STANDING BEFORE THE SECOND LISBON DECADE

The Legal Discourse on the Future of European Integration

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Approximately ten years after the Lisbon Treaty came into force, the debate on reforming the European Union has reached new heights. A decade of 'poly-crisis' has rattled long-held certitudes. At the same time, phenomena such as Brexit, a new European Commission, a new European Parliament, and potentially threatening extra-legal developments as diverse as authoritarian populism and climate change have culminated in a moment suggesting an indeterminate future from which much seems possible—even stasis. In the run-up to the next Lisbon decade, EU law scholarship, especially its German variant, must face up to the task of not only commenting on the development of Union law, but also of helping to shape it. However, before shooting aimlessly at amorphous clouds of ideas, it is certainly worthwhile considering the preconditions for reflecting upon the future of the European Union. This second order systematization can then be supplemented with substance by identifying structurally significant fields of reflection of relevance for the future of European integration.

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Content

1 Temporality and eternity of EU (legal) reform

Referring to the usual EU buzzwords, one can neither deny nor ignore that the European integration project has had its full share of crises: Brexit, populism, the rule of law, austerity, looming recession, migration and border control, trade wars, climate change—and, on top of all that, the current coronavirus pandemic. Looking back at the history of European integration and beyond, the last decade of 'poly-crisis'[1] crisis management of the day is not an outlier.

On the contrary, our egocentric perspective of the present probably overestimates the velocity, frequency, and concentration of current challenges to face. The European integration project has always in some way 'lurche(d) from crisis to crisis'[2] . Mirroring these perennial trials, the European Union is viewed as an inherently unfinished project, an ever-evolving organism, an organisation and community of constant, often incremental change.[3] This is, of course, due to the relative youth of this transnational construction of authority[4]. The forward vision of the European Union itself parallels humanity's stance in the present, expecting and projecting. There is (are) always future(s) and constant negotiation of possible trajectories.[5] The uncertainty of what will actually transpire challenges powers of prediction and at the same time generates countless attempts to extrapolate past patterns of events.

One could, on the other hand, question the relentless outpouring of yet another plan of necessary reform as a strategy of avoiding present challenges by pointing to a brighter future. As a rhetorical device, this political psychology of repression may come in handy from time to time. Yet political actors should always be concerned with even the slight chance of the realization of outrageous proposals and with a public that measures not only their truthfulness but also their results, as well as their principled convictions laid out in plans, manifestos, and proposals. This specifically connects to the reflection of the future in general, which always happens in – and from – the present, and can actually be seen as a more or less direct attempt to deal with current problems. Moreover, even mere contemporaneous critique may contain implied future currency—at least as a plea for change. Precisely because of all the indeterminacy involved, coupled with the abundant complexity of everything that is connected to the future, it seems pertinent to devote reflection not only to the substance of the legal discourse on the future of European integration, but also (and first) to the pre-conditions of this discourse *per se* and to the entangled strains of different ways of future-think. What does it mean to talk about the future of

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[1] E Morin, *La Voie* (2011) 20 et seq.
[2] J Weiler, *The European Community in Change: Exit, Voice and Loyalty* (1987) 18.
[3] See EF Delaney, 'Europe's Dialectical Federalism' in: Barber/Cahill/Ekins (eds.), *The Rise and Fall of the European Constitution* (2019) 73, 76 et seq.
[4] HP Ipsen, *Europäisches Gemeinschaftsrecht* (1972) 997.
[5] See H. Kahn and A. J. Wiener, *The Year 2000* (1967) 8; N. Luhmann, 'The Future Cannot Begin: Temporal Structures in Modern Society' (1976) Social Research 130.

something, and something as complex as the European project? What kind of projections can we discern and how are they are constrained?

Furthermore, this is, as new Commission president von der Leyen phrased it at her 2020 State of the European Union speech, 'the moment for Europe'[6]. Although, of course, the future does not always stop and knock at our front door, certain factors have contributed to a particular densification of the fate of the European Union. One is – a possibly hard –Brexit which should give everybody pause to think about causes and consequences. In December 2019, we celebrated the tenth anniversary of the Treaty of Lisbon coming into force; the 20-year anniversary of the Euro belongs here, too. These anniversaries coincide with a decade of multiple and interrelated crises: euro, banking, sovereign debt, austerity, migration, rule of law, and a crisis of authoritarianism. Then, also in 2019, both a new European Parliament and a new European Commission were starting respective terms more or less around these instances, celebrations, and historical running laps. Last but not least, we have witnessed a rising tide of EU reform proposals, notably spearheaded by the French president and the European Commission,[7] followed up by a considerable amount of public comment and scholarly literature[8]. The final attempt to grasp and exploit this moment of urgency and openness might be the upcoming Conference on the Future of the European Union that is supposed to convene political players and civil society.[9]

Sifting through the existing proposals and extracting best solutions imposes an arduous and potentially infinite task. Yet, in order to secure an epistemically sound stance from which to evaluate the proposals and to be able to structure thinking with substance, one needs to reflect the *kind* of reasoning that is applied when reflecting on future developments. Thus, to begin with, this paper tries to position context in and from which reflection on the future of European integration darts off (II.1.). Secondly, it explores the range of possibilities when applying future thinking, and at the same time, both intended and structural constraints of future reflection (II.2. and 3.). Instead of laying out another 100-point plan, in this contribution I shall point out four core fields of reflection pertinent to the future of European integration: a Europe of protection, a Europe of sovereignty, a Europe of flexibility, and a Europe of democracy (III.). Thus, pursuing a line of reasoning that is moving from the abstract to the concrete, this paper shies away from – not only, but mostly, because

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[6] U. von der Leyen, 'State of the Union Address', (16 September 2020, Brussels) https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655.

[7] E. Macron, 'Initiative for Europe', (26 September 2017; European Commission, White paper on the future of Europe, 1 March 2017).

[8] E.g. Bakardjieva, Engelbrekt, and Groussot (eds.), *The Future of Europe*, (2019); S. Fabbrini, *Europe's Future* (2019), 113 et seq.; M. Avbelj, 'What Future for the European Union?' (WZB Discussion Paper, SP IV 2017-802, July 2017). For a reform perspective in general see K. Weber, 'Proposals for a Reshaped European Union, in id. (ed.), *Reshaping the European Union* (2018), 384 et seq.

[9] U. von der Leyen, 'A Union that strives for more. My agenda for Europe.' Political Guidelines for the next European Commission 2019-2024 19; (Council of the European Union, 9102/20, 24 June 2020).

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of constraints of space – detailed and spelt-out legal proposals, and rather concentrates on providing a framework in which to flesh out and locate these.

2 Preconditions of the discourse on the future (of European integration)

2.1 Context: Creative scholarship and ten years of Lisbon

With respect to European integration (law), the analysis of future thinking is embedded in contexts that influence its departure. Two major contexts shaping and structuring *this* reflection are the placement in a certain version of legal scholarship and the stage of development of European Union law. While the former context is subject- or group-dependent and somewhat flexible, the latter is out of a scholar's reach and largely determines the setting of any future reflection.

In Germany, legal academia is predominantly occupied with ordering and commenting on incoming jurisprudence and law (proposals) due to traditions in legal education, the justice system, and legalistic culture.[10] Admittedly, this account is overbroad: although legal scholars rarely propose new law themselves (and defer this activity to legislators), strands of scholarship exist which are concerned with innovation and law;[11] and there is a German tradition of scholarly law and the proposal of so-called model laws. In general, though, German legal scholarship is more about critique than creation. This is not surprising, since German lawyers are specifically qualified to reflect upon the requirements and consequences of law proposals from a legally internal point of view. Drafting proposals of their own or drawing up multiple trajectories of future legal development causes (German) lawyers pause and wariness.[12] The predicament of leaving accustomed paths of thinking behind including the necessity of drawing on interdisciplinary insight encourages all the more creative legal scholarship to proceed cautiously, carefully reflecting on methodological steps. Even so, no eternal essence of legal thinking excludes legal scholars from applying future reflection to (EU) law.[13] The freedom to pick one's role – (1) *juriste normateur*, (2) *juriste praticien*, or (3) *spécialiste de la science juridique* –[14] has to be transparent and is inextricably tied to methodological principles and constraints.

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[10] F. C. Mayer, 'The EU in 2030: An Anticipated Look Back at the 2020s' (2020) 63 GLJ 21.

[11] W. Hoffmann-Riem (ed.), *Innovationen im Recht*, (2016).

[12] M. Ruffert, 'How will the EU develop without the United Kingdom', in Kadelbach (ed.), *Brexit – And What It Means* (2019) 35, 44.

[13] F. Ost and M. van de Kerchove, 'Pluralisme temporel et changement' in *Nouveaux itinéraires en droit. Hommage à François Rigaux* (1993) 387, 393: according to the Promethean time of law *'la loi, au moins virtuellement, anticipe un état de choses possible'*.

[14] P.-M. Dupuy and Y. Kerbrat, Droit international public, 14. ed. (2018) 10

Whereas a legal scholar may choose their methods freely and wisely, the object of future thinking is much more inert and resistant. Concerning the law of European integration, apart from (variable) power constellations that have to be kept in mind, main future thinking has to start from the treaty of Lisbon and its current rules and institutions. The treaty of Lisbon may serve as the (most recent) point of reference since it established the current constitutional framework [15] of the EU. This framework has turned out to more stable and resistant to change during the first Lisbon decade than others in the years before: very rarely has the text of the treaty been changed in the formal sense.[16] In spite of this formal stability, the Member States have at times, in an attempt to tackle Euro and sovereign debt crises, defaulted to substantial changes outside the framework of the Treaty of Lisbon, by concluding separate treaties of international law, while borrowing EU institutions,[17] or drawing on ad hoc emergency policies[18]. Indeed, the entire first Lisbon decade appears to be characterised by a list of peculiar paradoxes and chiasmus' like this one—a symptom of years of full-blown poly-crisis. Integration by stealth, already alluded to, leading to more centralisation and harmonisation even in sensitive areas like national budget policy lives side by side with tendencies of, and calls for more subsidiarity[19]. More than ever, Law is seen as a useful instrument to master a crisis, which is juxtaposed with diagnoses of law erosion.[20] The development towards authoritarian populism and Euroscepticism is paralleled by a recent rising level of trust in EU institutions. Overall, the institutional setting established by and around the Lisbon Treaty as well as differing perceptions of crisis shape the needs and possibilities of achieving reforms of EU integration (law).

2.2   Strategies of future thinking

These symptoms of crisis and more or less visible cracks in the foundation of EU integration illustrate the need for reform and progress. New, as well as persistent challenges like climate change, digitalisation, and the decline of the EU's relative power on the global stage are corresponding reminders of this task. Crises always open windows of opportunity.[21]

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[15] See ECJ (Full Court), 30 April 2019, Opinion 1/17, EU:C:2019:341, § 110.

[16] J. Ziller, Lisbon Treaty, in Oxford Research Encyclopedia Politics (9/2019)

[17] See H. Rathke, *Sondervertragliche Kooperationen* (2019).

[18] J. White, 'Authority after Emergency Rule' (2015) 585 Modern Law Review 78

[19] See M. Avbelj, 'What Future for the European Union?', WZB Discussion Paper, SP IV 2017-802 (July 2017) 10

[20] *C. Joerges*, 'Integration through law and the crisis of law in Europe's emergency', in Chalmers, Jachtenfuchs, Joerges (eds*.) The End of the Eurocrats' Dream* 299, 317 et seq.; *M. Rodríguez*, Legal Certainty after the Crisis, in J. Schmidt, Esplugues, Arenas García (eds.), *EU Law after the Financial Crisis* (2016), 279.

[21] *A. Grimmel*, There's life in the old dog yet! Challenges as catalyst for European Integration, in id. (ed.), The Crisis of the European Union, 2018, p. 226, 228; more sceptical *S. Fabbrini*, Europe's Future, 2019 124.

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There are two fundamentally different strategies in reflecting on the future of European integration. On the one hand, you can attempt to *predict* how the state of the Union will turn out at a certain moment in time (*predictive future reflection*). Bertrand de Jouvenel, one of the founding fathers of the science of the future, has coined the term '*proference*' for this kind of conjecture.[22] Prediction starts with analysing the current situation, as it has developed, and from this point one deduces how the future will unfold. Unsurprisingly, this form of prognosis carries a bag of methodological problems. No one can fully assemble – ahead of time – which factors, including chance, may interfere with the course of EU law;[23] much is experience and hunch, and thus prone to failure as well as being easily contradicted by future presents.

Trends and scenarios are sub-genres of prediction that try to minimise the methodological pitfalls of prognosis and turn the problem of extrapolation into an asset.[24] Trend predictions painstakingly avoid pinpointing future events and rather pick out mere characteristic tendencies of the present and extrapolate them into broad corridors of possible future developments. In similar fashion, scenarios release predictive stress, bypass commitments to certainty, and offer different trajectories of development which have a certain plausibility or probability of transpiring in due course. Predicting trends and offering scenarios is the business of government agencies, think tanks, media prophets, and, of course, scholars. For instance, more or less probable scenarios of global warming and population growth come to mind; it appears to be safer to predict developments of nature than that of human behaviour and its products, specifically its norms.

On the other hand, the bulk of publications – and specifically the legal output on the future of EU law – has a heavy normative gist (*normative future reflection*). Here, one does not need to concern oneself much with empirical methodology; the only relevant probabilities these prescriptive claims need to keep in mind, are the chances of putting them to realisation; political stakeholders' attitudes and behavioural patterns in need of being influenced are of importance when assuming legislative success. On the debit column of the balance sheet the bookkeeper of methodological rigour registers the phenomenon that it is harder to pinpoint consistent quality standards in general; normative reflection aims for successful persuasion and sails peacefully next to exacting measures of truth—normative reflection in its most naked attire can come down to a mere wish list. Yet still, subtle and profoundly reasoned reflections can strenuously work out chains of convincing argument about which future EU law is desirable and why, answering to commands of practical reason. Normative reflection on the future between these bookends, namely the tradition of critiquing and proposing law, is in fact close to the expertise

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[22] *B. de Jouvenel*, The art of conjecture, 1967, p. 60.

[23] See *E. Esposito*, Die Fiktion der wahrscheinlichen Realität, 2007, p. 52.

[24] See, e.g. *F. C. Mayer*, The EU in 2030: An Anticipated Look Back at the 2020s, GLJ 21 (2020), p. 63, 63; in general Muller (ed.), Law Scenarios to 2030, 2012; *H. Kahn and A. J. Wiener*, The Year 2000, 1967, pp. 5 et seq.

of many lawyers[25]—German lawyers, for that matter. The arc of abstraction rises from mere critique of the law and evaluations of proposals to actual drafts and recommendations,[26] and reaches its peak with utopian plans.

Programmatic undertakings combine predictive and normative future reflection. They link public self-commitment with the implied intent to persuade others of the value of the avowed goals. Political parties' platforms, manifestos, government announcements, priority lists, and guidelines[27] are manifestations of this kind of future-related work. The White Paper of the European Commission on the future of Europe from 2017 is such an endeavour of programmatic future thinking. It lays out five scenarios until 2025 (Carrying on, Nothing but the Single Market, Those who want to do more; Doing less more efficiently, Doing much more together).[28] Although allegedly neutral and in the words of the Commission dependent on the choices of the Member States and the European electorate, [29] one cannot but detect, unsurprisingly, a certain integration-friendly bias while reading the reflections in the paper closely.

2.3 Scope of future reflections

Having discarded unrealistic maximum demands[30] or utopian-style proposals – such as a United States of Europe –[31] the remaining future legal thinking still needs to choose its scope and spots wisely. One does not only have to pick the overall approach – predictive or normative – but also has to determine the breadth of subject-matter and, specifically, temporal reach. The relevant time horizon of legal scholars and social scientists hovers at around ten years.[32] While social science predictions confine themselves to shorter time frames, natural scientists or ecologists dare to project forward to horizons that are decades or more into the future.[33] Pertaining to EU law substance, and as the range of future states of EU law is virtually endless, one should confine oneself to either structural questions as

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[25] See the distance of legal scholarship from utopian thought in *L. Douglas, A. Sarat, and M. Merrill Umphrey*, An Introduction, in: ibid. (eds.), Law and the Utopian Imagination, 2014, p. 1, 1.

[26] See *F. de Witte*, Re:Generation, 2020 97 et seq.

[27] See U. von der Leyen, A Union that strives for more. My agenda for Europe. Political Guidelines for the next European Commission 2019-2024, 16 July 2019, https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

[28] European Commission, White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025, COM(2017)2025, 1 March 2017, pp 15 et seq.

[29] Ibid. 15, 26.

[30] *A. V. Bogdandy*, The Lisbon Treaty as a Response to Transformation's Democratic Skepticism, in Poiares Maduro and Wind (eds.), The Transformation of Europe. Twenty-Five Years On, 2017, 206, 208: 'proposals that usually age quickly.

[31] *M.-A. Latournerie*, L'idée de souveraineté européenne, Revue international de droit comparé 2019 555 et seq.

[32] See the White Paper of the Commission: 7 to 8 years; see also *F. C. Mayer*, The EU in 2030: An Anticipated Look Back at the 2020s, GLJ 21 (2020) 63

[33] See the reports of the IPCC, for example.

competence allocation or to future developments in rather specific policy fields, for instance data protection. Peculiar to law and legal science, interdependencies of law and the non-legal sphere also need to be taken into account. Some reforms might be successful by introducing secondary EU law, while more adventurous outlines entail changes of the founding treaties, which of course diminishes their chances of coming to fruition.

3   Core fields of reflection

The reflection on European integration's future delivered here attempts to address a state of the Union that has seen a decade of crisis and Euroscepticism.[34] All crises that have struck the EU have either contributed to it in some way or have sometimes even been fuelled by it, resulting in a decade that is marked by a crisis of legitimacy.[35] Therefore, any proposal should try to enhance the legitimacy of EU governance, embracing a wide range of (vested) interests, including those of the Member States[36]. The EU needs to deliver for the political elites as well as for the comparatively less mobile parts of society,[37] for minorities as well as for (current) majorities.[38] Such proposals obviously belong to the normative camp of future reflection, although a prognostic element is always included: factoring in chances of realisation has to consider, for example, the obstinate reluctance of the Member States to change the European constitution, namely EU primary law.[39]

In this vein, four core reflection fields may be identified which can serve as epistemic or heuristic tools to cut roads into the forest that is the future of EU law. They structure the debate, and inspire as well as generate more concrete elaboration of specific ideas of how to reform EU integration (law). These ideas are supposed to appeal to both decision-makers, member state governments, and the political elite on the one hand, and also to possible sceptics of the EU in the wider public including the have-nots, the (more or less silent) majority of EU citizens not as mobile as the transnational economic elite. The chances of realising such specific ideas are, of course, determined by where EU law stands today, by how radically it would need to be revised, and by how key players align or are perceived to stand on certain issues—and whether a new crisis like COVID-19 overshadows all others. These four

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[34] See *C. E. De Vries*, Euroscepticism and the Future of European Integration, 2018.

[35] *J. H. H. Weiler*, *The Transformation of Europe* Revisited: The Things that Do Not Transform, in Poiares Maduro and Wind (eds.), The Transformation of Europe. Twenty-Five Years On, 2017 333, 336.

[36] *C. E. De Vries*, Euroscepticism and the Future of European Integration 2018 205.

[37] See *G. Allègre*, Mitigating the Inequality Crisis, in Creel, Laurent, and Le Cacheux (eds.), Report on the State of the European Union, Vol. 5, 2018 133, 145 et seq., concerning tax preferences profiting EU mobility.

[38] *C. E. De Vries*, Euroscepticism and the Future of European Integration 2018 207, 210.

[39] *F. C. Mayer*, Reformbedarf und Reformperspektiven für die Europäische Union, in Kadelbach (ed.), Die Europäische Union am Scheideweg: mehr oder weniger Europa? 2015 187, 204.

fields[40] are (1) the Europe of protection, (2) the Europe of sovereignty, (3) the Europe of flexibility, and (4) the Europe of democracy.

3.1   A Europe of protection

A Europe of protection provides output legitimacy and takes universal equal rights seriously. It devotes effort to protecting people from harm and discrimination. It reacts to imbalances and injustices perceived as grave deficits of the EU. This may be realised by the introduction of basic social security or back-up funds scheme in times of crisis. A European-wide minimum wage or basic income would make the benefit of being a member of the EU more visible to more people, even those not profiting from transnational mobility.[41]

Protection has a defensive angle and could also be applied to the EU's external frontier in order to reassure sceptics which suspect the EU of being too migration-friendly and prone to lose control of the EU's borders. A positive side-effect of more supranational border engagement – which is already on Brussel's agenda[42] – could be the more equal and humane treatment of persons arriving at the external borders of the EU; nonetheless, a fairer division of labour could be achieved between Member States at the EU's external borders and those that are not. Accordingly, administration of incoming migration would have to be harmonised and supported by genuine EU administrative powers.[43] The two-way enhancing of legitimacy would be directed inwards as well as outwards.

3.2   A Sovereign Europe

Likewise, a Sovereign Europe creates legitimacy through a show of action and strength. It would assert a more powerful position towards Member States, on the one hand, and to the rest of the world on the other. The inward show of force requires the Union to become more federal and obtain some form of independent financial resource in order to deliver spontaneous (crisis reactions) as well as visible policy outcomes.[44]

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[40] See also *F. Schorkopf*, 'Europas neue Ordnung' – eine plurale Union, Neue Zeitschrift für Verwaltungsrecht 2018 9, 11 et seq., utilising three leitmotifs of the Commission's White Paper: Differentiation, Effectuation, and Democratization.

[41] For more fundamental economic reorientation proposals see *D. Vujadinović*, Causes of the Current Crisis and Ways Out – Seen through the Lens of the European Social Model, in Brunkhorst, Vujadinović, and Marinković (eds.), European Democracy in Crisis 2018 53, 63 et seq.

[42] See Art. 54 and Annex I, Regulation (EU) 019/1896, 13 November 2019, building up the European Border and Coast Guard standing corps of 10,000 until 2027.

[43] *D. Biegoń et al.*, The Relaunch of Europe 2018 19 et seq.

[44] See, e.g. the recovery plan for Europe proposal introducing exceptional own resources financed by the EU itself, European Commission, The EU budget powering the recovery plan for Europe, Communication, 27 May 2020, COM (2020) 442 final; Art. 3b of the amended Own Resources

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External sovereignty requires more unified action and appearance.[45] In this vein, it has been proposed – unsuccessfully, until now – to move to majority voting in certain areas of external policy[46], to introduce a European Security Council[47], or to let the EU fill the seat of France in the UN Security Council[48]. This appears to be the way forward, taking into account the decreasing hard and soft power of the EU (e.g. by 'losing' a seat on the UN Security Council in the wake of Brexit), although vested interests and entrenched attitudes of robust national sovereignty will impede reforms of this kind.[49]

3.3   A Europe of flexibility

While the thrust of the two previous areas point towards more integration in certain policy areas or even in a comprehensive manner, a (more) flexible Europe is, on the contrary, not locked in to moving inevitably towards deeper integration. The trajectory of European integration is inherently open towards more integration here and less integration there.[50] A (more) flexible Europe could provide an antidote to Euroscepticism,[51] and works on three highly interconnected levels: that of the federal, the member State, and the relationship between the two.

The critique of EU over-constitutionalisation, held responsible for a slow, yet persistent delegitimization of EU governance, approaches flexibility issues at a federal or so to speak relational level. A fundamental proposal addressing this problem would lead to the restructuring of the Treaties by reducing the (too) specific EU primary law precommitments to mere principles in constitutional fashion after having weeded through the thicket of predefined policy goals in EU.[52] This kind of

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Decision, Amended proposal, 28 May 2020, COM (2020) 445 final; for more comprehensive ideas see *M. Avbelj*, What Future for the European Union?, WZB Discussion Paper, SP IV 2017-802, July 2017, p. 16.

[45] *J. M. D. Barroso*, 2030 – Europe in the World, in: Leitl/Verheugen (eds), Europa? Europa! 2011 197, 200: 'the power of our example'.

[46] COM (2018) 647 final.

[47] *M. Kaim and R. Kempin*, A European Security Council, SWP Comment 2, January 2019.

[48] (German Vice Chancellor) *Olaf Scholz*, Humboldt-Rede zu Europa (28 November 2018), in Ruffert (ed), Europa-Visionen 2019 239, 248.

[49] The problematic consequences of unanimity are taken up by *F. C. Mayer*, The EU in 2030: An Anticipated Look Back at the 2020s, GLJ 21 (2020) 63, 67.

[50] *J. H. H. Weiler and J. Vasel*, The States' Upcoming Choice: Move Ahead All Together, Some Members Only or Alone? In Amato et al. (eds.), The History of the European Union 2018 535 et seq.

[51] *S. Usherwood, B. Leruth, and N. Startin*, Conclusion, in: ibid. (eds), The Routledge Handbook of Euroscepticism 2018 468, 476; *C. E. De Vries*, Euroscepticism and the Future of European Integration, 2018 217 et seq.

[52] *S. Weatherill*, The Competence Catalogue in the Treaty Establishing a Constitution and the Treaty of Lisbon: Improvement, but at a Cost, in Barber, Cahill, and Ekins (eds), The Rise and Fall of the European Constitution, 2019 107, 123; *F. W. Scharpf*, De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice, in Garben and Govaere (eds), The Division of Competences between the EU and the Member States 2017 284, 298 et seq.; another flexibility proposal by *J. H. H. Weiler and J. Vasel*, The States' Upcoming Choice: Move Ahead All Together,

federal self-constraint would enlarge wiggle room for both the Union and Member States' institutions and thus open space for contestation and consequently visible policy changes in the European Union. A corresponding entrenchment of certain Member States competencies to protect them from competence creep would probably shrink to a rather symbolic measure due to difficult competence delimitation.[53] The strengthening of more procedural solutions such as Member States' opt-outs[54], and strict subsidiarity control (even of existing EU legislation)[55] could prove more useful, creating EU competence stress-diminishing release valves. (Re-)Federalisation and (re-)harmonisation would then have to be fought for (or backed) politically. Agreed, more differentiated integration [56] increases the complexity of EU governance.[57] Nevertheless, the long-term dynamics of power and the stability of the Union need to be strongly considered here.[58]

Furthermore, a flexible Europe should also protect the possibility of democratic change inside the Member States themselves. [59] Internal democratic flexibility, impeding autocratic lock-ins, lays the foundation for federal flexibility in general. What is more, the empowerment of current political minorities creates indirect EU legitimacy when the locally oppressed, and thus the ultimate subjects of legitimacy, are given support in their struggle against the unfair bending of the rules of the political game. Ensuring democratic reversibility would entail measures such as a reformed rule of law mechanism,[60] stricter (judicial) enforcement of EU law, and the protection of opinion and societal pluralism by legislation which hinders media concentration[61], for example. In the latter field, in particular, EU authority is weak, so the EU has to tread carefully and be creative in finding ways to protect national

Some Members Only or Alone? In Amato et al. (eds), The History of the European Union 2018 535, 559: treaty revision through qualified majority voting.

[53] Similarly sceptical: *S. Garben*, Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator, in Garben and Govaere (eds), The Division of Competences between the EU and the Member States 2017 300, 328 et seq.

[54] E.g. a right to veto legislation by a committee of national parliaments, *I. Pernice*, Eine neue Kompetenzordnung für die Europäische Union, WHI-Paper 15/02 37 et seq.

[55] Report of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', 10 July 2018, 19.

[56] *J.-C. Piris*, The Future of Europe, 201, pp. 212 et seq.; *S. Fabbrini*, Europe's Future, 2019, pp. 130 et seq.

[57] *Weatherill*, The Competence Catalogue in the Treaty Establishing a Constitution and the Treaty of Lisbon: Improvement, but at a Cost, in: Barber, Cahill, and Ekins (eds.), The Rise and Fall of the European Constitution 2019 107, 121; sceptical: European Parliament, Possible evolutions of and adjustments to the current institutional set-up of the European Union, P8_TA (2017) 0048, 16 February 2017, Nr. 6 ff

[58] *G. della Cananea*, Differentiated Integration in Europe After Brexit: An Institutional Analysis, in Pernice and Guerra Martins (eds), Brexit and the Future of EU Politics 2019 45.

[59] *C. Möllers and L. Schneider*, Demokratiesicherung in der EU, 2020 (2018), 124 et seq.

[60] COM (2014) 158 final, 11.3.2014; COM (2019) 163 final, 3.4.2019; COM (2019) 343 final, 17 July 2019. See also the first Rule of Law Report RL 2018/1808/EU, 14 November 2018.

[61] See the protection of media plurality in Art. 11 sec. 2 CFR; European Parliament, Media pluralism and media freedom in the European Union, Resolution, 3 May 2018, P8 TA (2018) 0204.

spheres of free (political) speech. [62] Another avenue is the introduction of real transnational parties and transboundary electoral districts, so it would be impossible to lock in authoritarian one-party rule at least for EU elections. While most of these proposals would require few or no changes of EU primary law and could be achieved within the existing framework of EU law, soft approaches like benchmarking and reports [63] have limited consequences when autocratic government is already successfully established.

3.4   A Europe of democracy

The democracy of the European Union is far from perfect itself—the machinery of EU politics is too detached, confusing, and complex in the eyes of many citizens.[64] The issue here is not mainly or exclusively the absence of a clear narrative of EU governance; the solution, thus, is not improved constitutional aesthetics. Nevertheless, non-transparency dilutes (the visibility of) accountability, possibly leading to systemic problems of legitimacy.

The reconstruction of a Europe of democracy is not an easy fix: competing strands of legitimacy are compounded—in rather crude terms through representation of Member States, on the one hand, and on the other, a direct line of legitimacy through EU citizens themselves. Therefore, within a delicate institutional balance, interventions which strengthen one could easily weaken the other. Federal options empower the European Parliament, for instance by introducing a real right to initiate legislation or the power to authorise a European government.[65] The former solution, comparatively minor in consequence, would help politicise the bureaucratic rationale of Commission-induced legislation.[66] More modest forms of politicisation could be the parliamentarisation of the Eurozone, [67] a more binding/formal entrenchment of the *Spitzenkandidaten* process, or some form of paralegal coalition agreement amongst the parties that support the election of the current

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[62] See *A. Harcourt*, Media Plurality: What Can the European Union Do? In Barnett and Townend (eds), Media Power and Plurality 2015 131 et seq.; some pressure points available in Directive 2010/13/EU.

[63] See for media regulation *W. Schulze and S. Dreyer*, Visions of a Coherent EU Information and Media Order, Hans Bredow Institute Policy Paper, 1 September 2020 6.

[64] *S. Weatherill*, Law and Values in the European Union 2016 418.

[65] *A. K. Mangold*, Democratic Legitimacy of EU Law. Two Proposals to Strengthen Democracy in the European Union, in van der Walt and Jeffrey Ellsworth (eds) Constitutional Sovereignty and Social Solidarity in Europe, 2015 165 191; *M. Dawson and F. de Witte*, From Balance to Conflict: A New Constitution for the EU, European Law Journal 2016 204, 216 et seq.

[66] *M. Dawson and F. de Witte*, From Balance to Conflict: A New Constitution for the EU, European Law Journal 2016, 204, 208 et seq.; another politicisation proposal: synchronising national and European election dates, *J. White*, Politicizing Europe, in: Cramme and Hobolt (eds.), Democratic Politics in a European Union Under Stress 2015 87, 98 et seq.

[67] *S. Hennette et al.*, How to democratize Europe 2019.

Commission—thus pivoting EU politics more to the realisation of policy goals rather than preserving the representative allocation of important posts. Not only establishing (more) direct accountability and attribution of policy, values, and demands, but also enabling real reversibility, and thus influence on the changes to the main political course enhances legitimacy of EU governance.[68]

4   Conclusions

In a condensed space, this thought piece has attempted a compromise, or rather an oscillation, between structure and substance, between assessing methodology and voicing opinion. It is intended to serve as self-inquiry into what it means and entails when lawyers, or rather legal scholars, reflect on the future of European integration law. Daring to delve into the business of shaping the subject of one's science screams methodological caution, which is intensified by speculating about or calling for changes in the future. It is not enough for legal critique to take the future into consideration; instead, lawyers (but certainly not only lawyers) need to reflect the whys and hows of future reflection, thus informing typically content-driven work.

Attempting to map the future of European integration (law) turns out to be a Sisyphean task. As the entirety of this future is never available (at once), the future thinking on possibilities and constraints laid out here can only perform this exercise in one inadequate form or another. Nonetheless, I hope to have identified some of the core issues the European Union needs to address in the future, which always starts now. Although, the Constitutional Treaty disaster in the back of their minds, the Member States may easily and still shy away from treaty revision,[69] they should consider not only that more inclusive and transparent reform is possible, but also that the need for reform is acknowledged on all sides, by Europhiles and Eurosceptics alike[70].

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[68] *A. O. Hirschman*, Exit, Voice, and Loyalty, 1970, 123 et seq.

[69] *S. Weatherill*, The Competence Catalogue in the Treaty Establishing a Constitution and the Treaty of Lisbon: Improvement, but at a Cost, in: Barber, Cahill, and Ekins (eds), The Rise and Fall of the European Constitution, 2019, 107, 116 et seq., 120.

[70] *N. Walker*, Europe's Constitutional Overture, in: Barber, Cahill, and Ekins (eds), The Rise and Fall of the European Constitution, 2019, 177, 190 et seq.

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