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EDITORIAL

The 'European perspective'

In its Opinion of 17 June 2022, the Commission recommended that 'Ukraine should be given the perspective to become a Member of the European Union.'[1] In her President's statement of the same day, Ursula von der Leyen abbreviated the sentence and recommended that Ukraine be given 'a European perspective.'[2] And then, still the same day, she tweeted a picture of herself draped in the colors of the Ukrainian flag. And this:

> Ukrainians are ready to die for the European perspective.
> We want them to live with us the European dream.

If we understand the 'European perspective' as the prospect of membership of the Union, this is a distasteful appropriation of pain and suffering. Invaded by an imperial power that negates the very existence of their country and people, Ukrainians really don't need yet another possible epitaph for their tombstones. Every time they are told they are fighting for some greater good – European security, European values, freedom, democracy – Ukrainians have good reason to wonder why they are the only ones dying for it.[3] It is also pathetic, in the sense of ascribing to the Union a sense of pathos that it so obviously – and rightly – lacks. Even better than EU flags and hymns and a Constitution, it seems, would be a monument to the Unknown Ukrainian fallen for 'the European dream'.[4]

It is useful, perhaps, to understand the 'European perspective' in a different way, as a particular European way of regarding things, specifically, a particular European way of looking East. This involves, first and foremost, a whole lot of looking away and forgetting of history. Of course, looking through an Iron Curtain is hard. But for a project morally and intellectually grounded so profoundly in World War II, the near complete removal from collective memory of 'the Eastern front' is still jarring. The most intense fighting and the most horrific mass killing and deliberate mass starvation took place in the 'bloodlands' of the Baltic states, Poland, Belarus, western Russia, and Ukraine. It is here, where most Jews actually lived, that Jews were shot and gassed in the millions.[5] It was here that the War was decided, it was

[1]Commission Opinion on Ukraine's application for membership of the European Union (EU), COM (2022) 407 final, at 20.

[2]Statement by President von der Leyen on the Commission's Opinions on the EU Membership applications by Ukraine, Moldova and Georgia (17 June 2022), <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_3822>.

[3]K Mishchenko, 'Irgendwie ist alles teurer als ukrainische Leben', *Tagesspiegel* (28 May 2022) <https://www.tagesspiegel.de/kultur/irgendwie-ist-alles-teurer-als-ukrainische-leben-4335349.html>.

[4]See U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' 9 (2003) European Law Journal 14, 28, on the lack of fatalities at the disposal of the European Commission to turn 'chance into destiny'. The latter phrase, and indeed much of the thinking on the importance of tombstones of fallen soldiers for projects of nation building, Haltern borrows from B Anderson, *Imagined Communities – Reflections on the Origins and Spread of Nationalism* (Verso, rev. ed. 1991).

[5]T Snyder, *Bloodlands- Europe between Hitler and Stalin* (The Bodley Head 2010), puts the number of *civilians* killed in the bloodlands by *deliberate policies of mass murder* implemented by Nazi Germany and the Soviet Union at 14 million. (Soviet) Ukrainian military deaths are estimated at 2.5 million. French, British and American military losses combined do not reach 400.000. See, eg N Davies, *Europe at War, 1939–1945* (Macmillan 2006).

here that the hinge of fate turned. And yet, generations of Western Europeans have been brought up to believe that the decisive victories in World War II came in battle on the beaches of Normandy, and that 'Europe' was liberated by American and British soldiers, aided by French resistance fighters and Italian partisans. And those same generations have been brought up to believe that the key to 'peace in Europe' has been the project of European integration locking France and Germany in patterns of mutual dependence.

The 'European perspective' is informed by forgetting in more profound ways. Much of European legal scholarship and constitutional imagination is premised on the idea that European integration is an answer to the question: what after the nation state? The better question is: what after Empire? For the founding myth of European law to make sense, that of chastened nation-states overcoming war by wisely trading in nationalism for cooperation, power for law, and domination for reciprocity, Nation States had to be imagined into existence. Empire and colonisation have no place in that story,[6] let alone the brutal facts of Europeans establishing empires within Europe. It is here that Ukraine is so crucial and so painful: *Lebensraum* had a name, and a place. The German attempt to colonise Ukraine in 1941, including policies to deliberately starve millions of Ukrainians on the very black earth that was to feed the motherland, had to be removed from collective memory – *our* collective memory – and it was. If we cannot see that, we cannot really notice the resonance with the Soviet imperial policy of mass starvation a decade earlier, nor the similarities with the present Russian invasion. Ukraine, in the words of Timothy Snyder, 'reveals the rule: European history turns on colonization and decolonization.'[7]

Giving Europeans a 'European perspective' is also reminiscent of an intellectual process of inventing 'Eastern Europe' going back centuries and persisting long after 1989.[8] The classic here is Voltaire's *Histoire de Charles XII*, chronicling the Swedish King's early 18th century military adventures from the Baltics to the Black Sea.[9] In an exercise of philosophical geography, the towering figure of the Enlightenment took great pains to reveal a Europe unknown to Europe to Europeans. In the process, as reconstructed by Larry Wolff, Voltaire divided the continent into one Europe that 'knew', and another that existed to be known or unknown; in short, that waited to be 'discovered.' When Charles got lost in Ukraine, he wasn't really lost: he was just advancing in a *pays perdu*.[10]

The Iron Curtain is gone, but it still casts long shadows of cultural prejudice that long outdate it.[11] Tony Judt put the point memorably in *Postwar*, describing the Union after enlargement:

> Two and a half centuries after Voltaire drew the contrast between a Europe that 'knows' and a Europe that 'waits to be known', that distinction retained much of its force. Power, prosperity and institutions were all clustered into the continent's far western corner. The moral geography of Europe – the Europe in Europeans' hands – consisted of a core of 'truly' European states whose constitutional, legal and cultural values were held up as the model for lesser, aspirant Europeans: seeking, as it were, to become truly themselves.[12]

[6]See, eg SR Larsen, 'European Public Law after Empires' 1 (2022) European Law Open 6.

[7]T Snyder, *The Road to Unfreedom* (The Bodley Head 2018) 119.

[8]L Wolff, *Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment* (Stanford University Press 1994).

[9]Voltaire, *Histoire de Charles XII* (1731, reprinted Flammarion 1968).

[10]Wolff (n 8) 93.

[11]Also in academia. Especially in academia. See O Burlyuk, 'Fending Off a Triple Inferiority Complex in Academia: An Autoethnography' 6 (2019) Journal of Narrative Politics 28.

[12]T Judt, *Postwar – A History of Europe since 1945* (Pimlico 2007) 763.

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There is an ambiguity in the process, in as far as what it means to be 'truly' European is partly defined by its 'other'.[13] Romanticising Ukrainian death and sacrifice on the altar of 'the European dream' is part and parcel of that mechanism.

In this issue

European law scholarship has tended to focus on the specific rules at the core of European economic and monetary government (the 3 per cent deficit ceiling, the 60 per cent debt ceiling, the inflation target of 2 per cent, together with the means to enforce them), while neglecting the critical reconstruction and assessment of the theory of money which underpinned and largely keeps on underpinning the single currency. Building on the growing literature which reminds us of the extent to which the way in which money is constituted plays a decisive role in the constitution of the overall socio-economic structure (in other words, of the extent to which the way in which we constitute money predetermines the overall socio-economic constitution), Anna Chadwick invites the reader to rethink the monetary 'constitution' of the EU. Focusing on the processes through which money comes to have an economic value and, in particular, on the key role played by transnational legal regimes and institutions that enable (or disable) the production of sovereign money, the author sounds a note of caution to those who emphasise the role of the state in money-making. Chadwick's point is theoretical, but not only. Her fundamental contribution is intended to have a major impact on current debates, where there are perhaps rather overinflated expectations about what the ECB can do through its piously called non-conventional monetary policies. Any potential redefinition of the mandate of the ECB needs to take seriously, as Chadwick does, both the limited legitimacy of the bank and the limits to its actual capacity to do things.

In 'Who shapes the CJEU regulatory jurisprudence? On the epistemic power of economic actors and ways to counter it', Marta Morvillo and Maria Weimer open up a whole new field of inquiry in risk regulation. If much of the academic discussion has so far applauded the CJEU for deeply interrogating the decisions of the EU's risk regulation bodies, the authors ask in whose name this interrogation is taking place. They suggest that by allowing standing in risk regulation cases mainly for those actors that have direct economic interests – the industry – and by carrying out a more searching review of the administrative process and administrative discretion, the court's reasoning and thus public action reinforces the interests of that same industry. Instead of catalysing inclusive deliberation, it makes risk regulation mainly an issue of individual rights of industry rather than of the public interest. In this clearly 'political economic' move, the authors push the study of expert governance in the EU to embrace a broader set of questions, including, importantly, that of (epistemic) power.

The European Court of Justice may be tucked away in the fairyland of Luxembourg, but no other institutional actor has gained so much attention from EU legal scholars (and political scientists). However, our knowledge of the CJEU is uneven. Scholars focus (and overfocus) on judicial rulings while neglecting other aspects of its activity. Brekke, López Zurita, Naurin, and Šadl aim at one of the less studied outputs of the Court, orders, to throw new light on the workings of the institution and indeed on EU law. On the basis of an analysis of the whole set of orders issued by the Luxembourg Court, they argue that the search for efficiency and uniform application results in the blurring of the the lines between administration and judging. The result is not only an overpowering of the Registry and the cabinet of the President, but also the 'bureaucratisation' of the interpretation of EU law.

[13]There are, of course, similarities to the mechanisms famously described by E Said, *Orientalism* (Vintage 1979). Wolff (n 8) 7, proposed the label 'demi-Orientalisation' for the process he describes – the simultaneous inclusion and exclusion, non-Europe and Europe. It does not seem to have had enormous traction.

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A doctrinal reconstruction of the principle of direct effect? Yes indeed. Daniele Gallo traces the development of the principle of direct effect in caselaw and literature over several decades, in a careful and comprehensive analysis. He touches on all the classics – the relationship with primacy, the relation to direct applicability, the golden olden requirements of unconditionality and precision, the implications for individual rights – in an effort to give meaning to both our understanding of the doctrine and of its operationalisation. Gallo argues that direct effect is not, and cannot be, only a function of the quality of the EU law provision at hand, but can operate only after an analysis of the consequences of disapplication of a provision of EU law on the legal position of individuals.

Cozzi touches upon a fundamental issue in European law: the relationship between national Constitutional Courts and the two European Courts (the CJEU and the ECtHR). Recent tensions between national Constitutional Courts and the CJEU remind us that these relationships are far from settled, and formal rules of reference can have little analytical purchase. Cozzi takes interlegality – in particular, its double emphasis on formal mechanisms and structures of inter-relation between legal orders, and on normative yardsticks of substantive integration – as a lens to better understand the terms chosen by the Italian Constitutional Court to relate to the two supranational Courts on fundamental rights. While no single criterion of coordination (such as the 'maximisation of protection') can be found, the Italian Court nevertheless seeks to guarantee unity of the constitutional system of fundamental rights. Its case law expresses a vigilant deference, whereby it retains its role as the guardian of the domestic standards of protection, while securing cooperation. Her analysis extends to the impact that developments in the East – the depletion of the rule of law and the invasion of the Ukraine – can have in the relationship between higher courts in the West, as evidenced in the recent public positioning of the Italian Constitutional Court.

Somek explores the contradictions of legal knowledge and legal academia between commodification and interdisciplinarity in American legal culture and explains the apparently more solid position that the continental European legal academic has had. Legal scholarship on the EU, however, has had a distinct mark: it has been less about 'legal science' than about social engineering, or as he puts it, 'followership'. The commodification of legal knowledge that has spread to this side of the Atlantic is not far from that 'followership': the law professors retain their prestige and are valued for the ability to sell their expertise. Legal science is also commodified: intellectual changes and innovation are left behind when those who sell their expertise get to set the 'normative standard that the expertise of others is supposed to meet'. Their work is then hardly distinct from the work of the legal practitioner.

The war in Ukraine has sparked intense debates, not least about the role of the European Union in international relations (some institutional actors have spoken of a European 'geopolitical turn', whatever that might mean) and about the impact that the 11th European crisis in two decades may have on European integration (or disintegration). In his contribution to this issue, Tomas Hamilton focuses on a fundamental question which has been simultaneously over-discussed and neglected: the provision of arms to Ukraine by the EU. The author highlights the extent to which the supply of military assistance to non-EU states was a political and legal taboo which was broken after 24 February. That calls for an in-depth analysis of the pre-existing legal framework which keeps on setting the terms under which the EU may provide arms to third countries, paying attention not only to the literal tenor of the provisions, but also to the underlying reasons (and fears) which underpin them. In that spirit, Hamilton considers the legality (in its wide political and strategic context) of the decisions so far taken.

The pandemic has dramatically exposed the contradiction between the 'essential' character of the work that certain workers are doing, and their working conditions, raising fundamental questions about the law and regulatory frameworks that yield and govern these forms of work. The symposium – 'Law and the production of precarious work in Europe'- addresses these questions by looking at the role of law, and EU law in particular, as one of the factors contributing to the creation of precariousness and labour exploitation.

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The editors, Vladimir Bogoeski and Francesco Costamagna, introduce the symposium, which further consists of seven articles mostly exploring the role of the legal frameworks governing labour mobility in fostering precarious and exploitative working conditions. Four articles, by Iossa, Robin-Olivier, Passalacqua, and Corcione, focus on labour mobility in the EU context, while two others, by Mantouvalou and Dias-Abey, examine the effects of recent developments of migration policy on (seasonal) migrant workers in post-Brexit UK. The symposium concludes with an article by Ratti and García Muñoz addressing the role of (EU) law in shaping precariousness and exploitative working conditions for non-mobile workers, or those who work in their countries of 'origin' or citizenship.

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