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Turtles All the Way Down? Progress in EU Law Scholarship

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*Henri de Waele**

Abstract

European Union (EU) law, with a history of approximately 60 years, remains one of the younger legal disciplines around the world. The scholarship in this field initially focused on the development of the European Economic Community and its common market, gradually branching out, in tandem with the ever-expanding reach of the relevant rules. The number of books and journals has grown exponentially, with novel genres like blogs and podcasts recently gaining in popularity too. Increases in size or quantity should, however, not be automatically equated with the notion of 'progress' as such. For a sound measuring of progress, the key question that needs to be answered is the extent to which the knowledge base has been advanced, and whether genuinely superior insights have been acquired over the course of time. In EU law scholarship, these issues are closely connected to the general tone and objectives of the leading studies, which can be seen to have evolved significantly. The current article zooms in on three publications from the 2010-2020 period, discussing how they fit into the overall picture, indicating in what way the progress label may fruitfully be applied to these pieces, and hereby also reflecting on how they are believed to have exerted a marked influence on the work of subsequent authors.

Keywords: progress, innovation, EU law, scholarship.

1. Introduction

European Union (EU) law, with a history of approximatively 60 years, remains one of the younger legal disciplines around the world, especially when compared with civil, criminal or constitutional law. It could be said to have taken off properly about a decade after the launch of the European Community for Coal and Steel

* Professor dr. Henri C.F.J.A. de Waele is Professor of International and European Law at the Research Centre for State and Law, Radboud University Nijmegen, The Netherlands, Visiting Professor, Faculty of Laws at the University of Antwerp, Belgium and Senior Fellow at the Centre for European Integration Studies, University of Bonn, Germany.

(1951), receiving important extra stimulus from the creation of the European Atomic Energy Community and the European Economic Community (1957). Simultaneously, the broader field of 'European law' managed to gain traction, pursuant to the establishment of the Council of Europe (1949) and the effectuation of the European Convention on Human Rights (1953). The present contribution focuses, however, on the more specific branch that is ordinarily referred to as 'the law of integration', which up to this very day has stayed formally unrelated to the Strasbourg system.[1]

In the second half of the last century, the number of books and journals in the EU law continuum has grown exponentially, in tandem with the ever-expanding reach of the relevant rules. Traditionally, EU law has been presented and understood as a virtually autonomous world, governed exclusively by legal rationales and techniques of interpretation with an own endogenous professional circle. Moreover, outsiders have regularly perceived the scholarship as proceeding from certain unspoken assertions as to the Union's 'teleological inevitability' (Curtin, 2006, pp. 4 and 34). To a high degree, this may be due to another typical characteristic, namely that a substantial part of the writings in this sphere is produced by insiders, notably lawyers serving at the Brussels and Luxembourg institutions (Leino-Sandberg, 2022, p. 232; Rasmussen, 2021, p. 925).

Assessing the contemporary 'state of the art' proves difficult in light of the increasingly fragmented nature of the discipline, a direct consequence of the European *acquis* becoming ever more detailed, technical and carved-up into separate niches (e.g. environmental, consumer, energy or public procurement law). The number of specialist journals has grown concomitantly and exponentially, on top of which one should realise that the academics and practitioners come from different cultures and publish in multiple languages, situated as they are in twenty-seven different member states (besides what is being put out in various non-EU countries). A 'prevailing doctrine', as it is known as in other legal fields, does not hold sway either (de Witte, 2013, p. 102; Terre, 2009, pp. 6-7). While this could go so far as to suggest that it is impossible to track any sort of generic development here, there nevertheless exists a quasi-unison approach or method among the scholars regardless of their provenance, rendering it still feasible to sketch the evolutionary path – not least because the different commentators engage with exactly the same judgments and legislation (von Bogdandy, 2000, p. 210). By the same token, just as in the academic landscape more universally, English today counts as the *lingua franca* – even when the most knowledgeable in the field continue to read and reference works in German and French.[2] All the same, it should be noted that the EU and its predecessors, and hence the research base of the legal terrain, used to be a lot more compact – rooted in the project of the 'Europe of the Six', to which the British only became a party after the first 20 years. The identified trend of 'expansion', therefore, also carries a cultural and geographic dimension and is not a process solely attributable to dynamics in the law itself. Additionally, sizeable chunks of the EU *acquis* have gradually been 'repatriated',

1 For intriguing ruminations on how best to categorise the discipline, *see e.g.* de Witte (2020).

2 *See e.g.* de Witte (2013, p. 113), noting the 'growing hegemony of English'.

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owing to the implementation of supranational rules at the domestic level (e.g. in private, criminal or administrative law), potentially informing all kinds of twists and turns at a lower level that are left outside the scope of this contribution.[3]

One particular innovation that has recently become apparent concerns the form of the scientific output, with blogs and podcasts gaining in popularity, alongside the classic mediums of edited volumes, monographs and journal articles.[4] Such a development ought not to be equated, however, with the notion of 'progress' as such – neither should a simple uptick in the total quantity nor the fact that articles on EU law find their way into more general outlets.[5] To reach any meaningful conclusions in that respect, the key questions that need to be answered concern the extent to which the knowledge base has been advanced and whether genuinely superior insights have been acquired over the course of time. In EU law scholarship, these questions are closely connected to the tone and objectives of the leading works, which may be seen to have evolved significantly too. In line with the instructions provided by the editors of this special issue, the current article zooms in on three publications from the past decade, discussing how they fit into the overall picture, indicating in what way the 'progress' label can fruitfully be applied to these pieces, in part by reflecting on how they are believed to have exerted a marked influence on the work of subsequent authors.

To be sure, the selected publications are not ground-breaking in an absolute sense but individually succeeded in exerting a more granular effect. Each of them is linked to a separate sub-theme, testifying to the event-sensitive nature of EU legal studies, with constant new problems and puzzles being thrown up by virtue of the pace and variety with which the discipline is taking shape. In tune with the majority of social sciences, precisely the engagement with such new puzzles and problems has proved to be a source of renewal (Walker, 2005, p. 589). On a related note, it has not been decisive either whether a publication has been massively cited or not, but rather whether the proposed idea seems to have made headway in itself, by looking at how peers approached the topic later – a more qualitative than quantitative appraisal of the measure of progress achieved.[6] The two leading criteria for the selection have thus been whether a relatively original take is offered that was demonstrably absent from the preceding scholarship, and whether a piece visibly inspired colleagues to review the same subject-matter with a similar frame or orientation. Of course, this lays quite a responsibility on the shoulders of the present writer, requiring a ready admission that the exploration will consciously limit itself to the 'EU law mainstream' for lack of specific expertise in niche areas – where nonetheless numerous noteworthy developments may have taken place

3 On this 'repatriation' phenomenon, *see e.g.* Walker (2005, p. 582).

4 At the turn of the century, 'Adjudicating Europe' and 'Eutopia' were well-known blogs, meanwhile defunct and superseded by, inter alia, 'Europeanlawblog', 'Verfassungsblog', 'EU Law Analysis' and 'EU Law Live' (featuring podcasts and weekend editions).

5 The practice of finding refuge for one's thoughts in forums elsewhere is long established: *see e.g.* Schermers (1974), Stein (1981), Weiler (1991), Mancini and Keeling (1994), and Schilling (1996).

6 The oft-identified problems of concentrating mainly on citation scores are compounded in EU law, where, alongside the mainstream discourse in the English language, the scientific conversation is pursued in myriad languages and outlets at the national level.

also.[7] On the other hand, because of the author's self-perception as primarily a generalist, it is unlikely that feats that ought to be appreciated as holding a crucial significance for progressing the thinking in this mainstream have been overlooked (not to mention that per definition, any expectation of exhaustiveness qualifies as unrealistic).

To avoid misunderstanding, the central interest of the current article is to pinpoint progress from an academic perspective, which means that we leave aside the possible impact of the publications on the (trajectory of the) relevant EU law.[8] The reader might hereby note that the author places a heavy emphasis on writings that directly or indirectly deal with the European Court of Justice (ECJ) – a nigh inevitable but very deliberate set-up, in view of the pivotal role this institution has played in (moulding) the historical trajectory of the field. A renowned judge and professor once referred to the Court as 'the European lawyer's hobby-horse', a *bon mot* that continues to contain a truism, despite being uttered over 30 years ago (Koopmans, 1991, p. 15).

By way of final delineation, corresponding once more to a request of the editors of this special issue, the timeline of the inquiry is restricted to the 2010-2020 period, forcing us to ignore salient pieces from before and after and to give up immediately on the idea of representativeness. As that temporary limitation does risk painting a narrow and distorted picture of the status quo, insufficiently doing justice to the doctrinal context within which the selected publications found their home, the next paragraph offers a bird's eye view of the evolution's discipline, moving from there to the *horse-oeuvre*.

2. Taking Stock, 1952-2022

To the minds of some, the progression of EU law scholarship runs parallel to the progression of the legal order it is attached to (Lawson, 2006, p. 63). Consequently, for an account with a maximum of accuracy, one would have to analyse what went on during the full epoch of its existence – an enterprise that could only be undertaken by a team of researchers, producing a veritable opus magnum.[9] Following a snapshot technique instead, for starters, we can adhere to a strikingly global but actually quite customary categorisation, distinguishing between the EU's institutional law, on the one hand, and the substantive law on the other. Covering the evolution of the latter domain, even in a succinct manner, is better left to internal market and competition law pundits.[10] The institutional literature may then crudely be subdivided into different strands. One of these, *en vogue* in the

7 EU banking and financial law, for instance, constitutes but one prominent domain nowadays.

8 An exercise that might, e.g., be undertaken by looking at the sources that inspired Advocates General (AGs) in their opinions, in turn then depending on the extent to which the European Court of Justice followed his/her proposals. At the same time, rarely do AGs tie their opinions exclusively to one publication, nor does the Court always strictly adhere to their suggestions.

9 von Bogdandy (2000, p. 209): 'The sheer volume of law books and monographs prohibits any substantial overview, let alone a synthesis.'

10 *See e.g.* O'Leary and Sánchez Iglesias (2021), as well as Maher (2021).

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1950-1960s period, is dedicated to identifying what type of creature the Community (and today's Union) were in the first place.[11] Next to that, countless discussions have unfolded on respectively the (ambit of the) EU's competences, and its impact on the national legal order (see e.g. Craig, 2009; Davies, 2013; Pescatore, 1983; Schütze, 2008; Weatherill, 2011; Weiler, 2013b; Winter, 1972). Studies on judicial protection underwent a mushrooming as well, alongside a cornucopia dedicated to the principles of its external relations law, flourishing in the wake of the 1972 *ERTA* judgment.[12] Fundamental rights and citizenship arrived a bit later on the scene, when those sub-domains began to blossom in the jurisprudence, and accordingly became a subject of academic attention (see e.g. Alston, 1999; Besselink, 1998; Coppel & O'Neill, 1992; Fries & Shaw, 1998; Kostakopoulou, 2007; O'Leary, 1997). Lastly, a predictable 'hard core' of the literature is made up of the works looking at the power and functioning of the EU's institutions, their interactions in the decision-making process, coupled or alternated with investigations on the nature of the instruments they deploy (see e.g. Amtenbrink & de Haan, 2002; Arnull, 1999; Govaere & Garben, 2020; Prechal, 1995; Werts, 1991; Westlake & Galloway, 2006; Xanthaki, 2001). Besides the significance in itself of this incremental branching out, a closer inspection of these quarters – as undertaken in the remainder of the present paper – should reveal the strides forward that were realised in terms of the accumulated knowledge and insight.

When employing a chronological lens, centring less on the sub-genres than on the contents and protagonists, we can indicate a first generation of academics that devoted much of their efforts to underscoring the novel characteristics of the European Communities, propagating a need for the uniform application of the relevant rules and its reception into the domestic legal orders (see e.g. Donner, 1963; Lecourt, 1976; Schermers, 1974; Stein, 1981). The professional lawyers simultaneously busied themselves with the unlocking and clarifying of EU materials to improve their utility to the aspiring practitioner (de Witte, 2013, pp. 103-104). Allegedly, a very welcome doctrinal consolidation was prevented by the sheer pace with which the franchise expanded (Walker, 2005, p. 582). In the mid-1980s, a change in climate was detected that signalled a shift to the theoretical, contextual and interdisciplinary, sparking further calls for the pursuit of new directions (Arnull, 2008, pp. 416-417; Shaw, 1995; Snyder, 1990). By and large, the general pro-integration attitude dominated the scene until the early 1990s, with the prevailing sentiment eventually becoming as critical of EU law-making and judicial interpretation as comparable national scholarship (de Witte, 2013, p. 105; Rasmussen, 2021, p. 925). The widely-commented *Maastricht Urteil*, delivered by the *Bundesverfassungsgericht* in 1993, acted as a catalyst, inviting scepticism far beyond the confines of German legal writing. It moreover ushered in a line of 'pluralist thought' on the principle of supremacy (Baquero Cruz, 2007).[13] In roughly

11 von Bogdandy (2000, pp. 225-230). Two random modern samples are Schütze (2009), and de Búrca & Weiler (2012).

12 Case 22/70, *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32; *see,* respectively, Schermers & Waelbroeck (1969); Ward (2007); Cremona (2018); Schütze (2016); Kuijper (2007).

13 *Bundesverfassungsgericht*, decision of 28 December 1992, BVerfGE 89, 155.

the same era, after political scientists' discovery of the vital part played by the ECJ, a fertile new breeding ground emerged, leading also to a growing number of legal scholars finding their way into non-legal journals (see e.g. Burley & Mattli, 1993; Chalmers & Chaves, 2012; Conant, 2002; Davies, 2016; Garrett, Kelemen & Schulz, 1998; Hoevenaars, 2018). Empirical analyses concomitantly managed to gain a foothold, and multidisciplinary takes are steadily on the rise (see e.g. Hoevenaars, 2018; Mbongo & Vauchez, 2009; Šadl & Panagis, 2015). Even when forgoing detailed discussions of these movements, falling outside the bandwidth of the *reine Europarechtslehre* dissected here, in methodological terms, the reader may observe multiple signs of progress already.

It remains doubtful anyhow whether the trend identified earlier, of the increasingly fragmented nature of the discipline caused by the unstoppable proliferation of specialist sub-fields, points to a great leap forward or rather the opposite. It has similarly caught notice how the aforementioned 'repatriation' has led to an additional scattering of thoughts, exacerbated by the fact that in various national traditions there exists a predilection for examining with priority topics contained in the university canon in the country concerned (de Witte, 2013, p. 107). For one thing, this has made the composition of grand narratives less viable, raising the bar for 'horizontal' pieces that tend to the sum as well as its parts – perhaps even casting the latter into a niche of their own.

In conclusion to this brief survey, a truly towering figure is worthy of a hat-tip who will not be spotlighted in the paragraphs that follow. The oeuvre of Joseph Weiler, consecutively a professor at Michigan Law School, the European University Institute, Harvard Law School and New York University, has proven to be extremely influential on repeated occasions – from his seminal treatise on the transformation of Europe in 1991 to his stinging response to the president of the ECJ in 2013 (Weiler, 1991, 2013a). Weiler single-handedly pushed scientific boundaries and served as a pioneer in numerous respects, with his works reaching a qualitative summum of reflective comment (Shaw, 1995, p. 5). While citation scores, as remarked, should not be considered decisive parameters for measuring impact or progress, his oeuvre encompasses a plethora of classics that have been phenomenally well read and referenced. It is not too far-fetched to tag him as the living embodiment of its advancement, as without Weiler, 21st century's EU law would probably not be in its present state of 'rude health' (Arnull, 2008, p. 431).

3. Bobek's Elephant

Turning to our case studies, 'exhibit A' consists of a book chapter written by Michal Bobek, then a research fellow at the University of Oxford, who would go on to become professor at the College of Europe in Bruges and Advocate General at the ECJ. It is entitled 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts', and touches deftly on several different themes (Bobek, 2013). The 2013 volume in which the piece is incorporated focuses on the legitimacy of the ECJ's case law, with Bobek investigating the issue looking through the lens of the national courts. His approach is one of 'functional

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legitimacy' or 'legitimacy as feasibility', stressing that the perception of a judgment matters more than its contents. He throws up a slew of questions: are national courts really satisfied with the Court's decisions? Do they consider them authoritative? And do they sufficiently take heed of the ECJ's pronouncements in other cases?

The inquiry spans about forty pages, culminating in a number of surprising conclusions. Firstly, Bobek makes plausible that the Court's current standard of reasoning is fit for purpose in the eyes of most of its interlocutors (pp. 203-208). Secondly, with regard to the national acceptance of the jurisprudence, he conjures up the image of the silent elephant, so as to illustrate the many 'unknown unknowns' vis-à-vis the actual compliance rate – suggesting that we have been experiencing a false sense of security, in contrast to a real world of manifold violations (pp. 208-218). Thirdly, Bobek places his finger on some institutional and procedural opportunities for the ECJ to generate an enhanced legitimacy, among which are a proactive dissemination of information to parties and stakeholders, due attention for domestic judicial anxieties, and modified institutional staffing routines (pp. 218-233). To his mind, none of these options had been sufficiently exploited up to then, to the Court's own disadvantage.

Bobek's chapter is considered to epitomise progress perfectly, read to the background of the criteria that were outlined before. His take displays a supreme originality, and inter alia goes against received wisdom in his assessment of the quality of the Court's output. Furthermore, and fundamentally, he challenges the widespread idea of national courts embracing their European mandate, underlining that we are indeed dealing with the proverbial 'elephant in the room' that does not deign to raise its voice. As a corollary, his powerful and persuasive argument hints at a critical need for a thorough empirical unpacking of the state of play, eclipsing the exceedingly modest and tentative attempts hitherto (Alter, 1998; Golub, 1996; Volcansek, 1986; compare Groenendijk, 2015). Bobek's work equally satisfies the second criterion, i.e. visibly inspiring colleagues to adopt a similar frame or orientation in dealing with the *thématique* – in particular, it spurred an avalanche of research looking at how 'live' judges in office choose to discharge themselves of their tasks under the preliminary ruling procedure (see e.g. Krommendijk, 2021; Glavina, 2020; Leijon, 2020; Wallerman, 2019; Mayoral, 2019; Jaremba et al., 2016). This successful 'triggering' effect also held for his propositions on the selection and appointment methods at the ECJ, something that by now has become a subject of common interest (Bobek, 2015; de Waele, 2019; Dumbrovský, Petkova & van der Sluis, 2014; Granger & Guinchard, 2017; Kochenov & Butler, 2022). While Bobek's chapter alone did not, and obviously could not, usher in a complete sea change, surely the EU legal discourse would have been stuck at a lower level had it not seen the light of day.

4. Conway's Critique

'Exhibit B' links up to the historical dynamic of an ever greater scrutiny of the dicta promulgated from Luxembourg. Published in 2012, the monograph by Gerard

Conway concentrates on 'The Limits of Legal Reasoning and the European Court of Justice' (Conway, 2012). The focus of his study lies on the proper modus and scope of the ECJ's interpretations. Conway especially seeks to unpick its dominant purposive method and retrieve its theoretical underpinnings, tabling an alternative model that in his view should in fact be preferred.

In the opening part of his book, he dissects the literature available until then to provide (in his words) 'a short genealogy of judicial creativity' (pp. 52-85). Hereafter, he sets out the normative scheme the Court should arguably adhere to in its constitutional adjudication. Conway claims here that democracy and the rule of law are to be treated as guiding principles *par excellence*, carrying clear (negative) implications for its long-lasting penchant for teleology (pp. 86-171). At the heart of his argument is that much closer attention ought to be paid to the intentions of the rules the judiciary is asked to elaborate on. He hereby proclaims as his creed that a conserving or originalist interpretation is both epistemically feasible and normatively superior to evolutive interpretation (pp. 225-246). Reinforcing that conclusion, he argues that the paradigm of the *trias politica* deserves a stronger backing in the EU, as there are allegedly no identifiable factors requiring or justifying the breakdown of the traditional barriers between the three classic state powers.

Naturally, there are myriad objections to be levelled against originalism – above all, one may entertain doubts on whose intent ought to be considered decisive, and how that intent may be reliably ascertained. Yet, the oft-heard rebuke that the collective intention of the law-maker suffers from rules' principal indeterminacy might well constitute an overgeneralisation, excessively based on problematic cases. Rather, as Conway argues, in various instances it is indeed possible to uncover the assumptions and goals that underlie an EU rule, with the necessary data being readily available in the guise of *travaux préparatoires* or kindred documents (pp. 250-258). Besides, he rightly points out that, although judges should indisputably go against the grain if the underlying political preferences are morally reprehensible, such objections against originalism forget that within the EU, such situations have been incredibly rare. Conway's work proves extra compelling by his daring application of the theory to the Court's practice, singling out two famous precedents for a searching originalist review (pp. 258-272). These chapters magisterially convey the impression that, in comparison with what the *pères-fondateurs* had in mind, the Union's judiciary has regularly gone a step too far.

That commentators take issue with the style and purport of the ECJ's jurisprudence is in itself nothing new, ever since the flaming attack by the Danish professor Hjalte Rasmussen dating from 1986 (Rasmussen, 1986). We already noted how the prevailing sentiment flipped in the 1990s, leaving behind the benevolence of yore. Still, it has been noted how, when crises arise in the integration process, the qualities of detachment and dispassionate distance appear to be blunted, and at times even lost (Weiler, 2005). Not only did Conway provide a crucial, enduring counter-impetus, his book is also pivotal for exposing that the methodical choices of the EU judiciary were never path-dependent in any way. The originalist tenet of his work may be labelled as truly singular, marking a clear sign

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of progress. While his message was not wholly unique – actually forming part of a broader wave of academic criticism – his chosen angle definitely stood out (cf. inter alia Adams et al., 2013; Beck, 2013; Dawson, Muir & de Witte, 2013; Sankari, 2013). On top of that, in sync with the second criterion formulated previously, a decent array of follow-up studies can be observed, vindicating the decision to include Conway's book in the present article (see e.g. Arnull, 2022; Davies, 2014; Derlén & Lindholm, 2020; Dhooghe, Franken & Opgenhaffen, 2015; Horsley, 2018).

5. Von Bogdandy's Phantasy

The final 'exhibit' in this brief essay pertains to a 2012 article authored by a remarkably large number of collaborators, captained by the director of the renowned Max Planck Institute in Heidelberg, Armin von Bogdandy. Entitled 'Reverse *Solange* – Protection the Essence of Fundamental Rights against EU Member States', it posits that the Court develop a radical new policy to improve citizens' legal protection vis-à-vis their own governments (von Bogdandy et al., 2012). The word '*Solange*' refers to an infamous judgment of the German Federal Constitutional Court, when it initially refused to acquiesce to the ECJ's reluctance in allowing European rules to be trumped by domestic constitutional rights.[14] This concept is largely placed on its head, recalibrated in order to combat the worrying situation in some member states, towards which the attitude of the EU institutions has been disappointingly lax so far. The authors find that, although the Treaty legally obliges the latter to ensure due respect for human rights, they have not taken this duty to heart – inter alia demonstrated by the infinitely delayed deployment of the specialised infringement procedure (pp. 492-500). They therefore plead for opening up novel avenues, most prominently by making use of Union citizenship.

The 2011 *Ruiz Zambrano* case is taken as a point of departure for connecting the substance of citizens' rights to the essential values enshrined in the European treaties (pp. 500-507).[15] They then advocate for a reverse *Solange* approach, to be endorsed by the ECJ, entailing that the Member States are free to act autonomously outside the EU Charter of Fundamental Rights *as long as* it can be presumed that they ensure the essence of fundamental rights to the requisite standard (pp. 508-518). However, should this presumption be rebutted, the substance of Union citizenship (emphasised in the *Ruiz Zambrano* judgment) ought to come into play, on which basis individuals should be able to seek judicial redress at the national or the supranational level (pp. 518-519).

As indicated, there has never been a real shortage of reflections on fundamental rights and citizenship, a literature that received an extra impulse on the entry into force of the Charter (2009). The rule of law theme began to feature strongly around roughly the same time, so seen through that lens, we cannot say 'Reverse *Solange*'

14 *Bundesverfassungsgericht*, decision of 29 May 1974, BVerfGE 37, 271.

15 ECJ, Case C-34/09, *Gerardo Ruiz Zambrano v. Office national d'emploi (ONEm)*, ECLI:EU:C:2011:124.

broke entirely new ground. It has been argued, however, that these works failed to resonate with human rights lawyers working in other contexts (Walker, 2005, p. 583). While we cannot be sure that the contribution of von Bogdandy et al. found a much firmer place there, content-wise it can nonetheless be called innovative, as absolutely no-one had ever tabled the main argument before, satisfying our first 'progress' criterion. Equally striking is its German provenance – the country in which the original *Solange* doctrine took root, where many analysts continue to be of a critical disposition, and the Federal Constitutional Court keeps an open eye for EU *ultra vires* acts (see e.g. Hailbronner, 2004; Hillgruber, 2005; Payandeh, 2011; Voßkuhle, 2010). Apart from its inventive nature, the number of subsequent publications that have taken their cue from the article is noteworthy, regardless of whether they cite it in an approving or disapproving manner (see e.g. de Búrca, 2013; de Vries, Bernitz & Weatherill, 2015; Fontanelli, 2014; Morijn, 2018; Sánchez, 2012). It managed to stimulate supplementary exchanges from those agreeing with, as well as from those disagreeing with the viability of the proposed approach. It therewith merits being classified among the pieces that have succeeded in advancing the scholarship in the last decade – despite the Court of Justice never bothering to take the bait.

6. Concluding Remarks

The foregoing presented but a personal, impressionistic account of the trajectory of EU law. Colleagues are quite likely – and of course wholly free – to disagree with the present author's selection, which retains an unavoidable subjectivity.[16] Since the legal discipline thrives on debate, potential future discussions of the choices made here might rather help to elevate or solidify the discourse. In doing so, welcome additional progress is very well realisable.

All the same, the reader might venture to question whether the core paradigm does not defy an objective appraisal from the very beginning, even aside from possible differences of opinion on the 'correct' method to be employed for the measuring and determining. Indeed, one may experience trouble in asserting that a particular publication moved the status quo forward, when one must then first juxtapose it with an earlier one that should itself have brought us further – especially because originality serves as an essential precondition for genuinely academic output anyway.[17] When everything is defined by motion, what are stable yardsticks for movement? This tempts an analogy with the maxim of 'turtles all the way down', used to illustrate the epistemic problem of infinite regress (akin to the popular chicken-or-egg dilemma).[18] In our case, however, the regress does maintain a finite

16 In identical fashion, Altwicker and Diggelman (2014, p. 428), admitting that statements on progress are never neutral but always value-based.

17 Altwicker and Diggelmann (2014, p. 428), equally underline the relativity of the concept of progress.

18 Aikin (2005). The phrase alludes to the mythological tale of a world turtle supporting a flat earth, believed to stand on the back of a larger one, being part of a column of increasingly bigger turtles that stretches out indefinitely.

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character, with there existing clear temporal inception points for EU law scholarship in the 1950s and 1960s. From that perspective, it seems the notion of progress continues to be ascertainable with sufficient accuracy – notwithstanding the likelihood of legal academics bickering in perpetuity about the most suitable exhibits…

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