



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

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SHAPING THE FUTURE OF EUROPE: INTRODUCTION

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ABSTRACT: The present Introduction sets out the context of the following *Articles* to the anthology “Shaping the Future of Europe” to be published in two issues of European Papers. It briefly presents the people who made the anthology possible, in particular the speakers, commentators and other participants at the 2020 Salzburg Young European Law Scholars (YELS) conference and the peer reviewers. Subsequently, it lists the contributions of the anthology which all discuss essential topics related to the future of Europe and tackle a diverse array of issues in EU law, from institutional issues

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such as lobbying via novel approaches and complementary currencies to fundamental rights challenges like terrorist content online and to external action issues such as a future European army.

KEYWORDS: EU institutions – EU law enforcement – fundamental rights protection – EU external action – defence union – hybrid threats.

I. INTRODUCTION

Once again, Europe is at a crossroads: Although there is regular talk of crisis, trust in the European Union (EU) remains surprisingly stable.¹ Nonetheless, Europe faces many internal and external challenges, such as Euroscepticism, the return of nationalism, societal and technological developments, climate change, terrorism, and an ever-changing global political, economic and societal landscape, which may be in need of structural modifications. Most recently, the coronavirus pandemic has been added to this non-exhaustive list of challenges. While novel common European solutions might be prone to teething problems, they might entail solutions which can be allied to other areas of EU law. It is precisely against this backdrop that we pose this question: What could and should be done to put Europe and the EU in the position to properly address its challenges and, more generally, how should we shape the future of Europe?

To answer this question of utmost importance, we invited young scholars to propose ideas and to discuss their views on how to shape the future of Europe. In particular, we asked them to provide a forward-looking conceptual analysis on how to properly address Europe's internal and external challenges and to present bold and visionary approaches. Instead of proposals that focused on current shortcomings, we encouraged submissions that propose new, hands-on approaches to tackling Europe's challenges in an innovative and future-oriented way, or pieces that revisit existing but promising approaches that were never put into practice.

Our call was specifically addressed to Young European Law Scholars, i.e., scholars who had not yet secured a full professorship, but also young scholars from related disciplines such as political science, sociology, economics, and philosophy. The idea was to not only provide a platform for such young scholars to present and discuss their research with their peers, but also to enter into an exchange with already established scholars, who we invited to act as commentators at the conference.

Happily, our call met with an enthusiastic response by many young scholars, which put us in the rather fortunate albeit tough position of having to choose the eleven proposals we deemed most promising in light of the conference theme. The eleven young emerging scholars behind them were invited to join the debate on how to shape the future of Europe at the "3. Tagung junger Europarechtler*innen – 3rd Young European Law Scholars Conference", which took place at the University of Salzburg on Thursday 27th

¹ At least the Standard-Eurobarometer 90 published in March 2019 before the corona crisis had shown a record high: data.europa.eu.

and Friday 28th of February 2020. The conference, which was very well attended despite the waging Corona crisis, was opened with welcome addresses by the Rector of the University of Salzburg, Hendrik Lehnert and by the Dean of the Law Faculty, Michael Rainer. Advocate General of the Court of Justice of the European Union Eleanor Sharpston delivered an inspiring keynote on “The European Project – Past, Present and Future”. In this anthology, which will appear in two separate issues of European Papers, ten of the presentations from the 3rd YELS Conference are collected.

II. SHOUT OUT TO WONDERFUL COMMENTATORS & PEER REVIEWERS

A major goal of YELS is to bring together young and established scholars of European law or from related disciplines. Ideally, this combines fresh ideas from younger scholars with the experience and knowledge from established scholars. We, and surely also all authors of this anthology, are enormously grateful to Catherine Barnard (University of Cambridge), Enzo Cannizzaro (Sapienza Università di Roma), András Jakab (University of Salzburg), Daniel Kaufmann (University of Neuchâtel), Daniel-Erasmus Khan (Bundeswehr University Munich), Dimitry Kochenov (Central European University), Panos Koutrakos (City University of London), Markus Kotzur (University of Hamburg), Kirsten Schmalenbach (University of Salzburg), Ingeborg Zerbes (University of Vienna) and Sonja Puntscher Riekman (University of Salzburg) for having agreed to come to Salzburg in order to contribute to a wonderful and informed debate on how to shape the future of Europe. The informed comments from these distinguished scholars, together with an additional round of blind peer review, strengthened what we consider to be wonderful sparks to an important debate. We would therefore also like to extend our warmest gratitude to the scholars who have supported the present anthology in the role of peer reviewers.

III. OVERVIEW OF THE CONTRIBUTIONS

III.1. NOVEL INSTITUTIONAL APPROACHES

Institutions matter. This well-known assumption has driven a myriad of researchers from various disciplines, including political scientists, economists and, not least, legal scholars, to investigate whether and how institutions matter. The idea behind this assumption is that how institutions are organised and regulated, what their powers and functions are and how they interact with each other affects (or should affect), *inter alia*, their decision- and policy-making, their (democratic) legitimacy, their effectivity, productivity and consistency as well as the public perception about and the trust in them. What is more, the assumption that institutions matter has actually informed institutional choices in reality. This particularly applies to the EU and, earlier, the European Communities. The Member States, as ‘masters of the Treaties’, have a track record of modifying the institutional set-up of these European organisations in order to achieve certain aims, such as making

them or their institutions more democratically legitimate or their decisions and policies more effective and consistent. A perfect example to this effect is the Treaty of Lisbon, which, for instance, provided the European Parliament with a greater say in the adoption of legal acts and introduced the High Representative of the Union for Foreign Affairs and Security Policy as an institutional link between the Commission and the Council in order to make EU external action more consistent.

Both the contributions of Odile Ammann (University of Zürich) and of Maria Patrin (European University Institute) are implicitly based on the assumption that institutions matter, in that that they both inquire how an EU institution, namely the European Parliament and the European Commission respectively, should be regulated or modified with a view to attaining a certain objective.

Odile Ammann, in her *Article "Transparency at the Expense of Equality and Integrity? Present and Future Directions of Lobby Regulation in the European Parliament"*, addresses the problem of weak regulation of lobbying activities vis-à-vis the European Parliament and how this erodes trust in this democratic institution and the law-making processes in the EU more generally. She shows that domestic lobbies have increasingly been targeting the European supranational realm, including the European Parliament, which has become a key lobbying target due to its strengthened position in the EU law-making process. She argues that lobbying in the European Parliament should therefore be further regulated and outlines what should be observed when adopting stricter lobbying regulations. In particular, she points out that today's lobbying regulation neglects issues that transcend transparency, such as equality and integrity, and that it thus defies its ultimate purpose, namely enhancing public trust.

In "The European Commission between institutional unity and functional diversification. The case of economic governance", Maria Patrin analyses the Commission's diverse functions and addresses the significance of the diversification of the Commission's functions in terms of the Commission's institutional functioning. She argues that despite being a collegial institution, the internal decision-making process of the Commission is fragmented and heterogeneous rather than unitary. On the basis of an assessment of the powers and functions newly acquired by the Commission in economic governance, she unveils a paradox inherent in the Commission's multi-functionality. While, due to its independent and impartial status, the Commission is often entrusted with tasks of a political nature, it is not endowed with the legitimacy basis that would support its action in these fields. Ultimately, Maria Patrin argues that more clarity should be provided regarding the functions of the Commission, that is its political and enforcement functions, as they rely on different types of legitimacy, i.e. democratic accountability, on the one hand, and independence and neutrality of judgment, on the other.

III.2. NOVEL (DE-)CENTRALISED ENFORCEMENT

Like in every legal order, improving the administrative and/or judicial enforcement of applicable legal rules also looms large in the EU. The Commission's proposals as well as the academic discourse on public enforcement of EU law somewhat oscillate between increased and reinforced centralised enforcement on the EU level and more decentralised enforcement by the Member States' authorities – depending on the substantive legal framework. In essence, three ways of administrative enforcement are thinkable: i) centralised enforcement by an EU authority or agency, ii) enforcement by Member State authorities, or (iii) enforcement by a combination of both i) and ii).

In her *Article* "The EU Response to Terrorist Content Online: Too Little, (Maybe not) Too Late?", Viviana Sachetti examines the EU's efforts in strengthening the European Public Prosecutor's Office (EPPO). The *Article* provides an extensive overview of the existing substantive framework of countering the dissemination of terrorist content online in order to analyse the Commission's latest Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online (COM(2018) 640 final). After a critical analysis of the proposal, she puts the Commission's effort in the larger context of Eurojust and Europol as "crucial cybersecurity and human rights guardians". In her opinion, the extension of the EPPO's competences would not impinge on Eurojust and Europol's powers but "could lead to their role as specialised within matters pertaining to cybersecurity and the prevention and suppression of online terrorist conducts".

In her *Article* "The ECN+ Directive: An Example of Decentralised Cooperation to Enforce Competition Law", Corinna Potocnik-Manzouri deals with the other side of the same coin: decentralised enforcement of the EU's competition policy in the new European Competition Network (ECN+) Directive (EU) 2019/1. The national competition authorities (NCAs) now form a network of enforcement authorities with the European Commission. She explains the road to the ECN+ Directive by examining the success and shortcomings of the preceding Regulation 1/2003 and the respective actions taken. Then the ECN+ Directive is thoroughly scrutinised, presenting the novel feature of decentralised enforcement also for the rather unexperienced reader of competition law contributions. Having done that, the *Article* does not shy away from asking and answering the important question as to whether decentralised cooperation can contribute to an ever closer Union. In order to answer that question, she focuses on (I) the ECN+ eligibility to be characterised as a well-functioning system, (II) the aspect whether decentralised enforcement could contribute to an ever closer Union and (III) the ECN+ as a potential role model for other areas.

III.3. FUTURE IMPLICATIONS OF FUNDAMENTAL RIGHTS PROTECTION

Many events and publications recently celebrated the ten-year anniversary of the entry into force of the Charter of Fundamental Rights of the EU as a fully binding part of EU primary

law. Ever since, it has often been the Court of Justice that has been at the centre of attention for those studying fundamental rights and human rights in an EU law context. Is the Court doing the right thing? Is it being active enough or already “activist”, however one is to define this term? But fundamental rights law and policy also encompasses the other institutions of the EU and the Member States. The *Articles* in this panel therefore correctly focus not only on future challenges in the area of jurisprudence, but also on potential future legislative developments of EU fundamental rights law in order to shape the future of Europe.

Matteo Manfredi, in his *Article* “Enhancing economic and social rights within the internal market through recognition of the horizontal effects of the European Charter of Fundamental Rights” focuses on the social (justice) dimension of the EU and the European integration process. Examining the horizontal effects of the Charter and the (non-)recognition thereof, he identifies promises for promoting economic and social rights within the internal market, as well as limits and caveats, both in the European Court of Justice’s jurisprudence and on the political (Member State) level. Pointing out the prudence of the Court’s jurisprudence, he nonetheless calls for a more coherent solution and interpretation of the Charter’s horizontal effects, necessary to avoid legal uncertainty and to ensure uniform protection of fundamental rights in the Member States. He concludes that, although first steps have been taken in recognizing the horizontal effects of economic and social rights in the Charter, there is still a need for further (coherent) case law and, where applicable, additional secondary legislation.

In his *Article* “Shaping the Future of Europe in Prisons: Challenges and Opportunities”, Christos Papachristopoulos addresses the problem of the wide disparities in prison conditions across the EU Member States which result in violations of fundamental rights. Not only does this state of affairs constitute a problem for a supposed community of values like the Union, but it also puts the functioning of the Area of Freedom, Security and Justice at risk, as it undermines the functioning of the Area’s foundational principle of mutual trust. Based on literature on the topic of compliance, Papachristopoulos therefore develops a sophisticated typology of possible strategies of intervention of the EU in national prison systems to highlight their potential and shortcomings.

III.4. NEW “SOLUTIONS” TO CONTEMPORARY CHALLENGES

Stating that the EU is currently facing many challenges, some as a direct result of contemporary developments and some as a necessary result of its institutional structure and general character, is an often-repeated truism. In current times, one can think of contemporary challenges such as those presented by Covid-19, tech conglomerates and (online) disinformation campaigns, and the continued plight of people seeking refuge from war, hunger and climate change. It is, of course, important that those challenges are acknowledged, and it is also important to try and change one’s point of view and shift the focus towards possible solutions. Whereas, for example, the Common Market is a fundamental historical building block of the current EU, the Economic and Monetary Union is a more

recent example of European (economic) integration and the EU's (and its Member States') ambitions in this area. It is also a policy area that is still "under construction" and clearly remains in need of further reforms and faces political, legal and economic challenges. Similarly, and perhaps more urgently in light of the current challenges (Covid-19, climate change, political instability, among other problems) facing not just the EU Member States but almost all countries worldwide, the EU still lacks a comprehensive approach towards refugees, leaving many of them stranded in subpar conditions and without future prospects. In this section, therefore, the focus lies on new approaches towards two contemporary challenges that loom large: challenges within the Economic and Monetary Union and the EU's response to the refugee crisis.

Christian Gelleri, in his *Article* 'Reshaping the Future of Europe with Complementary Currencies?', considers a possible role for complementary currencies within the Economic and Monetary Union and the Eurozone, with a particular focus on their potential in harmonizing regional inequalities and strengthening the democratic legitimacy of (local) currencies. To this end, he discusses existing examples of complementary currencies, particularly the Chiemgauer currency in Bavaria, in light of the current legal and economic framework within the EU generally and the Eurozone in particular. The main focus of the *Article* lies on the stronger connection between individuals/regions and currencies that complementary currencies can provide and, as a result, the increase in democratic legitimacy of such a currency. By allowing for the direct involvement of people and decision-makers, regional alternative currencies more closely align with local needs and objectives and provide for a more democratic way of creating and using money, so Gelleri argues.

In her *Article* "Shaping the future towards a solidary refugee resettlement in the EU", Janine Prantl discusses the state of refugee resettlement within the EU and considers its challenges and possible reform. One of the main challenges she identifies in this regard is the creation of a common EU resettlement framework based on solidarity and responsibility sharing – a framework that has yet to materialize in spite of a pressing need and pledges made thereto – to replace the current system of voluntary commitment. She points out the difficulties related to deriving positive obligations from the principle of solidarity, both in EU law and in international law and analyses the issues relating to the EU's competences in the field of refugee policy, arguing that although a common EU processing of refugee resettlement requests would be beyond the EU's competences, the EU and its agencies can coordinate and support common procedures conducted by the Member States. She laments not only that a common framework has failed to materialize, but also the resistance by several Member States to comply with legally binding relocation obligations. One possible solution, she posits, would be the creation of a centralized general assessment of the qualification for resettlement, leaving room for the consideration of a refugee's individual conditions *and* for national concerns at the Member State level.

III.5. THE EU'S EXTERNAL ACTION, FUTURE EU DEFENCE POLICY AND THE CHALLENGES OF THE 21ST CENTURY

The EU has managed to establish itself as a genuine global actor on the international scene. Yet, global problems such as climate change and transnational crime and terrorism have yet to be addressed adequately, not least by the EU. How should the EU position itself in the ever-changing international landscape? Should the EU, when tackling external challenges such as climate change and migration, hold fast to multilateralism, or should it act unilaterally? What could such unilateral action look like? Is it possible to tackle Europe's external challenges without bending/abandoning the EU's values?

Recently, Jürgen Habermas, one of the most renowned European intellectuals, publicly appealed for a European Army. Does the appeal for a European Army point to another truly European constitutional moment? Does the EU need a European Army, or should it focus on its soft power? How could/should a European Army look? Could there be repercussions regarding the EU's most important foundational idea: peace? Could the Europeanization of Member State armies be a promising alternative or complement to a European Army? What are adequate short-term developments of the Common Security and Defence Policy? How should cybersecurity and artificial intelligence be dealt with under the Common Security and Defence Policy?

These are numerous questions which are far from easy to answer. Josef Weinzierl and Luigi Lonardo, however, provide insightful, careful and nevertheless forward-looking and fresh answers to these questions. In his *Article*, Josef Weinzierl provides "A democratic perspective on a future European Army", when posing the question "An Army of peoples?". His analysis is informed by political theory. As the core of his *Article*, he embeds the potential future shape of a European Army with questions of constitutional identity of the European polity, which, in his view, is best characterised as a democracy. He is optimistic in the sense that there is "conceptual space for autonomous armed forces beyond the nation-state". By making concrete proposals on what the institutional design of a European Army could look like in practice, his *Article* adds value to a debate that has mostly concentrated on a discussion about the pros and cons of such an initiative. Importantly, he notes that whatever plans for a future European Army might look like, they must fit the overall political nature of the EU.

Luigi Lonardo delivers "a first assessment" of "EU Law Against Hybrid Threats". In so doing, he elaborates on a topic which recently took centre stage in EU defence policy. Hybrid threats, constituted by diplomatic, military, economic and technological tactics, are high on the security agenda. Even though the responsibility to address such threats remains mainly with the Member States, it is the *Article's* merit that it provides a highly topical analysis of the first steps in EU law to address the challenge of hybrid threats. He argues that despite the diverse nature of hybrid threats, there is a supranational dimension to them and art. 114 TFEU could make for an adequate EU competence in this regard.

IV. CONCLUSION

Even though the European project faces many and quite difficult challenges, that does not mean that the future that lies ahead of Europe is necessarily bleak. On the contrary, we hope that Europe is able to rise to these challenges and to take the necessary steps to tackle them, by finding ways to act in a united, forward-looking and decisive manner. By inviting young scholars to share their ideas on how to shape the future of Europe, we aimed to contribute to this quest and think that this anthology may indeed serve as an inspiration in that regard. Moreover, we hope that the idea of YELS, a non-institutionalized, Europe-wide annual gathering of young and established EU law scholars proves to be a fruitful scholarly event as regards the conferences, which took place already, and hopefully for the many which are scheduled to come. It is a particularly encouraging sign for us that more or less at the time of publication, the next YELS Conference entitled “Back to Beginnings: Revisiting the Preambles of European Treaties” is taking place on 20th and 21st May 2021 at the University of Zürich².

² This *Article* takes into account developments as of beginning of May 2021.

