and, hence, on what users may get from the register. Whichever their reasons, design choices limit what one can retrieve, as well as the type of users who may be more 'successful' in getting the relevant results. For instance, the lack of subject matter metadata, she argues, makes the register cater better to the needs of knowledgeable users. From this perspective, it is not so much the legal provisions of the regulation on access to documents (as well as the attending case law) that delimit the scope of the right than the technological features of the registers. Then, 'information on how the registering of documents happens, who registers them and why' (noted by a journalist that she interviewed) emerges as an important dimension of EU transparency.

The court's classification of the Union's international treaties as 'an integral part of EU law' was always and inevitably going to have to reconcile divergent rationales: on the one hand, it expresses

a desire for 'friendliness' to international law which would translate into respect for its autonomy and its canons of interpretation. On the other, an 'integral part of EU law' cannot really be treated as something outside of and apart from the established doctrines and methods of interpretation of EU law. *Dunbar* does the hard work of systematically going through the case law in the various types and categories of international treaties and ascertaining the court's methods of interpretation of international law, in shorthand, either the instructions flowing from the Vienna Convention on the Law of Treaties or EU law's own teleology. He then evaluates the outcomes on justifications of either 'thin' justice, roughly, the coherence of treating like cases alike, or the 'thick' justice of substantive outcomes in individual cases. His conclusion – that the court is failing to achieve either legal certainty or substantive justice – is harsh and contains some important lessons for other areas of law.

'The limits to growth' was the title of a famous Massachusetts Institute of Technology (MIT)-sponsored report of the early 1970s which, in ways more than one, paved the way to a reconsideration of the industrial society. Despite its ambivalences, the report attracted lots of attention in Europe. If only because by the end of his time as commissioner and briefly president of the Commission, Sicco Mansholt had become a passionate degrowther (see his famous *Letter to Malfatti* of 1972 and his fundamental book of interviews, *La Crise*). The monetary turbulence unleashed by the end of the Bretton Woods arrangements, together with the economic crisis triggered by the sharp increase in the price of oil, had the paradoxical effect of European institutions (and also international and national ones) doing too little too late, when doing anything at all, to confront the massive challenge resulting from the manifest incompatibility between a finite planet and capitalism, a socio-economic system which assumes the infinite character of resources. Is the so-called Green New Deal a belated yet promising response to the environmental predicament in which Europeans and in general all inhabitants of the world find themselves? How can we assess, in particular, the ecological move taken by the Commission in the context of the Green New Deal? That is the main topic of the symposium edited by *Chiti*, with contributions from *Petersmann*, *Montini* and *Bogojevic*. The four pieces (plus the introduction) lean towards a moderately positive assessment, based on the discovery of underpinning tendencies that point to a transcendence, even if sometimes rather unconscious or even unintended, of the paradigm of sustainable growth. In a nutshell, they claim that ecological sustainability could yet be an 'evolutionary achievement' of the Green New Deal. The pieces open a debate which we hope will be continued in the pages of the forthcoming issues. In particular, we are actively seeking approaches that combine acute attention to the limits imposed by physics (not least the unavoidable decline of the amount of fossil fuels and raw materials to be available in the future) with legal and political analyses of the implications that ecological sustainability and degrowth will have for the way we understand the EU.

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