CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Marxism in EU legal scholarship
Authors	Lonardo, Luigi
Publication date	2024-06-13
Original Citation	Lonardo, L. (2024) 'Marxism in EU legal scholarship', in Deplano, R., Gentile, G., Lonardo, L. and Nowak, T. (eds.) Interdisciplinary Research Methods in EU Law. Cheltenham, United Kingdom: Edward Elgar Publishing, pp. 279-301. https://doi.org/10.4337/9781802205855.00025
Type of publication	Article (peer-reviewed)
Link to publisher's version	10.4337/9781802205855.00025
Rights	© 2024, the Editors and Contributing Authors severally. - https://creativecommons.org/licenses/by-nc-nd/4.0/
Download date	2026-10-31 08:47:34
Item downloaded from	https://hdl.handle.net/10468/16860



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Marxism in EU legal scholarship

Luigi Lonardo

Abstract

After providing an introductory overview of selected aspects of the thought of Karl Marx and of the main interpretative currents on Western Marxism, this chapter argues that Marx's legacy in contemporary scholarship on European Union (EU) law is found in methodology. This is because the use of holistic, teleological and/or historical materialist explanations, which are now widespread in EU legal scholarship, could be considered a Marxist legacy, even though the authors may not explicitly reference Marx or Marxism.
Marxist insights contributed to the move of EU law scholarship in English away from a purely doctrinal method to a contextual approach, and scholars borrowing from Marxism may still ask interesting normative questions. However, this chapter, which provides a perspective of 'analytical Marxism', contends that there is currently little standing of Marxist contribution which is to be learnt for EU legal scholars. Where Marx is still enlightening is in the identification of 'big picture' normative questions.

Keywords

Marxism – EU law – Karl Marx – European Union – European integration – Marxist legal theory

1. Introduction

'A Marxist approach to EU or international law sees law as a system by which the interests of the dominant class are safeguarded. In a capitalist society, the dominant class (the bourgeoisie) are those who own the means of production. Law's role is to preserve the power relations between the bourgeoisie and the proletariat (those who sell their labour within the capitalist society)'.[1]

It could not be put more succinctly. But it is the main argument of this chapter that Marx's legacy in contemporary legal scholarship on the EU goes well beyond explicit references to class struggle and means of production: it permeates methodology.

Two preliminary matters. First, one ought to dispel the impression that it is easy to speak authoritatively about Marx or Marxism: libraries are written on the topic, in several languages, every year. Even if it were possible to master one of these many libraries (a career-long endeavour, no doubt), the very boundaries of what constitutes Marxism must be identified with some arbitrary criterion, due the long-lasting intellectual influence of the tradition. Broadly speaking, a work is Marxist if it is inspired by Marx, but this does not tell us much. This chapter therefore operates with a narrower definition: a work is Marxist if it explicitly refers to Marx. This entails that Marxism can be influential also on work that is not Marxist per se. It will be an indirect influence. To take an example very relevant for EU legal scholarship, consider the

[1] T Hervey, R Cryer, B Sokhi-Bulley, and A Bohm, *Research Methodologies in EU and International Law (1st edn, Hart Publishing 2011)* 61 .

difficulty in telling apart Marxism from many critical theories which – knowingly or not – have their intellectual origins in Marx, or in a writer inspired by Marx.[2] Here one can in fact introduce an important idea, which will resurface throughout this chapter: in general, even when it goes beyond 'black letter law' to consider other factors shaping, or resulting from, EU law, EU legal scholarship was and is led by ideology rather than by philological accuracy. This means that authors do not refer to, perhaps are not aware of (probably because they are not interested in) the history of the concepts, categories, methods they use. The chapter tries to make the case that the use of holistic, teleological and/or historical materialist explanations, which are now widespread in EU legal scholarship, are a Marxist legacy, even though the authors do not explicitly reference Marxism. EU legal scholarship does not conceive of itself as an object of intellectual history, whose origins and 'grammar' are to be traced somewhere.[3] This chapter, which presents a perspective deeply rooted in analytical Marxism,[4] is also a contribution to that aim.

Second, even though Marxist insights helped the shift of EU law scholarship in English away from a purely doctrinal method to a contextual approach, and even though Marxist scholars can still pose interesting normative questions, Marxism now offers little to EU lawyers. This is partly due to reasons inherent in Marx's thought: there are many positive (as opposed to normative) matters on which he was later proven wrong by other scholars[5] or by history; partly because as Kołakowski says: 'it is impossible to answer the questions "How can the various problems of the modern world be solved in accordance with Marxism?", or "What would Marx say if he could see what his followers have done?" Both these are sterile questions and there is no rational way of seeking an answer to them. Marxism does not provide any specific method of solving questions that Marx did not put to himself or that did not exist in his time. If his life had been prolonged for ninety years he would have had to alter his views in ways that we have no means of conjecturing.'[6] The enduring appeal of the ideology is probably due to the strength of the political movements it generated, on which it became, paradoxically, parasitic.

This chapter will provide the reader with basic bio-bibliographical information about Marx (section 2) and basic historical and bibliographical information about Western Marxism (section 3). Sections 2 and 3 are a necessarily long introduction, which hopefully will be useful for a scholar of EU law who wishes to engage with Marxism. They may read like an encyclopaedia entry, with bibliographic suggestions that are the fruit of choice due to space

---

[2] C Harlow, 'The EU and Law in Context: The Context' (2022) 1 European Law Open 209, fn 27.'There is more than a hint of Marxism in many critical legal theories of law'. See also below section 2 for an attempt at explaining what in what exactly the 'more than a hint' consists.

[3] See, contra, the chapter by L Lonardo and T Nowak in this volume.

[4] On which see section 3.

[5] On this, I rely on secondary literature: 'In the words of Paul Samuelson (1957), Marx was a "minor post-Ricardian", his only contribution of interest being the precursor of input-output analysis in the second volume of Capital. Although there are still scholars who waste their time and that of their students by defending the labor theory of value and the theory of the falling rate of profit, Roemer (1981) and others have shown that Marx was a failure as an analytical economist 'J Elster, 'If Marx or Freud Had Never Existed?' in A Gosseries, P van Parijs and Y Vanderborght (eds), *Arguing about justice: essays for Philippe Van Parijs* (Presses Univ de Louvain 2011) 222. References are to P A Samuelson, 'Wages and Interest: A Modern Dissection of Marxian Economic Models' (1957) 47 The American Economic Review 884. And to JE Roemer, *Analytical Foundations of Marxian Economic Theory* (1. paperback edn, Cambridge Univ Press 1990). Similarly, I Steedman, *Marx after Sraffa* (Verso 1981) 14.

[6] L Kołakowski, *Main Currents of Marxism: The Founders, the Golden Age, the Breakdown* (W W Norton 2008) 6.

constraints and selective omissions. Sections 4 and 5 considers how Marxist perspectives surface in EU legal scholarship. Section 4 is a historical narrative. Section 5 is thematic. Marx and Marxism have influenced other social sciences more than law. It is possible to discern a Marxist legal theory, which is discussed in these sections, but this is not the main focus of the chapter: in EU legal scholarship, the legacy of Marxism is rather methodological and indirect.

2. Marx

2.1. Main works

Karl Marx (1818-1883) was a German philosopher. But not a systematic one. The corpus of his work comprises approximately thirty thousand pages.[7] He studied philosophy in Bonn and Berlin (1835-1841), and became closely acquainted with Hegel's (1770-1831) philosophy. He later worked as a journalist (1842-43), and once his newspaper was suppressed by the authorities, he dedicated himself to a *Critique of Hegel's Philosophy of Law* (published only posthumously). He moved to Paris (1843-45), where he became a communist and wrote among others the *Economic and Philosophical Manuscripts of 1844* (published only posthumously), in which he develops the key theme of alienation of man under capitalism. After moving to Brussels (1845-48), he wrote with his friend Friedrich Engels (1820-1895) *German Ideology* (published only posthumous), important for the reflections it contained on historical materialism, as well as a piece of political propaganda, the *Communist Manifesto*. After short periods in Berlin and abroad, Marx lived in London from 1849 until his death. He produced works on French politics, including an important (master)piece, *The Eighteenth of Brumaire of Louis Bonaparte* (published in 1852), which is at the basis of his theory of the capitalist state. He also wrote on economics: two pieces were published during his lifetime (*Critique of Political Economy* and the first volume of *Capital*, which is Marx's most important work). Everything else was published posthumously or it is yet unpublished. Among those published posthumously, there is the *Grundrisse der Kritik der Politischen Ökonomie* (Foundations of a Critique of Political Economy, also known in English by the first word of its German title), an enormous manuscript of economic history and economic philosophy; *Capital II* and *Capital III*, published posthumously, are very specialist reflections of political economy. Marx was also an important figure in the First International (the International Working Men's Association), and in the working-class movements in Germany (on which he commented in the *Critique of the Gotha Program* of 1875).

Understanding what Marx thought[8] through textual analysis of his writings is made particularly difficult by the fact that not all his writings are published, and the bulk of what is published was published posthumously by Engels and it is in a very uneven state of completion; that it is problematic to ascertain what was written by Marx and what by Engels; that many of his writings are 'largely journalistic or agitatorial and as such are unreliable guides to his considered opinion'.[9]

2.2. Methodology

[7] For a survey of editions of Marx's writings, see E J Hobsbawm , 'The Fortune of Marx's and Engel's Writings', in E J Hobsbawm (eds), *The History of Marxism* (Indiana University Press 1982).

[8] J Elster, *An Introduction to Karl Marx* (1st edn, Cambridge University Press 1986) is excellent and what follows largely repeats ideas contained there.

[9] ibid 2.

Marx's contribution has been enduring for his methodology as much as it has for ideology (which is considered in the next section). Marx's methodology is not presented systematically. It is instead scattered through his writings, and occasionally inconsistent. There are two significant 'favourites' of Marx that can be singled out: holistic and functional explanations; and dialectic.

Marx was interested in social problems and in *explaining* them. This preoccupation for explanations of facts and events comes organically out of his writings. He does not seek explanations explicitly, instead he uses expressions such as c*onsciousness is determined by social being*; *social and political life is conditioned by modes of production of material life*, etc.[10] *Capital I* is concerned with the question: why does and can the capitalist regime expand and reproduce itself?[11] (To be sure, Marx also asks normative questions, but these are not as relevant in a section on methodology). Marx tends to find holistic and functional explanations. Holistic explanations are those explanations that do not refer to an individual's action, but a collective or abstract entity (the working class, the capital); and functional explanations are those that explain an event by citing its consequence as cause. The problem with this kind of explanation is that they are based on a metaphysical impossibility,[12] unless they relate to particular cases of path dependence[13] (traditions, rituals, essential features[14]). Outside these very narrow exceptions, functional explanations also lend themselves to a form of paranoid thought: the fact that something is in the interest of someone is taken as an explanation for that something's existence. Cohen's example:

> 'Suppose a society requires a religion for stability, and has a religion fulfilling that need. It does not follow that its need for a religion *explains* its having one. The society may indeed require a religion, but it is a further question whether it has one *because* it requires one'.[15]

In other words, a functional explanation without further argument is deeply unsatisfactory. Functional explanations were guided by Marx's philosophy of history: 'the core intellectual flaw, inherited from Hegel, was the idea that the history of mankind had a foreordained and knowable end – "end" having the double sense of terminus and goal. This end was the advent of communist society, following which the book of history would only, in Hegel's phrase, contain blank pages.'[16] They were also, possibly, due to false analogy with the biological world, where in the 19th century many impressive advances were being made and which suggested to many that law-like occurrences could be uncovered in the social sciences as well.[17] Be that as it may, a particularly lasting influence of Marx's thought is in the combination of holistic and functional explanations, in the form of explaining the behaviour of a social class in terms of the beneficial consequences for that social class.

Dialectic is a mode of thinking and a feature of the world which Marx derives from Hegel's *Logic*. In short, dialectic as a mode of thinking entails that thought develops through contradictions and opposites, rather than by gradual incrementation. Dialectic is also a feature

---

[10] GA Cohen, *Karl Marx's Theory of History: A Defence* (7th print., 1st expanded ed, Princeton University Press 2001) 278.

[11] M Morishima, 'Marx in the Light of Modern Economic Theory' (1974) 42 Econometrica 611, 614.

[12] J Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (2nd edn, Cambridge University Press 2015) 1 'how can the existence or occurrence of something at one point in time be explained by something that has not yet come into existence?' This might be different in natural sciences.

[13] J Elster, *Making Sense of Marx* (Cambridge University Press; Editions de la Maison des sciences de l'homme 1985) 28.

[14] Cohen (n 10) 275–276.

[15] ibid 281.

[16] Elster (n 5) 221.

[17] There are references to evolutionary biology in the *Grundrisse*.

of the world in the sense that antagonism, conflict, and confrontation (between individuals, classes, nations) are necessary to achieve change. Painting with very broad strokes, Hegel's dialectic process consists of three stages (thesis, antithesis, synthesis), and this idea finds application in Marx as well. For example, in the evolution from individual (thesis) to community (negation of the thesis) to class society (synthesis). It is possible to see Marx's dialectic as uncovering important truth about the contradictions inherent in the social world,[18] and about history as the result of unintended consequences. Consider Elster's reformulation of Keynes's and Marx's examples: 'it is a central paradox of capitalism that each capitalist wants his workers to have low wages, because this is good for his profits; yet he wants the worker employed by all other capitalists to have high wages, because this creates a demand for his products […]. Although the desire of each capitalist is internally consistent, their desires taken together are contradictory'.[19] In this, Marx was a forerunner of the study of collective action.

2.3. Ideology

2.3.1. Historical materialism

The materialist conception of history was developed by Marx and Engels in the first phase of their collaboration, in direct polemic with Hegelian philosophy. It became an integral part of theoretical Marxism and the main vehicle of its influence, thanks above all to the editorial work carried out by Engels, who, after the death of his friend, published the *German Ideology*, which is where the two thinkers had defined most fully their philosophical position on the matter. The core of the materialist conception of history lies in the assertion that men, who live and produce in a given society, find themselves moving within 'definite relations that are indispensable and independent of their will',[20] which are the relations of production existing in a given phase of historical development; these constitute the economic structure of society, which is in turn the real basis on which rise the superstructure (legal and political relations, intellectual, moral and religious life, and above all the determined forms of social consciousness).[21] In the preface to the *Critique of Political Economy*, Marx states that his critical examination of Hegel's philosophy of law led him to the conclusion that 'neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind but that on the contrary they originate in the material conditions of life'.[22] This is the clearest statement of Marx's historical materialism.[23]

Albeit it is a different matter altogether, one could ask whether this is really Marx's idea or if it was not 'in the air' (and so when it resurfaces in other author's writing, whether their indirect inspiration is someone else rather than Marx). In a letter to Borgius of 1894, Engels wrote that 'While Marx discovered the materialist conception of history, Thierry, Mignet, Guizot, and all the English historians up to 1850 are the proof that it was being striven for, and the discovery

---

[18] Elster (n 8) 37.

[19] ibid 37–38.

[20] The sentence is from the *Critique of Political economy*, found in K Marx , *Marx: Later Political Writings* (Terrell Carver ed, Cambridge University Press 1996) 159.

[21] The clearest exposition is Cohen (n 10).

[22] Karl Marx, *A Contribution to the Critique of Political Economy* (N I Ston tr, Echo Library 2014) 11.

[23] Which emerges also from *Capital I* and *III*, the Communist Manifesto, *Eighteenth Brumaire of Louis Bonaparte (1852).*

of the same conception by Morgan proves that the time was ripe for it and that indeed it had to be discovered'. This would seem to suggest that historical materialism is not exclusive 'copyright' of Marx, and that authors who take this approach to history are not necessarily, not even indirectly, influenced by Marx. A closer genealogy of the ideas of contemporary authors who spouse historical materialism in one form or another shows, nonetheless, clear Marxist influence.[24]

2.3.2. Class struggle

The theory of class consciousness seeks to explain how a class becomes aware of being one: how it becomes aware of sharing the same interests.[25] This common interest is different for each class, and what this entails is that society is constituted by several layers (we can call them patricians, plebeians, feudal lords, serfs, nobility, bourgeoisie, etc), several factions that struggle for political power. Class struggle is therefore the dynamic of contrast, confrontation, or open conflict between classes.[26] It is political,[27] even though its origins are economic in nature. It exists in any regime of the past, as the Communist Manifesto explains in its historical overview from ancient times. This view of history as one class struggle, coupled with a teleological understanding of history, entails that one class will opt for socialism, leading to the inevitable collapse of capitalism: the wage earner, the proletariat. After acquiring class consciousness, the proletariat is able to become a political organisation,[28] and this will lead to the establishment of a socialist society. Why this happens is a central question in Marx and in Marxist writings.[29] In his pamphlet on *Wage Labour and Capital*, Marx contends that the conflict of interests in the distribution of product of labour between the capitalists and the proletariat will remain even as conditions of workers improve. From this divergence of interests, the normative conclusion that Marx and Marxist scholars (generally) draw is that workers' objective interests cannot be realised within the realm of capitalism. A socialist system is in their objective interests instead.

2.3.3. Alienation and exploitation – legal theory

Alienation and exploitation are the crucial flaws that Marx found in capitalism.[30] They are also meant to be explanations for the demise of capitalism as a system, and not just a normative critique of capitalism. Alienation is the lack of a sense of meaning. It is created by capitalism, which creates greater needs than it can satisfy (in this, capitalism has an important mission, praised by Marx for example in the *Communist Manifesto*). Communism permits to everyone the self-realisation that capitalism permits only to few. Exploitation refers to the condition created by capitalism in which the individual's desires do not belong to that individual but are instead compelled externally. Communism would erase this. The way capitalism exploits

---

[24] See discussion in section 3.

[25] The theory emerges from *Eighteenth Brumaire of Louis Bonaparte* and *Capital III*.

[26] This is most forcefully summarised in the *Communist Manifesto*.

[27] K Marx and J Kessler, *Misère de la philosophie* (Nouv éd, Payot & Rivages 2002) 224.

[28] ibid 223–224.

[29] A Przeworski, 'Material Interests, Class Compromise, and the Transition to Socialism' (1980) 10(2) Politics & Society 125.

[30] The views are most forcefully found in *Capital I*.

workers is by making labour subservient to the machinery: capital owns not only the worker's output, but also her autonomy.

There exists a Marxist legal theory, of which Pashukanisis possibly the main proponent (*The General Theory of Law and Marxism*, 1924). For Pashukanis, who expressed the Soviet Orthodoxy of the 20s (he perished in the great purge thirteen years later but was rehabilitated after Stalin's death), law was the result of class struggle over economic power, and it was the historical manifestation of oppression, born to regulate commercial production and then extended to other areas of social life, including personal relationships. Law conveys an idea of formal equality (equality before the law), in conditions of substantive inequality. Another Soviet theorist, Stuchka (his *Selected Writings on Soviet Law and Marxism* are available in English) held similar ideas: law is an instrument of class struggle, it will not be necessary once Communism is realised.

3. Marxism

After Marx's death, Marxism became a theoretical backbone of socialist struggle. The speculation of Marxists spread to other politically sensitive themes of the time such as the organisation of the proletariat in a party, imperialism and the colonial question, financial capitalism; as a general philosophy, it penetrated European culture. Marx's ideas flowed into the Second International (1889), and then split into two streams, now known as Western Marxism[31] and Soviet Marxism.[32] In Germany, Bernstein's work on *The Premises of Socialism and the Tasks of Social Democracy* (1899) represented the main text of revisionism, suggesting substituting revolution with gradual reforms. Revisionism was opposed by Germany's principal proponent of Marxism, Kautsky (*The Agrarian Question*, 1900), and later by Rosa Luxembourg (*The Accumulation of Capital*, 1913).

In Russia, revisionism was opposed by Plechanov and later by Lenin. The destiny of Russian Marxism followed that of Russian social-democracy, split between Bolsheviks and R eformists since 1902, and irreversibly since the first revolution (1905). Marxism-Leninism would become the official philosophy of the Bolshevik party, once it formed a government in 1917. The third International (1919) marked the affirmation of orthodox Marxism and a complete rejection of Reformism.

Western Marxism entered a renewed phase after the First World War. Lukács's *History and Class Consciousness* (1923) is the most significant work of the period, reading Marxism in the light of the new European philosophies, stressing the dialectic, Hegelian component; and in the same direction went Korsch, who published the same year *Marxism and Philosophy*. They were strongly condemned by orthodox Marxists. In Italy, philosophers such as Labriola (*On Historical Materialism* 1896) and his student Croce (*Historical Materialism and Marxist Economy* 1900), or politicians such as Gramsci read Marxism as antimetaphysics-historicism, in polemic with positivism. Gramsci (the only Marxist among the three Italian just mentioned) was an original and influential theorist (his *Prison Notebooks* were published by the leader of the Italian Communist Party after World War 2) for his emphasis on the role of political action in Marxism. In Poland, Marxism benefitted from the open challenge of positivism, making

[31] R Jacoby, *Dialectic of Defeat: Contours of Western Marxism* (Cambridge University Press 2002).

[32] The best introduction to Marxism after Marx is Kołakowski (n 6). I mention Chinese Marxism only to say I know not of any connections with EU law.

'Polish Marxism' a unique creature in the panorama of the Warsaw Pact countries, to which one may trace the origins of the 'analytical Marxism' mentioned below.[33]

The Frankfurt school, where Horkheimer led since 1931 the Institute for Social Sciences (funded by Marxist intellectuals), is best known for the mixture of Hegelian and Freudian insights for a critical study of society. In addition to Horkeimer, Marcuse and Adorno were the most significant philosophers of the school before the war. Hosted at Columbia during the early 40s, the institute was then re-opened under Pollock's directorship. It formed a new generation of philosophers including Habermas. The legacy of the Frankfurt school is inextricably linked to the fortune of the protests movement of the 60s in the US and 68 in Europe. Horkheimer's interpretation of Marxism focused on the philosophical-dialectical aspects. It led to a criticism of contemporary science (including academic knowledge), which Horkheimer and Adorno conceived of as functional to the maintenance of capitalism (*Dialectic of Enlightenment*, 1947). Fromm (*Method and Task of Social Analytical Psychology*, 1932) also pursued the encounter between Freud and Marx, and a common ground will be found in the volume of 1936 published by the Institute on *Studies on Authority and the Family*. The Frankfurt school is where many critical theories derive from. Several strands of 'critical studies' may be identified, depending on whether they focus on justice (among these fall also the reflections by Habermas), others on race (critical race theory), on gender (gender studies, feminist legal theory), on vulnerability (disability studies), on colonialism (post-colonial studies), or on borders (border studies, critical migrant theory).[34] What they all have in common is a focus on binary hierarchical divisions: a (dialectic) dynamic of oppressor/oppressed of Hegelian origins.
A French author, Foucault, also shares many themes of the Frankfurt school, even though he was not directly inspired by them.[35] His teacher was a French scholar of Hegel and Marxism, Hyppolite (*Essays on Marx and Hegel* 1955), and Foucault is sometimes referred to as a structuralist (with his friend and mentor Althusser, and Lévi Strauss). Post-structuralism would question the binary distinctions mentioned in the previous sentence on critical theories, while building on structuralist ideas.

In France, Althusser sought to study Marx from a humanist, philosophical perspective, deflating the aspects that had more political resonance, for example on the proletariat and class struggle (*Pour Marx*, 1965). Even though loosely inspired by Althusser, in the anglosphere, analytical Marxism (led by Cohen,[36] Elster – who only by accident did not study with Althusser[37]) set out to analyse the validity of Marx's thought with the tool of social science, leaving aside theoretical dogmatisms. About this self-styled 'non-bullshit Marxist' group, Elster writes, unforgettably, that '*non-bullshit Marxism was revealed to be an empty set* (a rare case of intellectual autophagy)'.[38] In the group participated, among others, Roemer (*A General*

---

[33] A Przeworski, 'What Have I Learned from Marx and What Still Stands?' (2021) 49(4) Politics & Society 433.

[34] The useful taxonomy is provided by T Casadei, 'Le Teorie Critiche Del Diritto. Tra Filosofia Giuridica e Filosofia Politica' in MG Bernardini and O Giolo (eds), *Le teorie critiche del diritto* (Pacini giuridica 2017) 372.

[35] M Foucault and D Trombadori, *Remarks on Marx: Conversations with Duccio Trombadori* (Roy J Goldstein and James Cascaito trs, Autonomedia 1991) 119–120.'if I had encountered the Frankfurt School while young, I would have been seduced to the point of doing nothing else in life but the job of commenting on them.'

[36] Cohen (n 10).

[37] The story about how Hyppolite had died, Althusser was not technically qualified to supervise doctoral work, and therefore he turned to Raymond Aron is in J Elster, 'Rules of the Game' (1983) 5(24) London Review of Book.

[38] J Elster, 'Hard and Soft Obscurantism in the Humanities and Social Sciences' (2011) 58(1-2) Diogenes 159, 163.

Theory of Exploitation and Class 1982) and Przeworski (*Capitalism and Social Democracy* 1985).

The Frankfurt school and structuralists are hugely popular. Like Marxism, it is possible that their reputation is parasitic on the political victories of the movements of the 60s and 70s. Functional explanations, the 'attempt to explain social phenomena in terms of their beneficial consequences for someone or something, even when no intention to bring about these consequences has been demonstrated',[39] abound in Marxist (and in non-Marxist) social science. The notion of 'structural causality', associated with Althusser, has been shown to be meaningless even by defenders of functional explanations.[40] Obscure, sometimes incomprehensible or meaningless language used by the Frankfurt school, Foucault, and followers has been denounced elsewhere.[41] The question is how much suggestive ambiguity one is ready to tolerate. Low tolerance entails a rejection of the opaque explanations of the kind many Marxist writings offer.

4. Marxism and EU law: a narrative on scholarship in English

The EU (and a fortiori EU law) is not the political expression of theoretical dogmatism. This differentiates it from the Soviet Union, and, less trivially, it differentiates EU legal scholarship from that which arose in contrast with political projects, as it was the case of the Frankfurt school, that was critical of the German social democracy. This opening statement of this paragraph ought to be qualified in two ways. First, authors writing about integration were receptive to Marxist traditions early on,[42] plausibly also because Communist parties had started to take a more favourable stance to European integration after the Prague Spring (1968).[43] Second, although there is no genetic connection between EU legal scholarship and politics, there are EU (critical) scholars who work on the premise of a unity of theory and practice ('social critique cannot be separated from the need of social emancipation and change'[44]).

The history of EU legal scholarship unfolds as one of progressive emancipation and self-appropriation (this section focuses on scholarship in English, but something similar has happened in French and Italian and, probably, in work done in the languages of the other funding Member States). Emancipation from national and international legal scholarship because the first generations of EU scholars – who, obviously, had not received university education on EU law – had to justify the worth of their object of inquiry, and indeed they first had to explain (defend?) its existence in negative terms: EU law is neither national nor international law. One can cite by way of example the seminal work of Pescatore, 1971 and

[39] Elster (n 8) 21.

[40] Cohen (n 10) 280.

[41] Elster (n 39) and bibliography there cited.

[42] See e.g. a discussion of the debate between Mandel and Poulantzas in E Nanopoulos, 'From Class-Based Project to Imperial Formation: European Union Law and the Reconstruction of Europe' in P O'Connell and U Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar Publishing 2021).

[43] On the evolution of Communist parties' view of European integration see R Dunphy, *Contesting Capitalism? Left Parties and European Integration* (Manchester University Press 2004) 24–25.

[44] P Neuvonen, 'A way of critique: What can EU law scholars learn from critical theory?' (2022) 1 European Law Open 60-88.

Lecourt, 1976.[45] Self-appropriation because at the beginning it was doctrinal[46] and 'acquiescent', as it needed to take stock of the new body of law (concerned chiefly with market and antitrust[47]), rather than being 'critical' or theoretical: it would take at least one generation of scholars (and teachers) of EU law before the field would raise its head from the books and look around to explore the *context*, that is the economic, social, and historical factors that shaped the genesis and development of their very object of study. And what was, by then, the context? For once, the Community had expanded its membership by one third in 1974; then, the problems of international politics facing Europe (the 1973 oil price shock); and the already recalled evolution of Western European leftist parties (or ideas, more broadly) on European integration, which was becoming increasingly more favourable after the 1968 Prague Spring. To be sure, not everything written about EU law beforehand was purely doctrinal or paid no attention to the 'context'. In 1977, for example, in an essay on direct effect, Alan Dashwood discussed the implications of the doctrine (and of *effet utile*) for European integration beyond what a strictly doctrinal approach to the Treaties or to the Court's decisions would mandate.[48] There were also critical voices: in a paper delivered at a 'judicial and academic conference' at the Court in Luxembourg in 1976, Hamson of Cambridge criticised the negative consequences of an overambitious development of the doctrine of direct effect.[49] In other words, scholarship was not only about internal consistency of the case law (that is, it was law in context)[50], but it did not explicitly use categories borrowed from other disciplines either and, in the years immediately after UK accession, it had not yet begun a process of intellectual emancipation.[51]

---

[45] P Pescatore, *L'Ordre Juridique des Communautés Européennes* (Bruylant 2006, 1st ed 1971); P Pescatore, *Le droit de l'intégration: émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes* (Bruylant 2005, 1st ed 1972); R Lecourt, *L'Europe des juges* (Bruylant 2008, 1st ed 1976).

[46] N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 581, 582.

[47] Lord Denning, in the 'Introductory Message" of the first volume journal that still bears the name 'Common Market Law Review' (1963) 1(1), wrote that: 'The structure of commercial law throughout the continent of Europe is being re-built under the impact of the Treaty of Rome. These great legal changes cannot fail to have an impact on the law in the United Kingdom and far beyond. It is of the utmost importance that the lawyers here should know what is happening overseas so that our own system may work harmoniously with the European system. Moreover our commercial law has in the past had a great influence on the commercial law of Europe and has, I am sure, an important role to play in the future.'

[48] There is also a sarcastic comment about Marxism in that essay: 'it is not only in the thought world of Marxism that quantitative differences eventually add up to a qualitative difference, and the intensity of direct effect produced by the EEC Treaty is one of its unique features, which helps to justify the conclusion that the Community constitutes a new legal order.' A Dashwood, 'The Principle of Direct Effect in European Community Law' (1978) 16(3) JCMS 229, 232. Decades later, the author would comment that 'Most of the substance of EU law is black-letter law of the deepest hue. […] But, at the same time, the legal order has a wider perspective of political aims and values, which are clear and persistent. The combination of hard law and political aspiration is what first engaged me and has held me ever since […] What I like so much about the EU is how well it is designed to cater for a political reality […] that is the inescapable fact that the Member States have refused to accept the dictates of Euro-federalism, as they did those of Marxism, and quietly wither away'. A Dashwood, 'Years an EU Lawyer—*Apologia Pro Vita Sua* Or EU Law—A 40-Year Journey and Still Motoring' (2011) 13 Cambridge Yearbook of European Legal Studies 47, 48.

[49] Hamson, 'Methods of interpretation. A critical assessment of the results' 27-28 September 1976 available at http://aei.pitt.edu/41812/1/A5955.pdf.

[50] This was the case regardless of the self-styling: in his seminal piece on the transformation of Europe, for example, Weiler wrote 'even though I shall look at relationships of legal structure and political process, at law and power, my approach is hardly one of Law in Context' J H H Weiler, 'The Transformation of Europe' (1991) 100(8) The Yale Law Journal 2403, 2409.

[51] In that paper, Hamson stated: 'In any event there is no British approach to Community Law. It is not necessary to remind this audience of the extreme variety which exists in the British Isles: there is not even a British legal

In the UK, this was to change also owing to Marxist insights (and Marxism's offspring as imported from the US, critical legal theory). This happened, for example, in the work of Warwick Professor Francis Snyder. Snyder wrote in 1987 that 'European Community law represents, more evidently perhaps than most other subjects, an intricate web of politics, economics, and law. It virtually calls out to be understood by means of a political economy of law or an interdisciplinary, contextual or critical approach'.[52] His analysis of the Common Agricultural Policy as well as of EU institutions was explicitly drawing on Marxist categories.[53] Snyder criticised, for example, the way the EU focused on the management of agricultural surpluses instead of prioritising redistribution worldwide. Many of the chapters in *The Political Economy of Law: A Third World Reader*,[54] the volume he co-edited that year, also had a Marxist orientation. Explicit Marxist influence is also found in the work of Michael Oliver, dating back at least to his 1983 *Social Work with Disabled People*, which, albeit not a work on EU law, would prove highly influential for disabilities studies and EU lawyers alike.[55] As Harlow showed in her recent essay on 'the context' of EU law,[56] which in turn builds on Shaw's 1996 Oxford Journal of Legal Studies article,[57] Snyder's plea was met with an enthusiastic response in the 90s, leading to a plurality of new approaches to study of EU law. Although none of the following are directly in the Marxist tradition, they were receptive of the idea that law is not a pure (in the Kantian-Kelsenian) object, but is rooted in historical realities. There is historicism, and/or a Marxian influence, but each one (and the relationship between them) is implicit. In 1995, Shaw and More published the edited volume *New Legal Dynamics of the European Union,*[58] whose aim was to broaden the horizon of legal scholars by exploring from a range of theoretical positions the unchallenged assumptions of the EU. Among others, that volume also contained the influential essay by Michelle Everson on the market citizen,[59] discussed below. In the same year, Snyder became Founding Editor in Chief of the European Law Journal (a law in context journal). In addition, in 1996 Ward published *A Critical Introduction to European Law*,[60] *The Margins of European Law*,[61] and then an *Introduction to Critical Legal Theory*.[62]

---

system. It is well-known that the British judge on the European court - an expression which is strictly meaningless (Article 167 does not reproduce the nationality requirements applicable to the Commission now contained in Article 10 of the Merger Treaty) – practised in the Scots Law, the legal system operating north of the Border, and not in the Common Law of England (which is the legal system normally associated with the British Isles in the continental mind).'

[52] F Snyder, 'New Directions in European Community Law' (1987) 14(1) Journal of Law and Society 167, 167.

[53] ibid 169. 'Consider, for example, the 'four freedoms' enunciated the European Community's constitution, the Treaty of Rome. They include the free movement of goods, workers, services and capital. These fundamental legal principles, the backbone of the European Community, seem to be simply a capsule summary of Marx's description in Capital of the general circulation of labour power and other commodities'.

[54] Y P Ghai, R Luckham and F G Snyder (eds), *The Political Economy of Law: A Third World Reader* (Oxford University Press 1987).

[55] See chapter by Ferri in this volume.

[56] Harlow (n 2).

[57] J Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16(2) Oxford Journal of Legal Studies 231.

[58] J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995).

[59] M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New legal dynamics of European Union* (Clarendon Press 1995).

[60] I Ward, *A Critical Introduction to European Law* (3rd ed, Cambridge University Press 2009).

[61] I Ward, *The Margins of European Law* (Macmillan Press ; St Martin's Press 1996).

[62] I Ward, *An Introduction to Critical Legal Theory* (1st edn, Cavendish Publ 1998).

Yet, still in 1996, over thirty years after UK accession to the EU, Shaw could write that 'EU legal studies have also been, at least until very recently, to a large extent insulated from the theoretical, methodological and contextual influences which have been felt in most other fields of legal study, from, for example, critical legal studies and Marxism, postmodernism, socio-legal studies, economics, social and political theory or feminist theory.'[63]
This had changed by the time the economic and financial crisis of the past decade (a subject which lends itself well to an analysis through Marxist categories) forced a critical reflection on the role of the EU. It is then that Marxism explicitly re-appeared in scholarship on EU law. Few examples may be mentioned, with no ambition of completeness. In terms of constitutional law, Tzanakopoulou's book, *Reclaiming Constitutionalism: Democracy, Power and the State*[64] analyses authors associated with the Marxist tradition (Althusser, Balibar, and Foucault) to make sense of EU law as a social system affected by ideological forces (law is 'a product of the capitalist relation of production [and of] a State apparatus that serves the reproduction of that relation'[65]). In the context of the internal market, Everson read significant judgments in terms of class struggle. That author states that '*Viking*,[66] *Laval*[67] and *Rüffert*[68] have become pivotal […] since they have also, with the aid of our old adjudicative friend of 'proportionality', once again excluded a European working class from any possible site of political contestation, within which its antagonistic interests might be presented and asserted. […] the CJEU might thus appear to further have extended the bourgeois colonisation of the framework of European law'.[69] With an eye to the longer term, Nanopoulos' essay in the *Elgar Handbook on Law and Marxism* is the first attempt at tracing the history of European legal integration through a Marxist prism, discussed again below.[70] Wilkinson's account of public law in Europe is explicitly anchored to the Marxist tradition in that it focuses on the tension between democracy and capitalism,[71] possibly one of the most interesting (normative) questions that Marxist scholars can tackle. The Covid-19 epidemics also resulted in another wave of contributions with a critical outlook on the current economic organisation of society, solidarity,[72] and class relations,[73] including those drawing explicitly from the Marxist tradition to show the racialised character of the labour market (Ashiagbor[74]).

In 2023, many scholars of EU law share the view that the EU, its legal system, and the scholarship on those is the product of political and ideological forces. This is witnessed by the

---

[63] Shaw (n 57) 236.

[64] M Tzanakopoulou, *Reclaiming Constitutionalism: Democracy, Power, and the State* (Hart Publishing 2018).

[65] ibid 15–16.

[66] Case C-483/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABG (Viking) [2007] ECR I-10779 .

[67] Case C-341/05 Laval un Pertneri Ltd v Svenska Byggnafsarbetareforbundet (Laval) [2007] ECR I-11767 .

[68] Case C-346/06 Dirk Rüffert v Land Niedersachsen (Rüffert) [2008] ECR I-01989 .

[69] M Everson, 'A Very Cosmopolitan Citizenship: But Who Pays the Price?' in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and disempowerment of the European citizen* (Hart Publishing 2012) 162–163.

[70] Nanopoulos (n 42).

[71] MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP 2021)

[72] D Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in H Krunke, H Petersen and I Manners (eds), *Transnational Solidarity* (1st edn, Cambridge University Press 2020).

[73] D Schiek, 'Collective Bargaining and Unpaid Care as Social Security Risk: An EU Perspective' (2020) 36(3) International Journal of Comparative Labour Law and Industrial Relations 387.

[74] D Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) 50 Industrial Law Journal 506.

many contributions on the politics of EU law,[75] some of which have an explicitly Marxist perspective.[76] Even though they do not always mention Marx or Marxism, and so are not Marxist works, scholars in the Marxist tradition (especially the Frankfurt school and the American Critical Legal Studies) are the 'immediate' intellectual model. References to Habermas and Foucault are omnipresent, and I take both authors to be sufficiently close to the Marxist tradition to entail that Marxism is an indirect (and occasionally explicit) inspiration. This is confirmed by the use of the perspective of method and ideology that resemble those discussed below: holistic, teleological explanations; focus on the subordination of labour to the capital, on class struggle, and on legacies of empire.
In this, EU lawyers are catching up with international legal scholarship, which instead engages routinely with Marxism (among many other 'extra-legal' factors influencing the genesis and functioning of international law). Yet even now, the Court is an institution largely believed to be (or studied as it was believed to be) sheltered from those external, contextual forces. Studies that move in a different direction are few and far between, and rather than from Marxism, they draw on American legal realism or other traditions.[77]

5. Perspectives on EU Law

5.1. Methodology

5.1.1. Explanations

A typical feature of 19th century philosophy are 'holistic explanations'. These refer to a subject that is above the individual. It could be the Spirit (Hegel), the working class (Marx), anything that stands in contrast with what today goes by the phrase 'methodological individualism':[78]

> '[i]n principle, explanations in the social sciences should refer only to individuals and their actions. In practice, social scientists nevertheless refer to supraindividual entities such as households, firms, or nations, either as a harmless shorthand or as a second-best approach forced upon them by lack of data or of fine-grained theories.'[79]

Marx uses 'capital' and 'humanity' not as figures of speech.[80] EU lawyers usually do the same when they refer to Member States or to EU institutions. This is a methodological shortcut. Without holding legal scholars to an unreasonable standard, more fine-grained studies could consider the personality of individuals for how they shape, implement, or otherwise apply the law.

A point on which Marx and Marxist scholars could be severely criticised as a matter of method is their abuse of functional explanations. As mentioned, functional explanations 'point to the

---

[75] M Bartl and J C Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022); PJ Cardwell and M Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar Publishing Limited 2020).

[76] E Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (Hart Publishing 2019).

[77] J Cotter, *Legal Certainty in the Preliminary Reference Procedure: The Role of Extra-Legal Steadying Factors* (Edward Elgar Publishing 2022) .

[78] Roemer (n 4).

[79] Elster (n 11) 7.

[80] By contrast: Russian writer Radiscev said that the revolution in Russia will be done by 'the citizen of future times' (which is a citation from Schiller's *Don Carlos*), but *that* is a figure of speech.

production of consequences that are beneficial in some respect and then without further argument assume that these suffice to explain the behavior that causes them'.[81] When used naively, the spill-over effect, originating in Haas' influential 1958 book *The Uniting of Europe*,[82] partakes this teleological, functional flair, even though on a plausible reading, what Haas had in mind was not a functional but a causal explanation. While a fuller discussion of the point is elsewhere,[83] here it can be recalled that the spill-over effect as envisaged by Haas as *explanatory* (as opposed to descriptive) mechanism, consists of an opaque description of belief-formation. In the simplest possible terms, it consists of the process through which elites change their mind about EU integration once they start seeing it in action. Dinan's foreword to *The Uniting of Europe* states in fact that: 'Haas built the idea of spillover not on economic determinism, but on changes in the attitudes and behavior of governments, parties, and, especially, labor and business interest groups'.[84] There is no need to pick on recent work displaying what I consider to be flawed explanations. Suffice it to say that crude functional explanations, not supported by more sophisticated reasoning, are common in EU legal scholarship.

5.1.2. Dialectic

Does the EU have a manifest destiny? As Tridimas wrote, irreversible integration was implicit in the ever-closer union paradigm.[85] A trajectory of non-linear, non-uniform, but one-way development was shattered by the post-Maastricht debates on differentiated integration and Kern-Europa.[86] The multi-crisis decade of the 2010s, with a highly unpopular emergency response to the Eurozone crisis which resulted in implicit and explicit constitutional amendments and the Brexit shock, ultimately shattered a collective optimistic belief in the ever-closer union.[87] While a belief in one-way integration would now be naive as a matter of political reality, there remain beliefs in the inevitability of some form of integration. Debates in EU legal history highlight as much. While Weiler's influential narrative[88] 'resonates with a functional determinist vision whereby law [here: the decisions of the ECJ] responds to societal needs that change according to a resolute evolutionary path',[89] the work of Rassmussen, Davies, and Nicola pays closer attention to the actual context for the choices made by the ECJ rather than to the big picture.[90]

---

[81] Elster (n 11) 8.

[82] EB Haas, *Uniting Of Europe: Political, Social, and Economic Forces, 1950-1957* (University of Notre Dame Press 2020) .

[83] In L Lonardo, 'Coping with Distinctiveness: Common Foreign and Security Policy in EU law' (PhD thesis, King's College London 2020) 245-246.

[84] Ernst Haas, *The Uniting of Europe: Political, Social, and Economic Forces* (Notre Dame University Press 1958)

[85] T Tridimas, 'Article 50: An Endgame without an End?' (2016) 27(3) King's Law Journal 297.

[86] Shaw (n 52).

[87] 'Editorial Comments: The Critical Turn in EU Legal Studies' (2015) 52(4) Common Market Law Review 881.

[88] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

[89] F Nicola, 'Critical Legal Histories in EU Law' (2013) 28(5) American University International Law Review 1178

[90] B Davies and M Rasmussen, 'Towards a New History of European Law' (2012) 21 Contemporary European History 305.

Zooming out from the legal dimension to integration more generally, appeals to a spill-over effect, even when not based on economic determinism, helps foster this kind of teleological thought. Marxism may help stimulate a reflection on possible contradictions of further integration. There are in fact contradictions in society, or in collective action more generally. For a given Member State, it may be irrational to adopt an adversarial stance against a neighbour (say, Russia); but it may be collective rational for the EU as a whole to do so (in these terms, this is a classic problem of collective action: the free rider problem). To take the reasoning one step further, however, that is to find the conditions at which a Member State will decide to behave 'irrationally' (for itself) but 'rationally' (for the EU), other strands of scholarship may be more useful: behavioural economics, for example.

Is democracy 'only a spasmodic, exceptional state of things . . . impossible as the normal form of society',[91] or is it a durable state of affairs? For Marx, democracy within capitalism was a contradictory stage, a tension which needed to be resolved, because democracy necessitates equality whereas capitalism necessitates the oppression of the proletariat. But is there necessarily a zero-sum conflict of interests, if the conditions of all strata of society (of all classes) increase?[92] Economic growth creates winners and losers, membership in the EU creates winners and losers (within one country; and between Member States), not in the sense that some are worse off, but because the 'losers' did not grow *as much as* the 'winners'. It is the comparison, the relative growth rate, to be sufficient to trigger envy (or, as Marx would say, 'dissatisfaction').[93]

5.2. Ideology: labour and capital, alienation and legal theory, class struggle, empire

5.2.1. Labour and capital: the internal market as the primacy of capital

Writing about the *Economic and Philosophic Manuscripts*, Przeworski says: 'Marx's text opens two lines of inquiry: What are the consequences of material scarcity, including the necessity to perform disagreeable labor, for the ways in which people experience their existence? What would people want and what would they be doing if they were free of material constraints?'[94] These are important and interesting normative questions and one could take them as a starting point for reflection of what the EU *should* do to allocate scarce resources in a society.

The belief in the need for constant economic growth to overcome resource scarcity, a belief typical of a market-based capitalist society, has been denounced by Marxists. Other goals (such as individual self-realisation, the pursuit of a relationship with the divine, or the freedom from desires) are subordinated, by capitalism, to the 'economic imperative' or are downright discarded because they are not allowed by it – whereas Marx himself would say that the normative idea of a happy life is that of joint self-realisation. Labor is not the satisfaction of a need – Marx says – it is the means to make ends meet.[95] This also entails a 'subordination'

---

[91] K Marx, *Writings on the Paris Commune* (Red & Black Publishing 2008) 198.

[92] Przeworski (n 33)

[93] K Marx, *Wage-Labour and Capital & Value, Price, and Profit* (1st paperback (combined) ed, International Publishers 1976). 'although the enjoyments of the workers have risen, the social satisfaction they give has fallen in comparison with the increased enjoyments of the capitalist, which are inaccessible to the worker'.

[94] Przeworski (n 33) 436.

[95] K Marx, *Economic and Philosophic Manuscripts* (1844) XXIII

(material and ideological) of labour – and other human activities – to capital. An example is the notion of market citizen mentioned above:[96] while this kind of analysis does not routinely use Marxist categories, it contended that it is possible to read the early case law of the Court as meaning that economic self-sufficiency was a precondition for EU legal protection of those who move and/or reside in a Member State or than the one of their nationality. Quite how much that reading of the case law was correct, and how much the requirement of economic activity and self-sufficiency has been relaxed, is a matter of debate:[97] but the 1995 piece of Everson had enduring resonance as criticism of the EU's organisation of society and class relations. Another example of subordination of labour to capital concerns discrimination on the work-place. Certain rules or provisions in the workplace have given rise to complex (legal) issues of discrimination where courts were essentially asked to choose between competing models of society.[98] Consider the cases of discrimination on the grounds of religion,[99] where an individual is forced to give up an expression of their religious belief[100] provided that the restriction is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[101] The kind of aims we are concerned with here fall within 'the protection of the rights and freedoms of others'[102], such as the protection of the employer's right to pursue an economic activity.[103] It is on these terms that a Court, called upon to apply EU law, would decide the case. The argument is not that the *reasoning* is flawed. It is not, either, that courts always or usually side with the right to economic freedom, or that they do not sufficiently protect freedom of religion. The point one could make is that the balancing frames economic growth (freedom to conduct business) as an objective commensurable with the pursuit of an activity which is meaningful for an individual.[104] This is necessitated by primary and secondary legislation. The work of Somek is cited in the next section on legal theory and alienation.

In the EU, the primacy of capital is ambiguous. In 1973, the nine Member States signed a `Declaration on the European Identity'.[105] They proclaimed that they shared `the same attitudes to life, based on a determination to build a society which measures up to the needs of

---

[96] Everson (n 54).

[97] N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(6) Common Market Law Review 1597; S Coutts, 'The Absence of Integration and the Responsibilisation of Union Citizenship' (2018) 3(2) European Papers - A Journal on Law and Integration 761 780.

[98] Commenting upon one of those cases, a former member of the CJEU stated: "The issues that they raise about the wearing of the Islamic headscarf – the 'hijab' – are ones that go to the heart of the question, 'what kind of a European Union should we be building for the future?'" Joined Cases C-804/18 and C-341/19 I.X. v WABE e. V. and MH Müller Handels GmbH v M.J. (GC, 15 July 2021), Shadow Opinion of AG Sharpston.

[99] The cases I refer to were considered, by the Court, to concern discrimination on the ground of religion; but some commentators note that they are best understood as cases of intersectionality, as they involved Muslim women. D Schiek, 'On uses, mis-uses and non-uses of intersectionality before the European Court of Justice' (2018) 18(2-3) International Journal of Discrimination and the Law 82.

[100] Case C-188/15 *Bougnaoui and ADDH (Bougnaoui) [2017] OJ L303/16*; Case C-157/15 *Achbita v G4S Secure Solutions (Achnita) [2017] OJ L303/16*.

[101] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, art 2(2)(i).

[102] ibid art 2(5). And not, specifically, other aims such as public security, the maintenance of public order and the prevention of criminal offences, or the protection of health, which some may consider (more) desirable.

[103] *Achbita* (n 91) para 38; *Bougnaoui* (n 91) para 33. Sharpston (n 89) para 74. It is a freedom protected by Article 16 Charter.

[104] If we consider that economic growth is what makes the employer self-realised, so that is his meaningful activity, then courts are indeed asked to choose between what activity is more meaningful.

[105] `Declaration on the European Identity' (1973) 12 Bulletin on the European Communities 118.

the individual […and] to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress'. In addition to the notion of market citizens, it is in fact possible to identify social dimensions of citizenship (such welfare citizenship).[106] It probably remains true that EU citizenship 'constructs a limited market-oriented picture of the citizen in which welfarist principles find it hard to establish a foothold in hostile territory':[107] the balance has changed over time, but a bias in favour economic activity remains,[108] as the case law in the area of social benefits showed during the financial crisis.[109] Other authors have uncovered and analysed the contradiction inherent in EU constitutional law, which protects (liberal) economic freedoms as fundamental rights in the area of internal market, but imbues rights derived from EU citizenship more broadly with social considerations. The two approaches (liberal economic and social) have been perceived to a great extent incompatible, but alternative responses have been proposed, 'focused on posting of workers, furthering fair employment conditions through public procurement and enabling effective collective bargaining and industrial action in the Internal Market'.[110]

Methodologically, one could suggest that the primacy of economics entails also that other disciplines (law, political science, and research in general) are valuable *only* insofar as they are instrumental to economic growth (or efficiency: they must be functional anyways). But one could be even more radical and contend that perhaps economic growth entails the subordination of democratic political processes (and maybe of everything else, but here I concentrate on democratic processes because it is particularly worrisome). Several legal scholars have in fact lamented the primacy of economics and shown how modern resulting rulemaking, subtracted from democratic deliberation and increasingly in the hand of experts, constitutes 'a technical-pragmatic construct of economic rationality'.[111] This line of criticism, of Marxist origins, found clear expression in the writings of Lukács[112] and Marcuse.[113] It is now restated by scholars of EU law: von Bogdandy wrote that in the EU, research is subordinated to the economy.[114]

5.2.2. Alienation and legal theory

The intellectual echoes of Marxist legal theory are felt in EU legal scholarship, although probably to a less extent than in the scholarship on international law.[115] In their work on the

---

[106] On social and gender policy, reference may be had to the chapter by A Tryfonidou in this volume.

[107] J Shaw, 'The Interpretation of European Union Citizenship' (1998) 61(3) The Modern Law Review 293, 301.

[108] Coutts (n 88).

[109] See case C-333/13 *Dano v Jobcenter Leipzig* [2014] OJ L158/77; C-67/14 Jobcenter Berlin Neukölln *v Alimanovic* [2015] OJ L158/77. A Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The *Alimanovic* Judgment' (2016) 53(4) Common Market Law Review 1007.

[110] D Schiek, L Oliver, C Forde and G Alberti, 'EU Social and Labour Rights and EU Internal Market Law' (2015) Policy Department A: Economic and Scientific Policy, Study for the European Parliament.

[111] E-W Böckenförde, *Wissenschaft, Politik, Verfassungsgericht* (Suhrkamp, Berlin, 2011) 302, quoted in A von Bogdandy 'The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text. Four Critical Topics in a Misleading but Insightful Perspective' (2020) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-08, 8.

[112] G Lukacs, *History and Class Consciousness* (MIT Press 1971) 83

[113] H Marcuse, *One-Dimensional Man* (Beacon Press 1964).

[114] See A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022).

[115] This second statement is purely based on anecdotal evidence. For example, a book explicitly in the Marxist tradition, N Tzouvala, *Capitalism As Civilisation. A History of International Law* (CUP 2021), won several awards including by the American Society of International Law and can therefore aspire to canonical status in

material constitution, Goldoni and Wilkinson also operate within the Marxist tradition (albeit not exclusively with reference to the EU).[116] It will be recalled that Tzanakoupoulou describes (EU) law as the result of material relations between classes.[117] In these works, there are echoes of Gramsci's work on law as a tool of the hegemon ideology: the legal system operates both to crystallise power relations and to 'educate' to them.[118]
Other strands of literature where a Marxist legal theory is applied to EU law are those that recognise the intersectionality of oppression, as well as proponents of a critical theory of rights. As an example of the first, drawing from black Marxism[119] and a feminist viewpoint of capitalist oppression,[120] Ashiagbor brings colonial exploitation into the analysis of labour relations, showing that 'race is constitutive of the labour market and present in the legal form by which labour is regulated'.[121] The work of Somek is an example of the second. Oppression perpetrated in order to control material factors results in alienation,[122] so European citizenship does not create beneficial individual rights.[123]

5.2.3. Class struggle: historiographical debate over the origins of the EU

Schematically, one can distinguish between scholars positing that the origins of EU integration were about (a) economics, (b) empire, or (c) transnational elites (but also (b) and (c) can, of course, be reduced to class struggle and economics). These three schools are all forms of historical materialism that posit that the world of idea (EU integration) depends on and derives from the material conditions. Although the debate originates in the field of international relations and EU integration, it finds space in this chapter because it is influential for legal scholarship.

For Peter Cocks, European integration can be explained by its function. His 1980 article 'Towards a Marxist Theory of European Integration'[124] argues that it is a process of state-building – lasting from the sixteenth century – which 'has performed two critical state functions: provision of the political infrastructure for the expansion of productive forces in protocapitalist and capitalist societies; and an appropriate means for legitimating the power necessary to maintain the social relations integral to these societies'.[125]

---

its field (theory and history of international law), whereas this is not the case for comparable monographs in EU law.

116 M Goldoni and M Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (1st edn, Cambridge University Press 2023); M Goldoni and M Wilkinson, 'The Tradition of the Material Constitution in Western Marxism' in Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (1st edn, Cambridge University Press 2023).

117 Tzanakopoulou (n 66)

118 Goldoni and Wilkinson (n 117): 'Gramsci [...] talks of the law as an hegemonic instrument for the selection of certain customs and attitudes, and the elimination of others'.

119 C Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Zed Press 1983)

120 S Federici, Caliban and The Witch: Women, the Body and Primitive Accumulation (Autonomedia 2004); M Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Zed Books 1986).

121 Ashiagbor (n 75) 2.

122 A Somek, 'Alienation, Despair and Social Freedom' in L Azoulai et al (eds), Constructing the Person in EU Law: Rights, Roles, Identities (Hart 2016): '[t]he root cause of alienation is that it is inherent in economic power to transform all economic relations into struggles over economic power'. See also Neuvonen (n 45) 79-80.

123 A Somek, 'Accidental Cosmopolitanism' (2012) 3 Transnational Legal Theory 371.

124 Peter Cocks, 'Towards a Marxist Theory of European Integration' (1980) 34 International Organization 1.

125 ibid 4.

Scholars of European integration have long posited that 'it's the economy'. It is an explanation grounded in economic reality (but not a functional explanation) when Moravcsik in his classic 1998 study *The Choice of Europe*, writes that 'the dominant motivations of government in the EC decisions studied here reflected not geopolitical threats or ideals but pressures to coordinate policy responses to rising opportunities for profitable economic exchange'.[126] Before that, Belgian Marxist economist Mandel, had sought to explain how the process of European integration derived from the need for European forces of production and capital to compete with American ones.[127] It is a classic Marxist explanation based not on choices by individuals, but on the teleology of capital.[128]

As illustrated by Nanopoulos, Marxist explanations for European integration also deal with empires. Again, the primacy of capital (and of a class in competition with others) is affirmed, for example in the words of Poulanzas: 'reached a new phase of imperialism characterized by the dominance of monopoly capital over competitive (national) capitalisms and a growing subordination of the European imperial metropolis to US imperialism. Far from creating class-driven geopolitical rivalries, this led to the emergence of a new class, the 'interior bourgeoisie', which was structurally dependent upon and increasingly integrated with American capital'.[129] This is ultimately an economic explanation based on class struggle.

Class consciousness is also relevant in the context of explanations for EU integration that stress the role of transnational elites. That class (what Poulanzas would call the interior bourgeoisie?) pushed for creation of the predecessors of the EU, and in this sense it is behind the genesis of European integration in the post WW2 context.

5.2.4. EU as empire: a Marxist analysis of foreign policy

To say that Marxism can be used by lawyers as a lens of analysis for foreign policy means to say that scholars can identify a dynamic of subordination and exploitation between a 'centre' and a 'periphery', or between classes, or between coloniser and colonised. Or that they may show how material factors (the need to acquire and maintain a market, for example) influenced legal constructs. Students of international law, for example, have unpacked the link between Marxism, colonialism, and imperialism.[130]
Legacies of empire are felt in EU law as well. Thus, scholars have linked a colonial past to the birth of the EU's predecessors. Even though not directly relevant for the EU, engagement with empire intends to show that the birth of modern constitutionalism (in France and the UK) is not exclusively due to internal forces, but also to 'capitalist imperialism defined as a global, Western-led, gendered and racialized system of domination and exploitation inherent to capitalism'.[131] In the case of the EU, the role that colonies played in the negotiations leading

---

[126] A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998) 6. This link between historical materialism with Moravcsik's work is also in P Haroche, *'Théorie réaliste de l'intégration européenne: les conditions de la transformation d'un système international en système interne'* (PhD Thesis, Université Panthéon-Sorbonne 2013).

[127] Nanopoulos, 'From Class-Based Project to Imperial Formation' (n 41).

[128] E Mandel, *Europe vs. America: Contradictions of Imperialism* (1. print, Monthly Review Press 1970).

[129] N Poulantzas, 'Internationalisation of Capitalist Relations and the Nation-State' (1974) 3(2) Economy and Society 145, 145.

[130] C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005).

[131] E Nanopoulos, 'The Material Constitution and Imperialism' (26 February 2022) in M Goldoni and M Wilkinson (eds*), Cambridge Handbook on the Material Constitution* (CUP 2023).

to the Rome Treaty are contained in the classic work by Hansen and Jonsson.[132] The authors show how the framers of the Rome Treaty used the colonies and the idea of Eurafrica, which allowed 'regional integration and consolidation of Europe's control of Africa, but without having to carry the blame for colonial exploitation and explicit white supremacy'.[133] The work is implicitly based on the premise of historical materialism and exploitation, but does not explicitly refer to Marxism as a lens of analysis.
Others have sought to conceptualise the EU's foreign policy as implicitly based on colonial models, or as having imperial undertones, even though work on the topic come rather from historians,[134] diplomats,[135] or geographers[136] rather than from legal scholars. An exception is the book by Nanopoulos, on the juridification of sanctions, which links EU sanctions 'to the configuration and needs of European capital and the political and juridical edifice that has grown to support it.'[137] From the perspective that concerns us here, the book is useful in questioning the extent to which the EU has shifted away from its colonial past. Critical studies of EU sanctions abound.[138]

6. Conclusion

Many authors could be cited as evidence of the enduring legacy of Marxism on EU legal scholarship, and there is no point in selecting only a few. The Frankfurt school and ensuing critical theories are now serious contenders for mainstream scholarship. Foucault, structuralism and post-structuralism, which in my view can all be reconducted to Marxism, are also often quoted. A mixture of holistic and functional explanation, with a dose of historical materialism, are also a favourite.

As this chapter has sought to show, Marxism is among the main intellectual currents that was followed by authors who moved EU legal scholarship beyond a doctrinal approach and who started the process of self-reflection that has now boomed into a reflection on method and into interdisciplinary approaches. It helps in selecting important questions, but the methods used to answer them do not always withstand scrutiny, as it was shown in the case of functional explanations, which explains phenomena by their consequences rather than by their causes.

A benefit of engaging with the writing of Karl Marx is to (re-)focus attention of legal scholarship to the normative (as opposed to descriptive) underpinnings of the integration project (what Europe do we want?) and of the role of EU law in it (what objectives should EU law pursue). The big questions to be asked – for lawyers – include the desirability of emancipation from economic necessity and, if this is established, the way in which the law can

---

[132] P Hansen and S Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury academic 2014).
[133] ibid 255.
[134] G Garavini and RR Nybakken, *After Empires: European Integration, Decolonization, and the Challenge from the Global South 1957-1986* (Oxford University Press 2012).
[135] M Lefebvre, *L'Union Européenne Peut-Elle Devenir Une Grande Puissance?* (La Documentation française 2012).
[136] R Foster, '*Tabula Imperii Europae* : A Cartographic Approach to the Current Debate on the European Union as Empire' (2013) 18(2) Geopolitics 371.
[137] Nanopoulos (n 77) 14.
[138] See for example V Mitsilegas, 'European Criminal Law and the Dangerous Citizen' (2018) 25(6) Maastricht Journal of European and Comparative Law 733; M de Goede, 'Blacklisting and the Ban: Contesting Targeted Sanctions in Europe' (2011) 42(6) Security Dialogue 499.

contribute to it. If other interests are deemed worthier, how should law be designed to reach them? Another big question is what democracy and the rule of law promise (political equality, social equality, or something else?) – and, empirically, whether they have delivered on that promise. Is democracy compatible with capitalism, or what form should a state take to organise society? And most importantly, for what purpose? What would, or should, people do if they were free from economic necessity? For the academics who believe the task of legal scholarship should be to reflect critically about the society they study, these are fruitful (maybe even eye-opening) questions.