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***FUTURE-MAPPING THE DIRECTIONS OF EUROPEAN  
UNION (EU) LAW: HOW DO WE PREDICT THE FUTURE  
OF EU LAW?***

Elaine Fahey

20 August 2020

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The City Law School

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## **FUTURE-MAPPING THE DIRECTIONS OF EUROPEAN UNION (EU) LAW: HOW DO WE PREDICT THE FUTURE OF EU LAW?**

Elaine Fahey\*

### Abstract

The paper introduces the Special Issue entitled ‘Future-mapping the directions of European Union law.’ The Special Issue aims to reflect upon the means to engage in future-mapping of an extraordinarily expanding field, with countless sub-disciplines emerging that increasingly demand esoteric expertise and new forms of collaboration to engage with it as a field. It invited participants to reflect upon ‘what’ and ‘how’, i.e. they map futures, *inter alia*, as a lexicon, methodology and end-point in their normative framing of their subject field. A new era of new analytical sources of the EU and its laws in digitised form provide an increasingly impressive functionality to look forward. It might certainly be the case that future predictions of the shape of EU law, where data-based are more robust than ever before. However, this temporal challenge of the future and its composite relationship to the past remains the nub of the complexity here. EU law scholars routinely operate as committed historians and eternal futurologists. The idea of the future is a vastly subjective exercise and the search for predictions of the future is a highly composite exercise here in EU law. The distinctiveness of EU law from a methodological perspective as a relatively recent subject with a highly dominant court is worth of significant attention. However, the limitations of a court-centric subject have been increasingly manifesting themselves. An innate tendency towards interdisciplinarity also characterises the new era of EU law. Yet court-centric-ness often dominates here also. The state of the art appears to agree but also be torn by the manner in which the subject has evolved. The paper advocates a non-court-centric future of EU law and a focus upon interdisciplinary methodology with EU law. It also advocates a new decade to advance critical studies of EU law.

### Keywords:

*Methodology; future-mapping; EU law; Court-centric- CJEU- critical studies*

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## Introduction

The EU as an organisation has extraordinary “future flexibility”- perhaps unlike many other legal entities or organisations.<sup>1</sup> Its demise is as regularly anticipated as its expansion. Yet what is distinct about EU law and its future? How do we know it? How can and should we imagine it? How does it differ from other subjects on the EU? And how does one prove the “why”? What about a counter-narrative to the future of EU law? To say that X not Y course would take place?<sup>2</sup> How is this rightly predicted? And how is this logically and reasonably formulated relative to the methods of any given discipline? It seems self-evident in the case of the EU that however extraordinary that it is, that the EU’s flexibility does not extend to crises responses where EU procedures like many international organisations (IOs) are simply cumbersome. Its future is littered with suggestions for its procedural, institutional and competence improvements. And so how is the narrative of the IO separated from its institutional procedures? What is a counter-narrative to EU law ingrained as a subject around integration? Opposition thereto? That it would not happen? These queries are posed to be indicative of the construct of compositive time plaguing EU law as a discipline. *How* to formulate its future is a core disciplinary challenge against the backdrop of its troubled contemporary present and distinct history. This Special Issue represents a discrete exercise of future-mapping of EU law at the start of a new decade from a diverse range of interdisciplinary scholars across the globe relating to European Union (EU) law. It considers: *how* should we predict the future of EU law? *How do* we predict the future of EU law? It explores how the future is analysed, mapped and project as to EU law as a subject and how it relates to questions of methodology.

The Special Issue considers the future of two grand over-arching fields at the heart of EU law EU law: 1) economic and regulatory issues and 2) constitutionalism and the individual.<sup>3</sup> It examines these fields through three key themes: I) the constructivist future of EU law (“making”), II) the methodological future of EU law (“doing”) and III), the conceptual future of EU law (“showing”), which are developed here next.

### I. The constructivist “future” of EU law

#### A. *The impossible probable genre of “Future”*

As Philip Allott has stated, more noted for his unconventionalism than “conventionalism”, conventionally “[i]n law-making, society speaks to its future, intending that, when the time comes, its future will listen to the past”.<sup>4</sup> It is also easily overlooked that future studies is an extraordinary field of research, with its own genres, sub-fields, methodologies, journals and so forth.<sup>5</sup> For instance, the World Futures Studies Federation was created in 1973, developing into a continent wide organisation with local chapters, often times consisting of businesses, entrepreneurs and consultants.<sup>6</sup> Yet for those willing to delve further, Clarke’s infamous quote: “It is impossible to predict the future, and all attempts to do so in any detail appear ludicrous within a very few years,” arguably cannot be bettered.<sup>7</sup> The term “futurology” probably means little as a “thick” interdisciplinary intellectual idea, especially not to lawyers. Future-looking trend forecasting appears annually in many subjects and disciplines and in many types of specialist and generalist or popular publications. They fill the deeply human desire to think differently and bigger *and* to engage in change. In Fukayama’s iconic piece on the start of a decades long clash between the place of liberal western democracy or modernity as the ultimate

<sup>1</sup> Cf Fleur Johns, “On Dead Circuits and Non-Events” in Kevin Jon Heller and Ingo Venzke (eds), *Contingency and the Course of International Law* (OUP 2019).

<sup>2</sup> Cf Jörg Polakiewicz, “EU accession to the ECHR: How to Square the Circle” (*The Council of Europe: News*, 9 March 2020) <[https://www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle->](https://www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle-) accessed on 31 July 2020.

<sup>3</sup> Most famously: “Change is to the law of life and those who look only to the past or present are certain to miss the future” (John F Kennedy Frankfurt, 1963).

<sup>4</sup> Philip Allott, “Reconstituting Humanity - New International Law” (1992) 2 *European Journal of International Law* 219, 224.

<sup>5</sup> Eg *Future Studies Research Journal*; *World Futures: the Journal of New Paradigm Research*.

<sup>6</sup> Jenny Andersson, *The Future of the World: Futurology, Futurists, and the Struggle for the Post-Cold War Imagination* (OUP 2018) 184.

<sup>7</sup> Arthur C Clarke, *Profiles of Future* (Macmillan 1973) 13.

dominant force of world politics has long since been contested as a state of future, past or even present.<sup>8</sup> It is also understood to be an iconic representation of the challenge of time and the challenges of portrayal of the past, present and future of the global order. Yet it is easily transposable to debates on the future of Europe.

At any given moment in time the EU lurches from crisis to crisis. It struggles consistently with partial institutionalisation in some field and incomplete competences, from health, migration, the Eurozone to rule of law powers, mostly at the wrong time. However, there are luckily no shortages of sources from those willing to re-imagine the future of the EU.<sup>9</sup> A vast numbers of articles, books, book chapters have been published on the future of the EU in the genre of EU law,<sup>10</sup> arguably not dissimilar to its closest legal subject perhaps, the future of international law.<sup>11</sup> In the “Futurology of International Law”, Trachtman reminds us of the fundamental basics of its futurology are likely to be demographics, democratisation and technological change.<sup>12</sup> Alter argues with equal force that the new frontiers of international law relate to cybersecurity, drones and climate change.<sup>13</sup> The three-fold or trilogy technique is one widely used in advocacy and popular writing, designed to simplify, distil and cogently

<sup>8</sup> Francis Fukuyama, *The End of Order* (London: Social Market Foundation 1997); Francis Fukuyama, *The End of History and the Last Man* (London: Penguin 2012); Jack Lawrence, *The Revenge of History: Why the Past Endures, a Critique of Francis Fukuyama* (Lewiston, NY; Queenston, Ont: E Mellen Press 2003); Mehmet Kucukozer, “Theoretical and Practical Challenges to Francis Fukuyama’s ‘End of History’ Thesis” (2005) 26 *Social Thought & Research* 105; Louis Menand, “Francis Fukuyama Postpones the End of History” *The New Yorker* (3 September 2018) <[www.newyorker.com/magazine/2018/09/03/francis-fukuyama-postpones-the-end-of-history](http://www.newyorker.com/magazine/2018/09/03/francis-fukuyama-postpones-the-end-of-history)> accessed 31 July 2020.

<sup>9</sup> Andreas C Goldberg, Erika J van Elsas and Claes H De Vreese “Eurovisions: An Exploration and Explanation of Public Preferences for Future EU Scenarios” (2020) *Journal of Common Market Studies* 1; “Franco-German non-paper on key questions and guidelines for the Conference on the Future of Europe” (European Sources Online, 2019) <[www.europeansources.info/record/conference-on-the-future-of-europe-2020-2022/](http://www.europeansources.info/record/conference-on-the-future-of-europe-2020-2022/)> accessed 31 July 2020; Emmanuel Macron “Dear Europe, Brexit Is a Lesson for All of Us: It’s Time for Renewal” *The Guardian* (4 March 2019) <[www.theguardian.com/commentisfree/2019/mar/04/europe-brexit-uk](http://www.theguardian.com/commentisfree/2019/mar/04/europe-brexit-uk)> accessed 31 July 2020.

<sup>10</sup> For an arbitrary selection: In the German Law Journal [2020] 20 Challenges for the EU in 2020: <<https://germanlawjournal.com/volume-21-issue-01/>> accessed 31 July 2020; Wolfgang Weiss, “The Future of EU Executive Rulemaking” (2019) 3 *European Law Review* 337; Miguel Maduro, Loic Azoulai (ed), *The Future of EU Law* (Hart Publishing 2010); Koen Lenaerts and others (eds) *An Ever-Changing Union?: Perspectives on the Future of EU Law* (Hart Publishing 2019); Gráinne De Búrca, “The Road Not Taken: The EU as a Global Human Rights Actor” (2011) 105 *American Journal of International Law* 649; Mark Dawson, “Better Regulation and the Future of EU Regulatory Law and Politics” (2016) 53 *Common Market Law Review* 1209; Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019); Nadezhda Purtova, “The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law” (2018) 10 *Innovation and Technology* 1; David Lloyd Jones, “Brexit and the Future of English law” (2018) 49 *Victoria University of Wellington Law Review* 1; Andrew Dickinson, “Back to the future: the UK’s EU Exit and the Conflict of Laws” (2016) 12 *Journal of Private International Law* 195; Franz Mayer, “The EU in 2030: An Anticipated Look Back at the 2020s” (2020) 21 *German Law Journal* 63; Dirk Andreas Zetzsche and Douglas W Arner, Ross P Buckley and Rolf H Weber, “The evolution and Future of Data-Driven Finance in the EU” (2020) 57 *Common Market Law Review* 331; Emmanuel Jeuland, Raoul C van Caenegem, *Le Droit Européen Entre Passé et Future: Unité et Diversité sur Deux Millénaires* (Daloz 2010); Jean-Luc Sauron, “L’UE: quelle légitimité? Quel avenir?” [2019] *The Authority of Law* 371; Thomas Delille, *L’Analyse d’impact des Règlements dans le Droit de l’Union Européenne* (Primento 2013); Peter Csonka, “Les Perspectives Futures du Droit Pénal de l’Union Européenne” (2006) 77 *Revue Internationale du Droit Pénal* 347; Erika Szczyrak, “Future Directions in European Union Social Policy Law” (1995) 24 *Industrial Law Journal* 19; Gisèle Vermimmen-Van Tiggelen and others (eds), *L’avenir de la Reconnaissance Mutuelle en Matière Pénale dans l’Union Européenne* (Éditions de l’Université de Bruxelles 2009); Elspeth Guild et Jean-Yves Carlier, *L’avenir de la Libre Circulation des Personnes dans l’Union Européenne* (Bruylant 2006); Yasmine Lahlou, “L’Avenir Du Droit Européen Des Contrats Le Programme D’Action De La Commission Européenne” [2003] *International Business Law Journal* 473; Pierre-Yves Greber, “L’avenir des Régimes de Retraites: Quelques Remarques Notamment au Regard du Droit International et Européen” (1996) 17 *Cahiers Genevois et Romands de Sécurité Sociale* 59; Siofra O’Leary, “The Past, Present and Future of The Purely Internal Rule in EU Law” (2009) 44 *Irish Jurist* 13; Matthias Weller, “Mutual trust: in search of the future of European Union private international law” (2015) 11 *Journal of Private International Law* 64; Paula Giliker (ed), *The Future of EU Tort Law* (Edward Elgar Publishing 2017); Gareth Davies, Matej Avbelj (eds) *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishers 2018) pt III; Martin Trybus, Luca Rubini (eds) *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar Publishers 2012); Steve Peers, “The future of EU treaty amendments” (2012) 31 *Yearbook of European Law* 17; Christian Twigg-Flesner, “Comment: The Future of EU Consumer Law—the End of Harmonisation?” in M. Kenny and J. Devenney (eds), *European Consumer Protection—Theory and Practice* (CUP 2015); Jesper Lau Hansen, “The Report of the Reflection Group on the Future of EU Company Law—As Seen from a Nordic Perspective” [2011] *Nordic & European Company Law Working Paper* 10; Angelos Dimopoulos and Mavluda Sattorova, “Present and Future of EU International Investment Treaties” (2012) 39 *Legal Issues of Economic Integration* 153; Martin Shapiro, “Judicial Review and Bureaucratic Impact: The Future of European Union Administrative Law” (2004) 1667 *Judicial Review and Bureaucratic Impact* 251; Catherine Barnard, “EU Employment Law and the European Social Model: the Past, the Present and the Future” (2014) 67 *Current Legal Problems* 199; Stefaan Van den Bogaert, “Bosman: The Genesis of European Sports Law. The Past and Future of EU Law” in Pinares Pessoa Maduro, Miguel Maduro, Loic Azoulai (eds) *The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishers 2010) 488; Verena Murshetz, “Future of Criminal Law within the European Union—Union Law or Community Law Competence” (2007) 38 *Victoria University Wellington Law Review* 145.

<sup>11</sup> Eg Karen J Alter, “The Future of International Law” in Diana Aytton-Shenker (ed) *The New Global Agenda* (Lanham: Rowman & Littlefield 2018); Joel P Trachtman, *The Future of International Law* (CUP 2013); Douglas Guilfoyle, “The future of International Law in an Authoritarian World” (*EJIL: Talk!*, 3 June 2019) <[www.ejiltalk.org/the-future-of-international-law-in-an-authoritarian-world/](http://www.ejiltalk.org/the-future-of-international-law-in-an-authoritarian-world/)> accessed 31 July 2020; Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012); Pitman B Potter, “The Future of International Law” (1943) 37 *American Journal of International Law* 632; Anne-Marie Slaughter and William Burke White, “The Future of International Law is Domestic (or, the European Way of Law)” (2006) 47 *Harvard International Law Journal* 327.

<sup>12</sup> Trachtman, *The Future of International Law* (n 11) 66-84.

<sup>13</sup> Alter, “The Future of International Law” (n 11).

communicate. It is not surprising to reveal common communication tools for persuasion embedded with futurology. Yet these communication devices may only take us so far. Many significant intellectual projects on the future of Europe or public international law have met with the same methodology problems as less idealised or reflective projects- often because of the basic “plain vanilla” fact that the future is difficult to predict irrespective of the elegance of its portrayal.<sup>14</sup> This might lead us to reflect upon the ingrained place of the past “in” the future there.

It is worth stating that the concept of the temporal *past* and its breadth is the subject of considerable disagreement in the discipline of Contemporary History, i.e. as to “world history”, “deep history” and “big history”.<sup>15</sup> Vast collections of sources which would previously have taken an individual lifetime to collect are now available to undergraduate students and the general public alike in the form of digital collections and databases. It is argued that, as a result, the “telescope” rather than the “microscope” is increasingly the preferred instrument of examination in contemporary history, whereby the “long-shot” not the “close up” is more prevalent.<sup>16</sup> This radical shift in *how we perceive time*, model it, utilise it and engage with new sources are all thus open to considerable reflection. They are arguably not just concerns of sub-genres of history.<sup>17</sup> Rather, they are matched in any EU-related course in particular. A new era of new analytical sources of the EU and its laws in digitised form, institutionalisation of the historical archives of the EU, better digital repositories of previous scholarship e.g. books, vast quantities of output from special issues to edited volumes or *festschriften*, digitised textbooks, theses, numerous collections of national, regional and comparative caselaw and so on provide an increasingly impressive functionality to look forward. It might certainly be the case that future predictions of the shape of EU law, where data-based are more robust than ever before. However, this temporal challenge of the future and its composite relationship to the past remains the nub of the complexity here.

### ***B. EU lawyers: Committed historians and eternal futurologists?***

The subject of EU law has not been short on multiple publications on the *future* of the subject.<sup>18</sup> However, arguably many have both a telescopic and short lens “*longue dureés*” scope for EU law at least, looking back at 50 years *and* forward at more. The types of time milestones in the history of the EU have tended to generate certain views of the future- where treaty revisions have regularly mile-posted integration, followed by referenda in more recent times and then shorter cyclical subject-specific frameworks. It is thus arguably routinely common for EU scholars to look backwards to engage in future-mapping. It is additionally common for many leading contributions to EU law scholarship to engage in some form of “revisionist” analysis of the past, revisionism here with a very small “r”. This is often in the form of a historical outlook. Arguably, this is because the future and past of EU law are eternally dominated by future integration and a perpetual current state of crises. However, the yardstick of the length of time looking backwards and forwards is often underestimated as to its composite form.

Thus most significant interventions in the field of EU law have predominantly always been backwards looking and *historical*, given the nature of integration- perpetually in want of a narrative to explain and expound its significance.<sup>19</sup> From historians, sociologists to political scientists, those examining the foundations of the EU legal system have developed a significant literature showing how a committed group of legal entrepreneurs worked to support the legitimacy of the CJEU’s jurisprudence and establish European law as a distinct field- predominantly constructively backwards.<sup>20</sup> Weiler’s

<sup>14</sup> Slaughter and Burke-White “The Future of International Law is Domestic (or, the European Way of Law)” (n 11) written in the “post-Kadi era” and appear as far-fetched perhaps as Mark Leonard, *Why Europe Will Rule the 21<sup>st</sup> Century* (Fourth Estate 2006), where the latter currently sells on Amazon for 0.61p (sterling), if a market-based assessment of its value is of any value.

<sup>15</sup> David Armitage, “What’s the Big Idea? Intellectual History and the *Longue Dureé*” (2012) 38 *History of European Ideas* 493.

<sup>16</sup> *ibid* 493.

<sup>17</sup> *ibid* 498-499.

<sup>18</sup> See n 8.

<sup>19</sup> Joseph H H Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403, 2410-31; Cf Daniel R Kelemen and Alec Stone-Sweet, “Assessing ‘The Transformation of Europe’: A View from Political Science” in Miguel Poirares Maduro and Marlene Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (CUP 2017). See the iconic Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution” (1981) 75 *American Journal of International Law* 1.

<sup>20</sup> Giuliano Amato and others (eds), *The History of the European Union: Constructing Utopia* (Hart Publishers 2019); Morten Rasmussen, “The Origins of a legal Revolution- the Early History of the European Court of Justice” (2008) 14 *Journal of European Integration History* 77; Anne Boerger-De Smedt, “Negotiating the Foundations of European Law, 1950–1957, The Legal History of the Treaties of Paris and Rome” (2012) 21 *Contemporary European History* 339; Bill Davies, *Resisting the European Court of Justice. West Germany’s Confrontation*



“Transformations of Europe” article is rightfully depicted in rich detail by leading political scientists to be “arguably the most influential paper published on the European Court of Justice... as a subtle, reconstructive account of the Court’s constitutional caselaw... [working descriptively and normatively through the] expansion of the scope of the EU’s jurisdiction and [blending] doctrinal analysis with a strategic political account,” paving the way for all of the political science to come.<sup>21</sup>

The place of the past is assuming much salience since the history of EU law and key caselaw is globally a long-term research project.<sup>22</sup> It is a vast research project comprising a significant number of scholars from a variety of disciplines, more recently legal scholars. However, it is work founded upon a body of caselaw that is studied principally relating to the internal market and its evolution.<sup>23</sup> Its work is dedicated to revisiting key cases and their dossiers. It is also a highly distinctive form of longer-term understanding integration through law. It might be legitimate at some point also to ask for the saturation-point (date) of this work? At what point is EU revisionism no longer possible, appropriate or legitimate? The demise of the EU is so regularly predicated particularly in the midst or aftermath of the latest EU crisis. We must ask how does this affect the composite place of the present, future and past in the temporality of EU law?

### *C. The critical voice of EU law: heavily court-centric?*

Historically, critical studies of EU law have arguably been associated with camps of scholars studying the judicial activism of the Court of Justice, and mostly working to “one side”, against the Court. Arguably, one of the earliest and most famous studies of activism is the work of Hjalte Rasmussen in his iconic work developed initially in the US on the Court of Justice.<sup>24</sup> It is fair to say that this work was not “well received” and initiated several decades of scholarship centred around the formulation of his argument against the Court, attacked for being “simplistic” and making unreasoned claims. Yet it is widely agreed that he irreversibly changed the way that we think about EU law, leaving behind, “constitutional law without politics, the written constitution as a sacred text, the professional commentary as legal truth, the caselaw as the inevitable working out of the correct implications of the constitutional text and the constitutional court as to disembodied voice of right reason and constitutional teleology”.<sup>25</sup> He ultimately challenged the so-called “Pescatore” School of European Law prevailing, based on the simple teleology that “EU integration is good, the ECJ is saintly, the Member States villainous”, through his interdisciplinary thesis on the politico-legal point of the integration project and his de-reification of the Court. What is remarkable is possibly not the argument itself- for many international courts and tribunals and many last instance courts are also regularly cyclically subject to the same genre of critique. Rather, it took place alongside a wave of significant political science scholarship in East Coast US Universities on the role of the Court and integration in the EU, opening

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with *European Law 1949–1979* (CUP 2012); Vera Fritz, “Activism on and off the Bench: Pierre Pescatore and the Law of Integration” (2020) 57 *Common Market Law Review* 475; Morten Rasmussen, “Establishing a Constitutional Practice of European Law. The History of the Legal Service of the European Executive, 1952–65” (2012) 21 *Contemporary European History* 375; Daniel R Kelemen, “The Court of Justice of the European Union” in Karen J Alter, Lawrence R Helfer, Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018) ch 10.

<sup>21</sup> Daniel R Kelemen and Alec Stone Sweet, “Assessing ‘The Transformation of Europe’: A View from Political Science” (n 19).

<sup>22</sup> Based inter alia at the University of Copenhagen, American University and now at the Law Department, EUI Florence at the Historical Archives of the EU: See European University Institute, *Historical archives of the European Union* <[www.eui.eu/Research/HistoricalArchivesOfEU](http://www.eui.eu/Research/HistoricalArchivesOfEU)> accessed 31 July 2020.

<sup>23</sup> Fernanda Giorgia Nicola, “Waiting for the Barbarians: Inside the Archive of the European Court of Justice” in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice* (OUP 2019); Fernanda Giorgia Nicola, “Introduction: Critical Legal Histories in EU Law” in Fernanda Nicola and Bill Davies (eds), *EU Law Stories, Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); Antoine Vauchez, “Upside Down, Inside Out: A Process-Oriented Approach to the ‘Political Role’ of the Court of Justice of the European Union” in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice, Collected Course of Academy of EU Law*, vol 28 (OUP 2019).

<sup>24</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making* (Dordrecht: Martinus Nijhoff Publishers 1986); Mauro Cappelletti, “Is the European Court of Justice ‘Running Wild’?” (1987) 12 *European Law Review* 4; Joseph H H Weiler, “The Court of Justice On Trial” (1987) 24 *Common Market Law Review* 555, 576; AG Toth, “On Law and Policy in the European Court of Justice” (1987) 7 *Yearbook of European Law* 411; Morten Broberg, “Hjalte Rasmussen, The European Court of Justice” (1998) 67 *Nordic journal of International Law* 497; Henning Koch and others (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Copenhagen Denmark: Djøf Publishing 2010).

<sup>25</sup> Joseph H H Weiler, “Hjalte Rasmussen: Nemo Propheta in Patria Sua” in Koch and others (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (n 24), pt XIII. See Cf Julio Banquero Cruz, *What’s Left of the Law of Integration? Decay and Resistance in European Union Law* (OUP 2018), Introduction, on the role of Pescatore. See also Karen J Alter, “On Law & Policy in the European Court of justice: An American Perspective” in Koch and others (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (n 24) 1, 5: “For me, the treasure... is that Rasmussen wrote about what others would only say in hushed tones behind closed doors...”.

up the world view of the Court through forms of realism. To this day, the “external” perspective in EU law is significantly often sent via critical reminders from leading EU scholars based in third countries such as the EU, often in discipline-shifting terms.<sup>26</sup> This external distance- geographically, socially, professionally- may be advantageous in engaging in reflection but is difficult to isolate its precise salience.

The post-Rasmussen era of EU law was followed by a wave of members of the Court or people associated with the Court, but not directly connecting with the academic debates, in a series of defensive and strategically-placed articles, mainly by English judges or academics.<sup>27</sup> A decade or so later, a debate was again ignited by challenges of the former President of Germany Roman Herzog that ignited a furore in Germany- and also beyond.<sup>28</sup> Some portray these debates in three ways only- 1) those debating with a mission to explain as associates of the Court, 2) those engaging in normative or descriptive academic arguments using caselaw or assessing the performance of the Court more broadly or 3) those wishing to defend the Court and its reasoning based upon “misunderstandings” of practice or procedure.<sup>29</sup> Arguably, although the activism of the Court continues to be a significant subject and object of EU law scholarship, the tenor of this specific debate has not been matched in the decades that would follow in EU law.<sup>30</sup> Whatever about the merits of these strands, they have more broadly dominated the adjudication of the subject and the wider question of its methodology. If anything, the place of court-centric studies in EU law continues to evolve in its own way. However, it also easily risks becoming a self-reifying subject and overly journalistic one at that purely from a methodological perspective.

Stepping back from purely EU law perspectives, in more recent times of rising Euroscepticism, however, there is an emerging literature in political science/ international relations- thus further away or apart from legal scholarship- on critical EU studies. It has sought to target the place of practice and methodology to overturn key assumptions as to EU integration.<sup>31</sup> Critical Studies- broadly understood- is arguably a useful genre of analytical and normative theorisation to apply to the study of the EU at a moment of significant disintegration and to apply to legal developments. Here, the actors of everyday action are intensely scrutinised. Some advocate the turn to studying this “everyday” practice as a result. Such a genre, for example, seeks to bring EU studies scholars closer to the social phenomenon that they want to study and argues for the use of approaches which bring scholars closer to the people who construct, perform and resist the EU on a daily basis.<sup>32</sup> In doing so, it looks to disorder and order EU studies. It thus increasingly reflects critically upon the subjects and objects of the EU law-making and integration processes. As a result, it seeks to challenge the orthodoxy of integration narratives but without adopting Euroscepticism as its end goals. Yet critical legal theory or Critical EU Studies is uninterested in EU law as much as EU law in it to date. Most standard textbooks on European Union law written in the English language medium do not have at the time of writing a chapter on Critical EU law.<sup>33</sup> Nor in specialist textbooks on EU law does such a topic exist.

A range of further scholars now advocate more critical approaches to EU foreign policy through

<sup>26</sup> Eg, more recently: Daniela Caruso and Fernanda Giorgia Nicola, “Legal Scholarship and External Critique in EU Law” in Siniša Rodin (ed), *Transformation of Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of Courts in the European Union* (Hart Publishing 2017); Joseph H H Weiler, “The Case for a Kinder, Gentler Brexit” (*EJIL Talk!*, 3 February 2017) <[www.ejiltalk.org/editorial-the-case-for-a-kinder-gentler-brexite/](http://www.ejiltalk.org/editorial-the-case-for-a-kinder-gentler-brexite/)> accessed 31 July 2020.

<sup>27</sup> See the monograph of Joxxeramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993); Patrick Neill, “The European Court of Justice: A Case Study in Judicial Activism” (EPA 1995); Geoffrey Howe, “How Euro-Justice: Yes or No?” (1996) 21 *European Law Review* 187; Trevor Hartley, “The European Court, Judicial Objectivity and the Constitution of the European Union” (1996) 112 *Law Quarterly Review* 95; Anthony Arnall, “The European Court and Judicial Objectivity: A Reply to Professor Hartley” (1996) 112 *Law Quarterly Review* 411; Takis Tridimas, “The Court of Justice and Judicial Activism” (1996) 21 *European Law Review* 199.

<sup>28</sup> Roman Herzog und Lüder Gerken, ‘*Stoppt den Europäischen Gerichtshof*’ (FAZ, 8 September 2008).

<sup>29</sup> Michal Bobek, “Legal Reasoning of the Court of Justice of the EU” (2014) 39 *European Law Review* 418.

<sup>30</sup> Eg Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice*, *Cambridge Studies in European Law and Policy* (CUP 2012); Niamh Nc Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013); Gunner Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013); Maurice Adams and others (eds), *Judging Europe’s Judges The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013); Mark Dawson, Elise Muir, Bruno De Witte (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013); Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (CUP 2018).

<sup>31</sup> See Rebecca Adler-Nissen, “Towards a Practice Turn in EU Studies: The Everyday of European Integration” (2016) 54 *Journal of Common Market Studies* 87; Emmanuel Adler and Vincent Pouliot, “International practices” (2011) 3 *International Theory* 1; Richard Whitman and Ian Manners, “Another Theory is Possible: Dissident Voices in Theorising Europe” (2016) 54 *Journal of Common Market Studies* 3.

<sup>32</sup> Adler-Nissen, “Towards a Practice Turn in EU Studies: The Everyday of European Integration” (n 31) 87-89.

<sup>33</sup> See exceptionally (in the English language) e.g. Ian Ward, *A Critical Introduction to EU Law* (CUP 2009); Andrew Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004).

a decentring of EU actorness in their attempts to capture and reframe perceived “Eurocentrism” in a variety of areas of foreign policy- apart from EU IR law.<sup>34</sup> This accords well with pluralistic and participatory understandings of EU foreign policy. Critical studies may afford insights to deconstruct and frame the future of EU law. For example, EU IR law is one where the EU risks becoming victim of its own success internally and externally. Yet it also risks becoming victim to significant backlashes against Eurocentrism and the complexity of decolonialisation. Developments in comparative regionalism look most unlikely to embrace its legal successes.<sup>35</sup> Critical studies may provide insights, however, it can hardly be said to constitute a dominant or mainstream genre of analysis with respect to law. The place of critique and external perspective in EU law may be said to be far from an easy target methodologically, to which this piece next turns.

## II. Methodological lens: on the future of EU law

### A. EU law: “beyond court-centric methods”?

Latest debates about the methods and methodology of EU law are largely data driven or advocate deeper law-in-context methods or historical studies- perhaps similar to public international law and / or related subfields.<sup>36</sup> Certain schools now advocate, for example, that the future of EU law *must* become more empirical to realise its scientific benefits, to develop the discipline and to broaden the reach of lawyers beyond the doctrinal.<sup>37</sup> Many such advocates, however, are predominantly often heavily “court-centric” and propose a highly court-centric understanding of EU integration as a modus operandi of EU law or place the Court as the ultimate subject and object of the data analysis. EU legal scholarship has of course long tended to adopt a highly “court-centric” approach. This is not inevitable either. One of the first places in the world to teach EU law was at Harvard Law School in the 1960s where Koen Lenaerts (now CJEU President) had to teach the content of the EEC treaties.<sup>38</sup> To impugn “court-centric-ness” is not to denigrate this approach- nor are other subjects e.g. public international law- so apart- which should be clearly stated- but rather to emphasise that organisational practice, law-making practice and Court judgments are different. Yet to advocate that a resolutely “non-court-centric” look at the EU may be considered is perhaps a “minority” methodology. However, non-court-centric views need to be taken into account in any realistic view of contemporary and future EU law. One could also claim that even court-centric views should at least concede that courts cannot be studied in isolation, but as actors embedded in a specific socio-political context, e.g. as regards the relationship between courts and other institutions, or between courts and the civil society at large.

Actorness when pursued as a research agenda in EU law also tends to develop a dynamic bottom-

<sup>34</sup> Stephen Keukeleire and Sharon Lecocq, “Operationalising the Decentering Agenda: Analysing European Foreign Policy in a Non-European and Post-Western World” (2018) 53 *Cooperation and Conflict* 277; “Decentering the vision(s) of Europe: The Emergence of New Forms” (Symposium, Paris, 25-27 October 2018) <[www.eastap.com/wp-content/uploads/2018/06/ABSTRACT-EASTAP-2.pdf](http://www.eastap.com/wp-content/uploads/2018/06/ABSTRACT-EASTAP-2.pdf)> accessed 31 July 2020; Ian Manners, “Another Europe is Possible: Critical Perspectives on European Union Politics” in Erik Knud Jørgensen, Mark A Pollack and Ben Rosamond (eds), *Handbook of European Union Politics* (Sage Publications 2007) 77; Nora Fisher Onar and Kalypso Nicolaïdis, “The Decentering Agenda: Europe as a Post-Colonial Power” (2013) 48 *Cooperation and Conflict* 283; Elaine Fahey, “Critical International Relations Law: A Research agenda” in Paul James Cardwell and Marie-Pierre Grainger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar Publishing 2020).

<sup>35</sup> See Tanja A Börzel and Thomas Risse-Kappen (eds), *The Oxford Handbook of Comparative Regionalism* (OUP 2016).

<sup>36</sup> Eg Arthur Deyve, Wessel Wijtvliet and Nicholas Lampach, “The Future of European Legal Scholarship: Empirical Jurisprudence” (2019) 26 *Maastricht Journal of European and Comparative Law* 348; Urska Sadl and Mikael Madsen, “A ‘Selfie’ from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers” (2016) 22 *Columbia Journal of European Law* 327; Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, “The Data-Driven Future of International Economic Law” (2017) 20 *Journal of International Economic Law* 217; See Rob van Gestel and Hans-Wolfgang Micklitz, “Why Methods Matter in European Legal Scholarship” (2014) 20 *European Law Journal* 292, 313-316; Michelle Egan, “Toward a New History in European Law: New Wine in Old Bottles?” (2013) 28 *American University International Law Review* 1223.

<sup>37</sup> Deyve, Wijtvliet and Lampach, “The Future of European Legal Scholarship: Empirical Jurisprudence” (n 36); Sadl and Madsen, “A ‘Selfie’ from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers” (n 36); Urska Sadl and Ioannis Panagis, “The Force of EU Case Law: An Empirical Study of Precedential Constraint” (May 31, 2016) iCourts Working Paper Series No 68 <<https://ssrn.com/abstract=2787119>> accessed 31 July 2020; Urska Sadl and Henrik Palmer Olsen, “Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts” (2017) 30 *Leiden Journal of International Law* 327; Arthur Deyve and Michal Ovádek, “Experimental Legal Methods in the Classroom” (2020) 16 *Utrecht Law Review* 1.

<sup>38</sup> Lecture of Koen Lenaerts, Amsterdam, 2013.

up approach to actors shaping EU law. However, it often returns to court-“centric-ness”.<sup>39</sup> How does the subject and object affect the research agenda? Looking inwards, from *outside* of the Court, matters look differently. In a subject where the Court of Justice celebrated its own birthday party of 50 years of the *Van Gend en Loos* decision, its most activist of all time, by inviting a significant number of leading EU law scholars to the event, it is difficult to separate the court-centric from the rest in a subject with such a heavy calculus in its favour.<sup>40</sup> It must also be remembered that the role of the Court was a central one in the Brexit referendum. It put the Court as a ‘red line’ in the negotiations not to be crossed, and elevating it, as a result, perhaps even exalting the complexity of its bold supranational dominance. These developments clearly impinge upon the direction of the Court as an actor, whose actorness has now become a research agenda unto itself, for example, as to its role in generating empirical spread of its form internationally.<sup>41</sup> The future of the CJEU appears even more public and actively engaged in setting the agenda as an institution. A good example of this might the Court releasing press releases to respond to the German Constitutional Court decision of May 2020 on Public Sector Purchase Programme (PSPP) or using twitter more actively or allowing the President of the Court to lead it more publicly in international debates, media and discourses.<sup>42</sup> Here, transparency and institutional autonomy look likely to radically shape the future of the institution going forward and how scholars engage with it. This Special Issue questions court-centricity where possible and explores future-mapping beyond such parameters where feasible.

### ***B. EU “Law in context”: on framing new directions***

A significant body of literature seeks to frame the future of EU law empirically. For instance, decades of jurisprudence is re-framed through a new scientific framing.<sup>43</sup> It raises many questions- how many sub-fields of EU law can usefully be guided by this methodology? Is the mapping of shifts in caselaw, subject fields and policy through empirics alone sufficient? Is such a genre of methodology of the future a sub-field in turn of law-in-context? What are the historical, economic and other limitations of purely empirical analyses? Are they also overly “court-centric”? Do empirics zoom out unduly from the form of revolution and evolution at the heart of EU law as a discipline, with its distinctive evolution from public international law? And is this empirical turn apart from distinctly or a continuum from the law in context era? What kind of empirics should shape this? From who? From what sources?

It can be said that new directions will need further and deeper analytical prisms. Data-driven work can easily present “fact” highly descriptively and circumvent normative projects. Alternatively, it can use data to set powerful agendas which challenge orthodoxies or generate complexity as to the narratives of EU integration historically learned. For instance, Sadl and Madsen using “Eigenvector Centrality” have mapped the importance of CJEU caselaw to “unpack” historic caselaw dossiers of the Court to present to thirteen new accession states.<sup>44</sup> They find that the selections undertaken by the CJEU have not been done so neutrally. Their highly significant research (question) was anchored as follows: “how does the European Court of Justice view itself?” It leads to the challenge as to precisely how this

<sup>39</sup> Antoine Vauchez, *Brokering Europe* (CUP 2015); Antoine Vauchez, “Keeping the Dream Alive. The Transnational Fabric of Integrationist Jurisprudence” (2012) 5 *European Political Science Review* 51; Harm Schepel, “The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law” (2007) 32 *Law & Social Inquiry* 183; Harm Schepel and Rein Wesseling, “The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe” (1997) 3 *European Law Journal* 165; Antoine Vauchez, “The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity”, (2010) 16 *European Law Journal* 1.

<sup>40</sup> See Court of Justice of the European Union, Celebrations of the 50th anniversary of the judgment in Van Gend en Loos (13 May 2013) <[https://curia.europa.eu/jcms/jcms/P\\_95693/en/](https://curia.europa.eu/jcms/jcms/P_95693/en/)> accessed 31 July 2020.

<sup>41</sup> Eg Karen J Alter, “The Global Spread of European Style International Courts” (2012) 35 *West European Politics* 135; Alec Stone-Sweet and Thomas L Brunell, “Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization” (2013) 1 *Journal of Law and Courts* 61.

<sup>42</sup> BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15, paras 1-237 <[www.bverfg.de/e/rs20200505\\_2bvr085915en.html](http://www.bverfg.de/e/rs20200505_2bvr085915en.html)> accessed 1 July 2020; Court of Justice of the European Union, Press Release 58/2020 following the judgment of the German Constitutional Court of 5 May 2020 (8 May 2020) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>> accessed 31 July 2020; Koen Lenaerts, “European Court Chief Defends Decision to Strike Down Data-Transfer Agreement”, *Wall Street Journal* (13 October 2015) <[www.wsj.com/articles/european-court-chief-defends-decision-to-strike-down-data-transfer-agreement-1444768419](http://www.wsj.com/articles/european-court-chief-defends-decision-to-strike-down-data-transfer-agreement-1444768419)> accessed 31 July 2020.

<sup>43</sup> Eg Sadl and Panagis, “The Force of EU Case Law: An Empirical Study of Precedential Constraint” (n 36); Sadl and Madsen, “A ‘Selfie’ from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers” (n 37); Sadl and Olsen, “Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts” (n 37); Dyevre and Ovádek, “Experimental Legal Methods in the Classroom” (n 37).

<sup>44</sup> Sadl and Madsen, “A ‘Selfie’ from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers” (n 36).

evidence could be challenged and by whom? Using what methodology? And what impact or revisionism is necessitated by such stark empiricism?<sup>45</sup> What place for the future and past hold here in terms of framing? They propose understandings of EU integration that are also increasingly irrefutable to those outside of their methodologies.<sup>46</sup> There are important consequences to the empirical revolution that need to be embedded in legal education in earlier stages- and how others engage with it- or not.<sup>47</sup>

While, it is indisputable that much pioneering work on the CJEU may be said to be derived from non-legal scholars and which continues,<sup>48</sup> arguably it is fair to state that EU law has become increasingly interdisciplinary in its ordinary practice if the use of cross-disciplinary sources are a viable metric. In an era where interdisciplinarity is rewarded as a benchmark of scientific excellence for lawyers, the *manner* in which it is embedded within EU law becomes all the more significant. Major interdisciplinary contributions to EU law are usefully broken down as to *how* schools of thought are invoked and what best practice might be. For example, Paunio's *Legal Certainty in Multilingual EU law* is said to deploy an examination and critical discussion of literature from EU law, legal theory, legal reasoning, multilingualism, philosophy of language, theory of translation and an analysis of caselaw of multilingual interpretation of EU law and other sources processed into a theoretical fabric woven from interpretation and discourse theory.<sup>49</sup> To similar effect, Kelemen and Stone-Sweet, writing on Weiler's iconic piece "The Transformation of Europe" describe eloquently its (interdisciplinary) salience as follows:

Read as political science, the importance of the piece is three-fold. First, it laid out a subtle, reconstructive account of the Court's "constitutional" case law. This discussion quickly became a standard reference point for scholars developing new empirical research on the legal system's impact on integration. Second, Weiler described (and reflected normatively upon) the steady expansion of the scope of the EU's jurisdiction, findings that would be confirmed in more systematic research to come. Third, it blended doctrinal analysis with a strategic, "political" account of why two sets of actors – Member State Governments and the national courts – did not destroy the process of legal integration in its infancy, though each had the power to do so. Weiler showed how the ECJ's (often conflictual) interactions with national judges had served to allocate joint authority between the supranational and national legal orders, while enhancing judicial power on both levels. The so-called "judicial empowerment" thesis remains a dominant approach to explaining legal integration. Third, and most important for present purposes, TE presented a theory of how the Court's doctrinal moves related to state power within the EU's system of lawmaking and governance.<sup>50</sup>

Some contend that EU law has benefited from the sources doctrine of international law as it developed the basis for its legal order and has enable the adoption of an international doctrine of sources of law at EU law.<sup>51</sup> In this way, international human rights law and EU law are major unifiers of national

<sup>45</sup> To similar effect (to a degree), Malecki has used a statistical analysis of different Chamber formulations to argue that judges differ significantly in their attitudes towards EU integration, derived from their willingness to follow or defy the Commission's position in litigation: Michael Malecki, "Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgements of Chambers" (2012) 19 *Journal of European Public Policy* 1.

<sup>46</sup> Take similarly, Dyevre and Ovadek paper, 'The Voices of European Law: Legislators, Judges and Law Professors and their distinctiveness', deploying literally tens of thousands of sources - 200 000 legislative acts, 55 000 court rulings and opinions and 4000 articles from a leading EU law journal. The engagement with the narrative only becomes possible at an extremely specific level. This is again not to denigrate the significance of the work but rather to amplify the need to consider its broader methodological significance in the future of EU law. Dyevre, Arthur and Ovadek, Michal, *The Voices of European Law: Legislators, Judges and Law Professors* (September 4, 2019). Available at SSRN: <https://ssrn.com/abstract=3447770> or <http://dx.doi.org/10.2139/ssrn.3447770>

<sup>47</sup> Cf Dyevre and Ovadek, "Experimental Legal Methods in the Classroom" (n 37).

<sup>48</sup> See above generally in Section I and for a(n arbitrary) selection Tomasso Pavone and Daniel R Kelemen, "The evolving judicial politics of European integration: The European Court of Justice and National Courts Revisited" (2019) 25 *European Law Journal* 352; Sabine Saurugger and Fabien Terpan (eds), *Crisis and Institutional Change in Regional Integration*, Routledge Studies on Challenges, Crises and Dissent in World Politics (Routledge 2016); Cf Karen J Alter, *Establishing the Supremacy of European Law* (OUP 2001).

<sup>49</sup> See Elina Paunio, *Legal Certainty in Multilingual EU law* (Ashgate 2013).

<sup>50</sup> Daniel R Kelemen and Alec Stone Sweet, "Assessing the Transformation of Europe: A View from Political Science" in Maduro and Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (n 19) 193. See Jan Komarek, "Why read the Transformation of Europe today? On Transformation's constitutional imaginary" (Presentation to the EU EU law working group (June 2020, on file with the author).

<sup>51</sup> Martin Scheinin, "International law and human rights: Good or Bad for European Law?" in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method- In a Multilevel EU legal Order* (Copenhagen Denmark: Djøef Publishing 2012).

doctrines of sources and thus also major sites of interdisciplinarity- i.e. enriching it organically. Future directions are *already* embedded beyond traditional subject fields.

This leads neatly onto the broader questions of methodology.

### ***C. Methodology in EU legal scholarship: evolution not revolution?***

Legal scholarship also has undergone a profound shift in recent times where qualitative empirical research has become more common. It has been long been stated that interdisciplinarity is important for legal scholars to engage, in order to achieve a reflective historical inquiry drawing on the humanities and emerging trends in the social sciences.<sup>52</sup> However, its topicality and salience has taken off in more recent times of the hardening “scientification” of the social sciences.<sup>53</sup>

Over several centuries, individual European legal cultures driven by positivist dream of the proper method have constructed and deconstructed various methods or canons of interpretation. In Europe, the emphasis was on reason as to law and the analysis of theory and arguments of legal interpretation and decision-making.<sup>54</sup> Yet European legal cultures remain remarkably positivist, with a conviction that there are “correct” canons of legal interpretation. Jurists have been taught to follow and to display the proper method of legal reasoning e.g. in *travaux dirigés*.<sup>55</sup> This is argued to have been translated into a contemporary culture that there is a ‘proper method’ for the CJEU to resolve a case.<sup>56</sup> This has generated naturally court-centricness. A robust debate has also been ongoing about “a” European Legal method for some time, i.e. whether it exists or even its distinctiveness, not dissimilar to that taking place in international law.<sup>57</sup> There, the distinction between method and methodologies has been robustly contested.<sup>58</sup> For instance, some advocate a specific European Legal Method in Denmark and Sweden.<sup>59</sup> Others advocate the extent to which Scandinavian Legal realism provides a suitable background for understanding EU law, where valid EU law cannot be defined solely as the

<sup>49</sup> Elisa Morgera, “Global Environmental Law and Comparative Legal Methods” (2015) 24 *Review of European Comparative & International Environmental Law* 254; Neil Walker, *Intimations of Global Law* (CUP 2014); William Twining, “Diffusion of Law: A Global Perspective” (2004) 36(49) *Journal of Legal Pluralism and Unofficial Law* 1.

<sup>53</sup> See Christopher Mc Crudden, “Legal Research and Social Sciences” (2006) 122 *Law Quarterly Review* 632. For Germany: Hans-Eberhard Heyke, “Ist ‘Rechtswissenschaft’ eine Wissenschaft?” (2003) 34 *Rechtstheorie* 229; Rob Van Gestel, Hans Micklitz and Miguel Poiras Maduro, “Methodology in the New Legal World” (2012) *EUI Working Papers LAW* <<https://ssrn.com/abstract=2069872>> accessed 31 July 2020.

<sup>54</sup> Some state that the Brussels School of Rhetoric (Perelman, Olbrechts, Tyteca), the impact of hermeneutics (Gadamer) and of discourse theory in Germany (Habermas), the study of legal cultures and legal argumentation (Tarello, Guastini and the Genoa school, but also Conte, Jori, Pattaro and others) and the analytical legal philosophy applied to judicial decision-making (Wroblewski) all paved the way for the first ground-breaking analyses of legal reasoning as a social case of practical reasoning in philosophy with a group of authors that would eventually converge in the so-called ‘Bielefelder Kreis’: MacCormick, Summer, Wroblewski, Aarnio, Peczenik Alexy and Taruffo; Joxxeramon Bengoetxea, “Text and Telos in the European Court of Justice Four Recent Takes on the Legal Reasoning of the ECJ” (2015) 11 *European Constitutional Law Review* 184, 214.

<sup>55</sup> Michal Bobek, “Legal Reasoning of the Court of Justice of the EU” (2014) 39 *European Law Review* 418.

<sup>56</sup> *ibid* 419.

<sup>57</sup> Robert Cryer and others, *Research Methodologies in EU and International Law* (Oregon USA: Hart Publishing 2011); Ulla Neergaard, Ruth Nielsen and Lynda Roseberry (eds), *European Legal Method—Paradoxes and Revitalisation* (Copenhagen Denmark: Djøf Publishing 2011); Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method: towards a new European Legal Realism* (Copenhagen Denmark: Djøf Publishing 2013); Ruth Nielsen, “Legal Realism and EU Law” in Koch and others (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (n 24) 545; Martijn Hesselink, “European Legal Method? On European Private Law and Scientific Method”, (2009) 15 *European Law Journal* 20; Van Gestel, Micklitz and Maduro, “Methodology in the New Legal World” (n 54); Michal Bobek, “Legal Reasoning of the Court of Justice of the EU” (2014) 39 *European Law Review* 418; Gunnar Beck, “The Legal Reasoning of the Court of Justice of the EU - A Reply to Michal Bobek” (2014) 39 *European Law Review* 579; Steven R Ratner and Anne-Marie Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers” (1999) 93 *American Journal of International Law* 291, 292; Gregory Schaffer, “Melvin C. Steen Lecture, A Call for a New Legal Realism in International Law: The Need for Method” (2008) *Minnesota Legal Studies Research Paper No 09-02* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323912)> accessed 31 July 2020.

<sup>58</sup> Eg Rob van Gestel on Cryer, Herve, Sokhi-Bulley and Bohm: “They label ‘methodologies’ as diverse as: Natural law, Legal Positivism, Cosmopolitanism, Constitutionalism, New Governance, Queer Theory, Feminism, Postcolonial Theory, Marxism, but also Law and Economics, Law and Literature, and Law and Sociology: The latter raises .. questions: ... why do they call these ‘schools of thought’ methodologies and not just different legal styles or cultures? ... why are there such major differences between experts in the same field with respect to the canon of methodologies? Even more notable is that Cryer c.s. admit to use the words methodology, theory, and approach as synonyms but immediately add to this: ‘We rejected the use of the word ‘theory’ alone because in our experience many legal scholars, including the majority of PhD students in law, are uncomfortable with expressly identifying themselves as theorists.’... Although we can understand that legal scholars do not want to give the impression of being detached from legal practice, the latter remains strange for different reasons.”: Van Gestel, Micklitz and Maduro, “Methodology in the New Legal World” (n 54) 2.

<sup>59</sup> Eva Edwardsson and Helena Wockelberg, “European Legal Method in Denmark and Sweden—Using Social Science Theory and Methodology to Describe the Implementation of EU Law” (2013) 19 *European Law Journal* 364.

rules that the ECJ declares to be the law.<sup>60</sup> There are no shortages of subject specific methods at sub-genre level of EU law.<sup>61</sup> While so many contest a distinction to exist between understanding EU law through its judicial interpretation or enforcement and conducting EU legal research, we argue that the debates are interlinked significantly as to the “how” debates of the future.

Some have sought to challenge omissions in EU law methodologies as future research agenda methodologies. Take, for example, a critique of internal market law adjudicated by the Court as a conflict between market and non-market goals to constitute a Keynesian, supply-side related theory.<sup>62</sup> Others critique of the omission of the social from the internal market project.<sup>63</sup> Perhaps ultimately, the explicitness of the manner in which lawyers reason is an elementary challenge in the present and future scientification of EU law.<sup>64</sup> However, *time and temporal* framing remains here an issue apart- mostly implicit, mostly court-centric, which leads to the contributions here on the nature of the *framing* of the past and this brings us to the substantive content of this Special Issue.

### III. Outline of Special Issue

This Special Issue in two dominant and grand themes of EU law- economic and regulatory, constitutionalism and the individual- focuses upon interdisciplinary consideration of how to predict the future of EU law. It considers thus future directions of European Union (EU) law and how this is done in a set of sub-disciplines of EU law. What sources and methods achieve this? How? The Special Issue probes a diversity of sub-fields, exploring *inter alia* the future of public and private law related themes, cutting-edge regulatory developments, the next legislative agenda and the post-Brexit constitutional legacy and landscape. It thus considers both the descriptive and normative contours of the legal, political and competence shifts that are likely, including from a comparative perspective. However, the Special Issue also probes the place of time, manner and space in future-mapping of subsets of EU law. The place of legislative and policy time-frames and court-centric time-frames arguably dominate legal methodologies of the future. Yet what strictures do they impose on analysis? Do they hamper analytical method logically? How can, do or should we frame future analysis beyond “court-centric” frames- or not? How do distinct analytical sub-fields interact here or compare and contrast?

The Special Issues thus aims to reflect upon the means to engage in future-mapping of an extraordinarily expanding field, with countless sub-disciplines emerging that increasingly demand esoteric expertise and new forms of collaboration to engage with it as a field. It invited participants to reflect upon ‘what’ and ‘how’, i.e. they map futures, *inter alia*, as a lexicon, methodology and end-point in their normative framing of their subject field.

With all of the caveats aside about concerning the formulation of methodology of the future, how does this Special Issue hope to achieve its goals? For a start, all contributions engage in thematic debates relating to future methods of their subject fields and normative directions. All contributors are also assessing future frameworks and concern significant and profound social shifts and alterations to the status quo. A significant number consider how to eradicate legitimacy deficits and improvements to the nature of EU being cognisant of disciplinary challenges. The contributors range in area from highly established and significant areas e.g., constitutional, governance or market-based subjects to those with a more cutting-edge dimension as to their regulatory concern. All contributions work towards the conceptual and constructive dimensions uniformly of directions of future-mapping. All contributors engage in what might be said to be some counter-homogeneity about the future and what it could be, from the normative, descriptive to conceptual. They are uniformly engaging in a spectrum of analysis about the future, methods, frameworks, actors and profound societal shifts, in particular tackling legitimacy deficits.

<sup>60</sup> Ruth Nielsen, “Legal Realism and EU law” in Koch and others (eds), *Europe: the New Legal Realism: Essays in Honour of Hjalte Rasmussen* (n 24) 545, 563.

<sup>61</sup> See Martijn Hesselink, “European Legal Method? On European Private Law and Scientific Method” (n 54); Kaarlo Tuori, “The Relationality of European Constitution(s). Justifying a new Research Programme for European Constitutional Scholarship” in Neergaard and Nielsen (eds), *European Legal Method: towards a new European Legal Realism* (n 58) 23-37.

<sup>62</sup> Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016).

<sup>63</sup> Marija Bartl, “Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political” (2015) 21 *European Law Journal* 572.

<sup>64</sup> Van Gestel, Micklitz and Maduro, “Methodology in the New Legal World” (n 54).

Contributors were asked to capture the future of distinctive fields in an interdisciplinary collection of themes, including the following: i) How to frame and present future-mapping: methods, concepts, methodologies; ii) Analytical presentation of future integration and disintegration in their field, iii) Envisaging and mapping future competences, policies and expansion and/ or contraction; iv) Methodological openness of portraying the futures of sub-fields of EU law; v) Understanding the travel of the field of EU law in respective sub-fields and vi) The direction of past to future developments in the field. They were asked to consider: what actors dominate? How does this fit methodologically? What lexicon shifts are apparent?

In the stream of papers on ‘Economic and Regulatory futures’, the following papers feature:

*Butler in The Future of EU International Agreements as Legal Instruments in the ASEAN Region*, drawing from EU External relations law and regional studies, focusses upon the legal tools and technical procedures of EU-ASEAN widening and deepening. The future will see ASEAN integration occur at a quicker pace than the last half century. The article concludes that extensive bilateral international agreements will be reached between the EU and individual ASEAN Member States for the foreseeable future until ASEAN, an international organisation, is conferred, implicitly or explicitly, the necessary competence to conclude an international agreement covering matters that the EU currently pursues bilaterally with individual ASEAN Member States.

*Costa-Cabral in Future-Mapping the three Dimensions of EU Competition Law*, draws from competition law caselaw and official communications and accordingly maps EU competition law as a future mapping exercise beyond its traditional two dimensions. He considers the place of modernisation in the future of the digital economy using policy documents, legislation proposals, caselaw and theorisations of modernisation. There are two directions in which EU competition law can evolve-keeping close to modernisation or striding away. The normative character of competition law is radically changing- i.e. the reaction to COVID-19, and another long coming, proposals of new legislation. The article considers how there have been persisting questions of how competition law has allowed certain technological companies to acquire near-monopolistic positions. It considers two proposals of new legislation by the Commission, one on a ‘New Competition Tool’ and another on ‘Gate-Keeper Platforms.’ Future-mapping competition law can be assisted by a framework of these three dimensions, which engages directly with the normative breaks from the notion of abuse and consumer welfare justifications.

*Stefan in The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19*, drawing from governance, transparency, accountability literature and COVID-19 emergency instruments, this paper shows that the current crisis increases the salience of both the advantages and the drawbacks of soft law instruments. Doctrinal legal research has been rather critical to the phenomenon of soft law, pontificating that law is either hard, or not law at all, and leaving most of the work to the “lawyers in context”. Since the beginning of this Millennium however, legal scholars have become more and more involved in studying EU soft law and engaging with political science research. However, work has been focused mostly on the EU phenomenon itself and only marginally explored the potential for reform. The key finding is that soft law is mostly relevant at the national level, yet there are major variations regarding its effects, as well as the involvement of national authorities in the processes of adoption of such instruments. This article advocates for a better streamlining of the adoption and the national implementation of EU soft law, which would increase transparency while fostering participation and ultimately enlisting support of authorities and the judiciary at the national level.

*Zahn in What Future for the European Social Model? The Relevance of Early Intellectual Concepts of Social Integration*, drawing from historical sources of EU social integration and archival material and literature, engages in reflections on the place of history in the past and future of the European Social Model in EU Labour law. It is a vivid attempt to use the past to construct the future, drawing from a source document worthy of revisitation. The EU social model has been critiqued for legitimising a neoliberal integration project and the time is ripe to examine the exclusions of solidarity and social policy from the Treaty of Rome.

*Kendrick in The Future of EU Differentiated Integration: The Tax Microcosm*, drawing from differentiation, integration, VAT, digitisation and digital services literature argues that tax embodies the tensions between Member State sovereignty and EU law harmonising agendas, and in the context



of the imperative to harmonise caused by the digitalisation of the economy, it is a microcosm. The tax microcosm demonstrates that there are limits to how far harmonisation can go in the EU, and that the future will likely see more differentiated integration. Digitalisation may increase the need for differentiated integration in future in the area of taxation. In answering the research question, this article will demonstrate that there is a limit to how far harmonisation should go in the EU, and that in future-mapping developments in EU law, more differentiated integration will be used. Tax, as a microcosm, shows this to be the case.

In the stream of papers on ‘constitutionalism and the individual’, the following papers feature:

*De Visser* in *The Future is Urban: The Progressive Renaissance of the City in EU Law*, considers the place of the city in EU Constitutional law, public law, multi-level governance and environmental law, providing an initial conceptual map of the patterns of interactions between cities and the European Union going forward where the future is undeniably urban. The future architecture of the EU’s operating system will evince a rapprochement between the socio-economic clout of local authorities, notably cities, and their legal-political recognition at Union level. It argues that the local tier should be disaggregated, with cities treated as a distinct subset of the category of subnational authorities that warrant attention in their own right. The relationship between the EU and cities should be dissected further to develop a more fine-grained map of the possible ways in which both levels interact and the norms and incentives that shape those interactions. There is persistent and progressive enfranchisement of cities, spurred on by self-directed transnational networking and by EU-led efforts to engage cities as direct dialogic partners under its new Urban Agenda. Mainstreaming cities could further benefit the scholarly dialogue on the operationalization of EU regulatory ideals.

*Ficchera* in *Framing EU Constitutional Time: A Future-Oriented Theory of Constitutional Change for the EU*, drawing from EU constitutionalism, political theory, and comparative studies, frames a future theory of constitutional change for the EU. The European project is called upon to incorporate the temporal dimension more forcefully. Yet, precisely because the European project is reaching more advanced stages of integration, contradictions which were previously not addressed or minimized are bound to emerge more visibly- between constituent power and destituent power, but also between national and post-national; between localism and universalism; between (re-) politicisation and de-politicisation; between *homo economicus* and *homo juridicus*; between thin constitutionalism and thick constitutionalism. Accordingly, a shift from self-referentiality to heterarchy is advocated, whereby concern for the local level of decision-making is taken more seriously.

*Lock* in *The future of EU human rights law: Is accession to the ECHR still desirable?*, drawing from EU and ECHR caselaw, official documents and interdisciplinary debates on the EU’s Area of Freedom, Security and Justice, conceptualises the counter-factual by considering what the actual future of EU human rights law is and could have been. Lock hypothesises that Opinion 2/13 does not appear to have permanently dented the EU’s and the Council of Europe’s enthusiasm for accession. Accession negotiations were meant to recommence in March 2020, but had to be postponed due to the Covid-19 pandemic. In light of the overall negative reception of Opinion 2/13, he questions whether EU accession remains desirable in light of the conditions formulated in Opinion 2/13.

*Tzanou* in *The Future of EU Data Privacy Law: Towards a More Egalitarian Data Privacy*, drawing from data privacy, socio-legal, gender equality and egalitarianism literature, assesses the state of the art of data caselaw, regulation and governance in EU law. She argues that the future of data protection law should not be technology driven and that it has suffered from an egalitarianism eclipse. The paper calls for a shift of the current focus of EU data privacy law from technological problems to societal problems of situationally disadvantaged parties that tend to go unremarked. The future focus of EU data protection law should be in developing an egalitarian EU data privacy law guided by methods that bring forward neglected perspectives and narratives and ensure its inclusivity and diversity. Only if EU data protection law is attentive to the inequalities that the most vulnerable face, it can remain relevant in the future.

*Yong* in *The future of EU citizenship status during crisis – is there a role for fundamental rights protection?* maps the future of EU citizenship in times of constitutional crises from a doctrinal, political and socio-legal perspective, where the CJEU appears at odds with a deeper citizenship narrative. The

paper brings citizenship status into the post-Lisbon context of the Eurozone crisis, the migration crisis, the rule of law crisis and the UK's withdrawal from the EU. In each crisis, the claim is that there is room for fundamental rights protection to play a more pivotal role in protecting the individual as part of their status as an EU citizen. It argues that restrictive case law jeopardises the future of EU citizenship status and fundamental rights, and that there are legitimate reasons and a feasible way for these rights to be more central to the CJEU's considerations. The Court of Justice of the EU's apparent choice not to fully integrate fundamental rights into EU citizenship case law affects the fundamentality of EU citizenship status, as it was originally hailed to be. It argues that there is a case to be made for a stronger role for fundamental rights protection as part of the future of EU citizenship's status.

#### **IV. Conclusions**

The distinctiveness of EU law from a methodological perspective as a relatively recent subject with a highly dominant court is worthy of significant attention. However, as has been argued here, the limitations of a court-centric subject have been increasingly manifesting themselves. An innate tendency towards interdisciplinarity also characterises the new era of EU law. Yet court-centric-ness often dominates here also. The state of the art appears arguably to be torn by the manner in which the subject has evolved.

Particularly radical developments as to data/ empirics will bring new light to the as to the robustness of assumptions underlying the discipline. Yet it is unclear how far such radical developments will shift the substantive boundaries. Can historical 're-visitations' of EU law reach saturation point ever? Where law in context is 'normalised' the improved futures of the EU, its scholarship, its laws and their adjudication are likely to be more robust.

The Special Issue seeks to contribute to more explicit and composite time-mapping, synthesising the past and future in order to reform legitimacy deficits. Many do this through explicit interdisciplinarity, considering sources, and values (e.g. Costa-Cabral, De Visser, Tzanou), others through taking bold positions on court-centricity (e.g. Stefan, Yong, Lock). Ultimately, the means as much as the end is argued to be critical here when depicting the future of EU law in an new era of EU law.

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