European Law Open (2025), **4**, 286–289
doi:10.1017/elo.2025.10017

DIALOGUE AND DEBATE: SYMPOSIUM ON MARXIST APPROACHES TO EU LAW

Introduction: symposium on Marxist approaches to EU Law

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(Received 1 November 2024; revised 1 November 2024; accepted 13 February 2025)

Over the last two decades, Marxism has experienced a significant revival, including in the discipline of law. The 2003 Iraq War and, perhaps more obviously, the 2008 financial crisis posed questions about the relationship between law, capitalism and imperialism that mainstream legal scholarship had difficulty answering. One marked exception to this revival has been in the field of European Union (EU) law. EU law scholarship, perhaps understandably given that few Member States participated in the invasion, had little to say about the Iraq War. For its part, the 2008 financial crisis and its manifestation in Europe as the 'Euro-Crisis' prompted a 'critical turn' in EU legal studies.[1] However, these two movements – the Marxist tradition and critical EU law scholarship – have largely failed to meet. Marxist analyses of EU law, let alone the development of a full-blown Marxist theory of EU law, remain almost non-existent.

Several reasons could explain the absence of Marxist analyses of EU law. One factor may be the place of law as a discipline within the Marxist tradition. While Marxists have developed theories of law, and while law has played a significant role in many 'general' Marxist analyses,[2] Marxists have not tended to situate themselves with the discipline of law. Where this has been the case, Marxist scholarship has tended to cluster in Legal Theory, Public Law, and – particularly – International Law, certainly not EU law. However, the most significant factor, in our view, has been the general outlook of EU law scholarship. Historically, EU lawyers have not only ignored the Marxist tradition but have had limited engagement with critical legal theory more broadly and have tended to be uncharacteristically supportive, rather than critical, of the EU project.

The generally non-critical outlook of EU legal scholarship may be partly linked to the nature of the EU, including its allegedly technocratic character, its allegedly purely voluntary membership, and the consolidation of a distinct ideology of Europeanism according to which European integration is a 'natural', 'rational' and inherently progressive process with clear benefits for the majority of the population.[3] Both the technocratic and consensual character of the EU and EU law have been challenged, including in the context of European enlargement towards the southern European periphery and the East, which prompted an important wave of more critical engagement with the EU project. Yet, the triumphalist idea of the EU as inherently 'good' has been harder to displace. If anything, this idea has grown stronger in recent years when it has been linked to a defence against populist and far-right forces. As a result, anti-EU sentiment ('Euroscepticism') has not only been equated with nationalist and racist political views, but for many EU lawyers,

[1]'Editorial Comments: The Critical Turn in EU Legal Studies' 52 (2015) Common Market Law Review 881.
[2]See R Knox, 'Law' in B Skeggs and others (eds), *The SAGE Handbook of Marxism* (SAGE 2021) 876–98.
[3]'Editorial Comments: The Critical Turn in EU Legal Studies' (n 1) 881.

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https://doi.org/10.1017/elo.2025.10017 Published online by Cambridge University Press

there is now an active and even more urgent *duty* to uphold the integrity of the European project. From that perspective, developing a more radical critique of EU law would be highly inappropriate because it might destabilise the EU or feed into and fuel reactionary movements.[4]

The historically uncritical posture of EU legal scholarship may also be linked to the role of legal experts and academics in the EU project. European integration was, from the outset, a distinctively juridical project around which coalesced a variety of interests. Sociologically, this meant that EU legal scholars have had and continue to have a vested interest not only in the expansion and legitimation of EU law but also in the unique merging of the object and subject of critiques.[5] Such an interest, of course, does not lie in any particular 'selfish' orientation of individual EU lawyers but rather as a structural feature of the discipline itself. To critique EU law was and often remains tantamount to a critique of the EU legal community and discipline itself.[6]

Finally, if we take these two considerations together – the nature of EU law and the pivotal role of lawyers in European integration – perhaps EU law scholars' lack of engagement with the Marxist tradition also owes something to the role of *crisis* within the discipline. The EU project – and its attendant legal framework – is understood as emerging in response to the crises of the Second World War and serving as a bulwark against the return of those dark days. Simultaneously, though, the EU project is understood as a precarious one that is constantly under threat. To fundamentally critique the European project – as a Marxist approach would do – would be to open the gates to untold horrors.

In this symposium, we take the opposite position. It is only through understanding – and changing – the social relations that underpin the European project and also give rise to these crises that we might hope to overcome them. If EU law is merely holding back such crises, it can only serve – at best – as a temporary fix, which ultimately upholds the conditions and forces responsible for generating the constant threat of crisis. We argue that the tools of Marxist analysis are thus essential for understanding EU law and, ultimately, for assessing and transforming the 'European Project' in an emancipatory direction that would truly work to the benefit of all.

Against this background, this symposium seeks to bring Marxist tools to bear on the discipline of EU Law. The symposium opens with a programmatic introduction, which aims to act as a starting point for those interested in developing Marxist approaches to EU law. The article offers a systematic map of how Marxists have approached questions of law, state, imperialism and gender; how Marxists have sought to understand the EU; and how these approaches could inform EU law scholarship. In so doing, it also outlines some of the limits of the EU law's 'critical turn' and how a Marxist critique of the EU would differ from some of the most common criticisms of EU law.

From there, the symposium offers three further pieces by Maria Tzanakopoulou, Dimitrios Kivotidis and Andrew Woodhouse, which engage with discrete substantive debates in EU law. Each of the three pieces seeks to intervene, from a Marxist perspective, in key EU academic discussions that are usually framed in liberal terms. Together, these contributions don't offer an exhaustive account of EU law but aim to illustrate the distinctiveness and significance of the Marxist approach in terms of both its method and conclusions regarding our understanding of EU law.

Tzanakopoulou's contribution focuses on EU legal subjecthood, challenging cosmopolitan and liberal approaches that see EU subjects as free and equal individuals moving spontaneously across the internal market. As against this view, she emphasises the socio-political and, hence, collective

[4]Ibid., 887.

[5]I Isailović, 'Critical Approaches in EU Law – Still a Blindspot' (*Transformative Private Law Blog*, 28 Sep 2023) <https://transformativeprivatelaw.com/critical-approaches-in-eu-law-still-a-blindspot/>.

[6]A famous example is the work of Hjalte Rasmussen, which adopted a critical tone of the Court of Justice. H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Kluwer Academic Publishers 1986); Schepel describes how Rasmussen's book was met 'not only with scholarly disagreement but with moral outrage.' H Schepel, 'Reconstructing Constitutionalization: Law and Politics in the European Court of Justice' 20 (2000) Oxford Journal of Legal Studies 457, 458.

https://doi.org/10.1017/elo.2025.10017 Published online by Cambridge University Press

nature of European subjecthood, showing how it is rooted in and shaped by power relations and the class struggle. Kivotidis's piece turns to the issue of the EU's democratic deficit, challenging formal and critical accounts, especially those emphasising the EU's 'economic constitution' as embedding merely an ideological compromise. Offering an exposition of the Marxist approach to the democratic form of the capitalist state, Kivotidis shows the limitations of critical approaches which overlook the issue of class rule and state power in their calls for democratisation. Woodhouse's paper discusses the EU's response to the climate crisis. Instead of a liberal, market-based understanding that conceptualises individuals as consumers, Woodhouse offers a class analysis of the Emissions Trading System, emphasising the distribution of wealth and power embedded in the EU's existing approach to the climate crisis.

In each of these papers, the authors root the issues underlying the relevant debates in the deeper logic of capitalism. As such, they break not only with benevolent accounts of the EU that imagine it as distinct from the interests of capital but also with critical accounts that confine (and blame) this synergy to the EU's 'neoliberal turn'. Indeed, Marxist accounts stress that the EU and its Member States are and have always been structurally dependent on the continuation of capital accumulation. Under this view, neoliberalism is not only an ideological political choice, but a historically specific regime of capital accumulation, with a distinct way of managing the population and sustaining capitalist profit rates. In that regard, Tzanakopolou's paper goes beyond existing critiques by exploring the methodological fallacies of the theoretical current of liberal cosmopolitanism, which, she argues, has dominated the field and study of EU law and politics. Kivotidis's account moves beyond existing critiques of the EU's economic constitution, which typically attribute the problem to its neoliberal foundations and the resulting depoliticisation and judicialisation. According to Kivotidis, this critique is limited because it fails to account for the scope of reform that the EU, as a (supra-)state formation, allows to respond to the challenges of the process of capital accumulation. Woodhouse's paper explores the neoliberal roots of the Emissions Trading System but ultimately argues that the control of economic production by capitalist firms is the barrier to a meaningful transformation commensurate to the challenge of the climate crisis.

In engaging with the material basis of EU law, these papers also show how a Marxist analysis would offer a radically different and more complex understanding of European integration more generally. Going beyond critiques that see the EU as a rogue neoliberal organisation that is corrupting the social-democratic potential of the nation-state, these contributions recognise the capitalist nation-state itself as part of the problem. Indeed, nation-states have tended to use the 'European level' to minimise the potential for domestic class struggle by closing down spaces for democratic economic intervention, ultimately consolidating the power of capital over labour. In moving beyond the neoliberal critique, each of the contributions in this special issue reaches different conclusions as to the way forward. Tzanakopoulou, having explored the multidirectional interactions between the EU and the Member States and how these shape the class struggle, concludes that the latter materialises and can, therefore, only be pursued primarily domestically. For Kivotidis, by contrast, the return to nation-state democracy, which is equidistant from actual self-government of the popular strata as its EU counterpart, cannot be the solution to the EU's democratic deficit unless this involves a process of challenging the central tenets of the capitalist mode of production. Finally, Woodhouse critiques the Emissions Trading System on its own terms, leaving open the question of the best level of governance to pursue a more direct decarbonisation strategy. All, however, transcend some of the classical 'cleavages' and assumptions that have informed criticisms of the EU and how best to overcome them.

This symposium is published in a journal, *European Law Open*, whose founding story begins with the resignation of the editorial and advisory boards of the *European Law Journal* (ELJ). In a blog post, Harm Schepel and Joana Mendes explained their decision to resign as a reaction against the control of the journal's publishers and in defence of the idea of a journal as 'owned' by 'the

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academic community of editors, authors, reviewers and readers'.[7] The editors also reflect on the achievements of the ELJ, and in particular, how the journal brought 'avowedly theoretical and critical work' into European law scholarship, including 'Heller and Schmitt, Habermas and Luhmann, Foucault and Bourdieu, or Hayek and Polanyi'. This symposium seeks to further expand the scope of EU law scholarship by introducing authors that offer a challenge to the very precepts of EU law: Luxemburg and Pashukanis, Lenin and Fanon, Vlachou and Carchedi, and Marx and Engels.

Competing interests. The author has no conflicts of interest to declare.

[7] J Mendes and H Schepel, 'What a Journal Makes: As we say goodbye to the European Law Journal' (*Verfassungblog, 04 Feb 2020*) <https://verfassungsblog.de/what-a-journal-makes-as-we-say-goodbye-to-the-european-law-journal/>.

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