

## THE PARTICULARITY OF THE EU LEGAL ORDER

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### Abstract

*This contribution provides a concise examination of the notion of ‘particularity’, a concept frequently employed to convey the distinctive character of the European Union and its legal order. The history and purposes of particularity are addressed, highlighting its creating and sustaining qualities. Building on that perspective, the crucial significance of the individual within the EU’s particular rules-based system as well as, more generally, the pre-eminence of the role of law itself are emphasized as the fundamental tenets of the EU’s legal particularity. At the same time, the argument presented here challenges the perception that particularity serves as an alibi for exceptionalism, proposing instead that it encapsulates the distinctiveness of the political community governed by the EU. It is also posited that particularity embodies a continuous responsibility to develop strategies that enable the EU legal order to adapt, so that the Union can face new challenges more effectively and in a way that does not undermine the values shared by its Member States.*

### 1. Introduction

Unique. Peculiar. *Sui generis*. The particularity of the European Union (EU) legal order is expressed in different ways and sometimes treated more like a self-fulfilling prophecy than an objective state: say it often enough, and it becomes an accepted fact. That perspective subdues the fact that we must not take the particularity of the Union and of the EU Treaties as a given but remain aware of what it is, what causes it, what functions it serves, and what challenges it continues to pose.

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Particularity is not an alibi for exceptionalism. Rather, it captures the uniqueness of the political community it governs. It also embodies the continuous responsibility to develop strategies to adapt the EU legal order so that the Union can face new challenges both more effectively and in a way that ensures that the values common to the legal orders of its Member States are not undermined.

The Court of Justice is often considered as the architect of the EU legal order's particularity. While it has undeniably played a critical role in articulating and developing the system's quality of particularity,<sup>1</sup> the source material with which the Court has worked should be placed at the forefront. The EU Treaties are unprecedented in both ambition and scale. They have been politically – and unanimously – agreed by the Member States, both founding and later acceding. The Union and the Member States are, together, the architects of particularity, understood here as a set of features that make the European legal order distinct from national and international law,<sup>2</sup> laying down autonomous mechanisms and dynamics for the interaction with both.

In this short paper, we briefly set out how, and why, *law* was engaged both to set up and to protect particularity of a legal system designed, first, to reflect and, later, to preserve the particularity of the Union itself (Section 2). We then consider the challenges that particularity presents for the geopolitical Union (Section 3).

The EEC was intensively legalized as an integration vector so that volatile political forces might be contained. Importantly, that process was rationalized by elevating the position, the dignity, and thus, due consideration of the person within the business of States. And it was firmly rooted in law. Do those choices risk holding back the Union in facing the challenges of a new historical time? Or do they remain, on the contrary, the source of its 'particular' strength?

## **2. The particularity of the EU legal order: Law as system enabler and system protector**

If the EU legal order is a particular kind of legal order, what, more precisely is special, what is distinctively different about it?<sup>3</sup>

1. We do not have the space here to discuss how particularity is employed by the other EU institutions, but we note as an example the European Council's consistent references to safeguarding the autonomy of the EU and its legal order throughout the Brexit process.

2. For a different, more 'external' perspective, see the contribution to this issue by Samantha Besson.

3. Of course, we are not the first ones asking that long-standing question. See eg René Barents, *The Autonomy of Community Law* (Kluwer 2003).

In the first instance, we would point to the political and historical realities that led to it; and to the ensuing willingness and resolve of a small group of sovereign States that, in a moment of clairvoyance, decided to overcome the idea of exclusive sovereignty as the only path to govern their coexistence and (economic) development. These ‘Member States’ took, and continue to take, a sovereign decision to surrender parts of their sovereignty.

The magnitude of this foundational decision cannot be overlooked for it captures the essence of the European project: the *sovereign decision to surrender sovereignty* and to *create* a commonality that transcends rehearsed political projects. The pooled sovereignty then produced is exercised through a political construct where these States and their political communities continue to influence decision-making but through institutional dynamics that apportion weight to interests in a different manner than national political processes might. At the core of the process lies legal innovation. The essential element in which Europeans should take pride is, as Fassbender puts it, ‘having created *legal relations* between their countries which largely can do without the notion of sovereignty’.<sup>4</sup>

The particularity of the EU legal order comes, then, from the particularity of the Union itself: the will to integrate translates into a legal order with the same strength and features as the legal orders that it is destined to integrate – the national ones. From this point of view, the peculiarity of the EU legal order is its closeness to the functioning of a national legal system without ever ceasing to be an international law construct. Catalysers of particularity are represented by three fundamental decisions of the Member States in the founding Treaties: the EU’s innovative and powerful institutional system (replicating neither national institutions nor international ones); a multilevel set of novel legal sources; and conspicuous faith in an intricate and multi-layered system of judicial remedies.

Why does the narrative of particularity (still) matter and why should we be aware of it? At a general level, it performs two parallel functions for the EU legal order: *creating* the EU system, in distinction from both national law and ‘ordinary’ international law (Section 2.1); and *sustaining* it, in light of the perceived vulnerability of the (still young) system with reference, once again, to both national and international law (Section 2.2.) Both of these functions are evident in the case law. What we remember less, perhaps, is *why* the Court of Justice reasoned in the way that it did.

4. Bardo Fassbender, ‘Are the EU Member States Still Sovereign States? The Perspective of International Law’ (2023) 8 EP 1629 at 1643 (emphasis added).

### 2.1. *Law as enabler*

In *Van Gend en Loos*, the Court articulated the particularity of the ‘new legal order of international law’ constituted by the EEC Treaty by pointing out that the Preamble of the Treaty referred ‘not only to governments *but to peoples*’.<sup>5</sup> Thus, the Court derived the specialness of the EU legal order from the unusually central place afforded to the individual within a Treaty-based system addressing inter-State interests and relationships. It highlighted too ‘the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens’ and the preliminary reference procedure as a vital mechanism signalling that Community law can be invoked before national courts and tribunals. The practical consequence goes to the heart of particularity: ‘Community law therefore not only imposes *obligations on individuals but is also intended to confer upon them rights* which become part of their legal heritage’.<sup>6</sup>

As early as the ruling in *Costa*, the emphasis had shifted somewhat from the significance and protection of the individual to the special nature of the EU legal order more abstractly: notably, the Court held that ‘[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which ... became an integral part of the legal systems of the Member States and which their courts are bound to apply’.<sup>7</sup> Moreover, it considered that ‘the law stemming from the Treaty, an independent source of law, could not, because of *its special and original nature*, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question’ (emphasis added). That reasoning, presaging more explicit discussion of the autonomy of the EU legal order in later judgments,<sup>8</sup> brought an existential edge to the creationist approach in *Van Gend en Loos* – an edge that was sharpened in subsequent case law.<sup>9</sup>

In one sense, the differences in language and tone are entirely understandable, given that *Van Gend en Loos* established direct effect – a fundamentally person-centred principle – whereas case law asserting the primacy of EU law was necessarily more concerned with the functioning of institutional relations across different levels of the EU system. But the central role of the individual underpins the claim of primacy too since, if

5. Case 26/62, *Van Gend en Loos*, EU:C:1963:1 (emphasis added).

6. Emphasis added.

7. Case 6/64, *Costa v ENEL*, EU:C:1964:66 (emphasis added).

8. eg Opinion 1/91 (EEA Agreement), EU:C:1991:490.

9. eg Case 106/77, *Simmmenthal*, EU:C:1978:49, para 18 (‘would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community’).

the EU system is deprived of it, the rights that the system confers directly on individuals cannot be effectively exercised or protected. That correlation was reinforced by how the creation of rights under EU law became so profoundly merged with the enabling of meaningful remedies.<sup>10</sup>

However, engaging law as the system enabler means that the particularity of the EU legal order is more a continuous process than a destination. In other words, the existential factor remains ‘live’ beyond the system’s successful creation, even as the system matures. Law enjoys, in consequence, a central significance as the transmission belt between EU policy and its effective implementation, application, and enforcement.

At the same time, there is a balance to be struck – there must be a due appreciation of what this particular EU system is *for*, above and beyond what it *is*. Tapping the potential of the EU Treaties to express that wider purpose was undertaken by the Court when the structure of the new legal order was underpinned by the effectiveness narrative. The idea of a legal order that creates *effective* rights and obligations for individuals, directly enforceable before national courts, remains respectful of yet evolves the nature of a legal order that still remains anchored in international law as its necessary precondition; even though what has been built willingly and voluntarily through this international law foundational act unfolds differently, as a new system. Particularity is the narrative that allowed these apparently irreconcilable understandings to converge.

## 2.2. Law as protector

The notion of ‘autonomy’ was already present in *Van Gend en Loos*, but it has become more prevalent since the 1990s. Three developments in the case law progressively turned the EU legal order’s particularity into a self-preservation tool: (1) stronger reliance on expressions of the purpose of the Union in the Treaties (including its Preamble) that emphasize integration of the peoples of Europe; (2) greater awareness of threats from outside the Union to the particular system that realizes that objective;<sup>11</sup> and thus, (3) more entrenched system protection responses from the Court.

On the first point, the Court became bolder about how it expressed the *raison d’être* of the Union and its legal order.<sup>12</sup> In Opinion 1/91, the Court

10. eg Case 80/70, *Defrenne*, EU:C:1971:55; Case 14/83, *Von Colson*, EU:C:1984:163; Case 283/81, *CILFIT*, EU:C:1982:335; Joined Cases C-6 & C-9/90, *Francovich*, EU:C:1991:428.

11. We acknowledge, of course, threats coming from inside, more recently; we return to this below.

12. Building on earlier statements, eg in Case 43/75, *Defrenne v SABENA*, EU:C:1976:56, para 10, where the Court pointed out that the Community ‘is not merely an

stated that ‘the provisions of the EEC Treaty on free movement and competition, far from being an end in themselves, are only means for attaining those objectives’, having already underlined, drawing from Article 1 of the Single European Act, that ‘the objective of all the Community treaties is to contribute together to making concrete progress towards European unity’.<sup>13</sup> Fast forwarding a couple of decades, this approach was affirmed in Opinion 2/13, where the Court considered that ‘[t]he pursuit of the EU’s objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy’ and determined that ‘[t]hose provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the *raison d’être* of the EU itself’.<sup>14</sup>

On the second point, autonomy takes centre stage, discharging a powerful and controversial function of protecting the distinctiveness of the EU legal system.<sup>15</sup> The Court deploys EU law as a hard filter through which relevant international law and standards are channelled into – or left outside of – the EU system.<sup>16</sup> In this way, the particularity of the EU legal order dominates the reception and the non-reception of external norms and standards, erecting a shield that rebuffs external scrutiny.<sup>17</sup> In this context, the particularity of the EU system of remedies and the close connection between the Court of Justice and national courts strive for the ‘preservation of the particular nature of EU law’,<sup>18</sup> which operates to the exclusion of other

economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty’.

13. Opinion 1/91, paras 18 and 17.

14. Opinion 2/13 (Accession to the ECHR), EU:C:2014:2454, para 172 (emphasis added).

15. Niamh Nic Shuibhne, ‘What is the Autonomy of EU Law, and Why Does that Matter?’ (2019) 88 *Nordic Journal of International Law* 9, doi: 10.1163/15718107-08810002. Especially as regards how it affects the EU as an external actor; see eg Cristina Contartese, *The Principle of Autonomy in EU External Relations Law* (Wolters Kluwer 2025).

16. eg Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Bakaraat International Foundation*, EU:C:2008:46; Case C-284/16, *Achmea*, EU:C:2018:158; Opinion 1/09, EU:C:2011:123.

17. Which has been controversial as regards international human rights standards in particular; see eg Joyce de Coninck, *The EU’s Human Rights Responsibility Gap* (Hart Publishing 2024); and Gráinne de Búrca and Claire Kilpatrick, ‘Resisting External Accountability: The European Union and Human Rights’ in Kenneth Armstrong, Joanne Scott and Anne Thies (eds), *EU External Relations and the Power of Law: Liber Amicorum in Honour of Marise Cremona* (Hart Publishing 2024) 137.

18. Case C-109/20, *PL Holdings*, EU:C:2021:875, para 46. See also Case C-741/19, *Republic of Moldova*, EU:C:2021:655, para 65.

potential actors intervening in the monogamous relationship between the CJEU and each and every national court. But this approach ensures, too, that the protection of the individual is funnelled primarily through the EU system, not for its own sake but because of that system's guarantees of effective rights and realistic remedies compared to 'ordinary' international law.<sup>19</sup>

However, on the third point, whereas the autonomy of EU law erects a shield against external risks, the judicial developments that unfolded to counter the internal risks posed by the rule of law crisis elevated the particularity of the EU legal system and its particular system of remedies to a new level. Without it being possible to give a full account here of these multifaceted developments, it suffices to recall how the Court of Justice mobilized all national courts and tribunals as 'EU courts-in-waiting' in the *Portuguese Judges* ruling<sup>20</sup> – not only in terms of function but also in terms of responsibility, which the Court read into the open-ended and non-specific statement in Article 19(1) TEU that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

Where, in these developments, is the line between system protection and system protectionism? Did particularity become an end in itself? Or, is it more fruitful to think of the particularity of the EU legal system as a vehicle for system adaptation – as a progressive transformation that activates different parts of the Treaties under specific, often unforeseen, circumstances and challenges in order to preserve the nature, function and objectives of the Union and thereby, in the end, to realize the level of protection of the individual promised by the foundational case law?

As we suggested at the outset of this paper, it is important to place the role of the Court in the bigger picture. A focus on case law only hides the fact that the Court is not, in fact, acting alone. Going beyond litigation – which, by definition, places the 'agenda setting' function in the hands of claimants and national courts – other EU actors are key parts in this process, notably *die Herren der Verträge*. Notwithstanding episodes of resistance, the general (if not uncontested) will of the Member States to be – to remain<sup>21</sup> – *Members* has endorsed the Court's integration method and also its evolution; and it has, periodically, in every process of EU Treaty reform (to date), confirmed and deepened European integration.<sup>22</sup>

19. eg Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Bakaraat International Foundation*.

20. Beginning with Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU: C:2018:117.

21. Acknowledging Brexit, however, and the UK's decision *not* to remain a Member State.

22. This, far from being a factual statement, has turned into a fully-fledged legal argument: Case C-204/21, *Commission v Poland* (Independence and private life of judges), EU:

That integrationist – and, in result, system protective – instinct has not only been visible through the crucial though relatively rare event of Treaty reform. It was, for example, the Member States who mandated that ‘[t]he agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [ECHR] provided for in Article 6(2) [TEU] shall make provision for preserving *the specific characteristics of the Union and Union law*’.<sup>23</sup> In Opinion 2/13, the Court undeniably did significant constitutional work on the basis of that instruction.<sup>24</sup> But the instruction as basis point remains important.

This ‘protection’ or ‘preservation’ function is today tied to both continuity and transformation. There is, first, strong *continuity* in the sense that the Court continues to affirm the importance of the person in the whole endeavour, expressed now through the more explicit grammar of fundamental rights and Union citizenship.<sup>25</sup> That status and the rights that Articles 20 et al TFEU confer on Member State nationals, alongside the binding effect that the Lisbon Treaty authorized for the Charter of Fundamental Rights, have transformed the EU legal order, expressing both the ideas conceived and the process initiated in *Van Gend en Loos* in more constitutional than functionalist language. Let us call that spade a spade.

We would reiterate that the engine of this move has been, in large part, the idea of placing the individual at the centre of integration as a part of a bigger process of moving the legitimacy focus, so progressively at the EEC’s birth, from States to peoples. It could be said that this focus on the individual has overcome, to a significant degree at least, the pull of sovereign pride. In turn, the connection between the polity and the individual takes centre stage as a manifestation of the particularity of the system itself. In *Commission v Malta*, for example, the Court found that ‘the provisions relating to

C:2023:442, para 76: ‘[t]hose essential characteristics of the EU legal order and the importance of complying with that legal order, as required, were, moreover, confirmed by the ratification, without reservation, of the Treaties amending the EEC Treaty and, in particular, the Treaty of Lisbon, as evidenced, in particular, by Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon’.

23. Art 1 (emphasis added) of Protocol No 8 to the TEU, added via the Lisbon Treaty.

24. Especially through the finding that ‘these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU’ and that ‘[t]o these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States ... and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves’ (Opinion 2/13, paras 165–166).

25. See further Eleanor Spaventa, ‘A Very Valuable Citizenship? European Values and Citizenship after *Commission v Malta*’ (2025) 62 CML Rev 1791.

citizenship of the Union are among the fundamental provisions of the Treaties which are part of the framework of a system that is *specific* to the European Union and which are structured in such a way as to contribute to the implementation of the process of integration that is the *raison d'être* of the European Union itself'.<sup>26</sup> In both the submissions of the Commission and the reasoning of the Court, the particularity of the EU legal order is front and centre in justifying the outcome, that is, that Malta's investor citizenship scheme does not comply with EU law in light of its 'consequences for the functioning of the European Union as a common legal order'.<sup>27</sup>

Second, the protective function of particularity is progressively *evolving* from a protectionist undertone to more open embracing of the transformative nature of the EU legal order. It has escaped no-one's attention that the values expressed in Article 2 TEU are now increasingly central to the Court's expression of the EU's constitutional nature.<sup>28</sup> Crucially, these values are *shared* by the Member States rather than manifesting the EU system's particularity. Interestingly, though, for these shared values, Advocate General Čapeta expresses the same functional and existential roles that we noted above for the legal principles that are indeed particular to the EU (its 'specific' characteristics). In her Opinion for *Commission v Hungary*, she considers that 'respect for the values enshrined in Article 2 TEU is the political and practical condition for the existence of the EU legal order'.<sup>29</sup>

Now, in other words, particularity meets generality, and we return to the implications of this shift below where, more generally, we ask: following on from our (necessarily abridged) summary of the particularity of the EU legal order and of how it has been sustained as such up to now, where does particularity take the Union and its legal order from here? Where, conversely, might the particularity of the EU legal order prevent the geopolitical Union from going?

### **3. Particularity and constitutional challenges for the geopolitical Union**

In Section 2, we sketched the process of constitutionalizing the EU legal order as a very particular legal order, advanced most visibly, though not

26. Case C-181/23, *Commission v Malta*, EU:C:2025:283, para 91. See also para 93.

27. *ibid*, para 89.

28. See generally Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (OUP 2023).

29. Opinion of AG Čapeta in Case C-769/22, *Commission v Hungary*, EU:C:2025:408, para 163.

only,<sup>30</sup> in the legal discourse of the Court. The Court's script inserted new dynamics into conceptual constellations familiar to national traditions, benefiting from both the legitimacy of inherited categories and the freedom that comes with novelty. The Treaties could be the '*charte constitutionnelle d'une communauté de droit*'<sup>31</sup> and the EU legal order could buttress its claim of overarching primacy over (all) national law<sup>32</sup> without dismantling the separation of legal orders that still anchored to autonomous sources of validity.<sup>33</sup>

Different developments point to an intensification of that process in more recent times: to a deepening of both the reasons for and the implications of the EU legal order's particularity. In many respects, this progression is about the internal functioning of the system. On the one hand, as already noted, the growing reliance on Article 2 TEU comes hand in hand with the acceleration of the 'Europeanizing' of the constitutional structures of the Member States, especially – but not only<sup>34</sup> – their judiciaries. On the other hand, notwithstanding the decades since *Van Gend en Loos* and *Costa v ENEL*, we can also see further reconfiguration of the philosophical underpinnings of the primacy of EU law<sup>35</sup> and of its (direct) effects.<sup>36</sup> The more recent case law offers a logic that transcends the functionality and effectiveness of the EU legal system, relying more strongly on its material legitimacy:<sup>37</sup> the prohibition of discrimination on grounds of nationality;<sup>38</sup> the equality of Member States before the Treaties;<sup>39</sup> but above all, the commonality that underlies the *very identity* of the Union.<sup>40</sup>

30. We are struck, for example, by the number of Member States pushing for significantly 'centralized' outcomes in Case C-29/22 P, *KS and KD*, EU:C:2024:725 and Case C-769/22, *Commission v Hungary*, pending.

31. Case 294/83, *Les Verts v Parliament*, EU:C:1986:166.

32. Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

33. Joined Cases C-10 to C-22/97, *IN. CO. GE. '90 and Others*, EU:C:1998:498, para 21.

34. eg Case C-808/21, *Commission v Czech Republic*, EU:C:2024:962, and Case C-814/21, *Commission v Poland*, EU:C:2024:963 (right of Union citizens to become a member of a political party or political movement).

35. Case C-430/21, *RS*, EU:C:2022:99.

36. Case C-487/19, *WZ*, EU:C:2021:798, especially paras 155–161.

37. Editorial Comments, 'Seventy-Five years of the Schuman Declaration. Pragmatism Lay on the Pace; Idealism on the Goal' (2025) 62 CML Rev 691.

38. Joined Cases C-357, C-379, C-547, C-811 & C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034, para 246.

39. Case C-430/21, *RS*, para 55.

40. This concept, coined by the Full Court in Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para 232, is later key to countering the interpretation of national identity enshrined in Art 4(2) TEU as a limit to primacy. See Case C-204/21, *Commission v Poland*, paras 67 and 72.

What is noteworthy, though, is that this judicial thickening of systemic particularity comes hand in hand with a twist in the narrative: frequent and open acknowledgement of the *voluntary* participation of the Member States in the Union; and of the peculiar nature of that construct since it is ‘under international law, precluded by its very nature from being considered a State’.<sup>41</sup> If, in other words, the foundational case law emphasized the sovereignty that the Member States had ceded, now we find more reminders of the sovereignty that they *retain*.<sup>42</sup> If the Court now openly heralds the idea of a ‘*common* legal order’ in terms of the values ‘which are an integral part of the very identity of the European Union’,<sup>43</sup> it does so in connection with a strong reminder that the EU is composed ‘of States which have freely and voluntarily committed themselves to the values set out in Article 2 TEU’.<sup>44</sup>

In other respects, the heightening of the particularity of the EU legal order concerns how the EU can act beyond its borders. Does particularity breed contempt in the interlocked global world or does it cultivate a necessary, more local resilience to global shocks and increasingly unpredictable politics? Will the EU legal order have to bend to greater external adaptation or is its more isolated specialness, which includes its particular dependence on law, a powerful site of resistance as law generally, and international law especially, becomes more unstable in the swing from rules-based to powers-based thinking (and acting)? We return to the challenges facing law at a general level below. The point for now is to concede that there is still more work to be done in reconciling the Union as not only an autonomous system but a *particular* autonomous system with more evident openness to the external legal orders that surround it; to conceiving of compliance with external legal standards as a part of sustaining rather than as undermining the EU legal order.<sup>45</sup>

Writing extra-judicially, the President of the CJEU has tried to do this. Reflecting on Opinion 2/13, he stated that the (first) draft ECHR accession agreement ‘[failed] to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by [the EU Treaties] are governed by EU law *to the exclusion, if EU law so requires, of any other law*’.<sup>46</sup> Nevertheless, he also suggests that ‘the “autonomy” put forward in

41. Opinion 2/13, para 156.

42. eg Case C-621/18, *Wightman*, EU:C:2018:999, para 57.

43. Case C-808/21, *Commission v Czech Republic*, para 127.

44. Case C-204/21, *Commission v Poland*, para 66.

45. Importantly too, the Lisbon Treaty demands it, thinking especially of the wording of Arts 3(5), 8(1) and 21 TEU.

46. Koen Lenaerts ‘*La Vie Après l’avis: Exploring the Principle of Mutual (Yet Not Blind) Trust*’ (2017) 54 CML Rev 805 at 806, doi: 10.54648/COLA2017061 (emphasis added). See in the case law eg Opinion 2/13, para 170.

Opinion 2/13 does not refer to plain detachment. On the contrary, when it comes to protecting fundamental rights, the ECJ seeks to define the EU constitutional space without denying that EU law influences, and is influenced by, the legal orders that surround it'.<sup>47</sup> If the EU aspires to global leadership as a geopolitical union, it will need to find ways to render this openness more demonstrable.<sup>48</sup> Merely reiterating the perspective that the EU closes its legal borders to standards outside of it in order better to protect the person within it will hold up only so long as that protection is evident.<sup>49</sup> And until or unless a firmer grip is taken of the EU's internal rule of law crisis, things remain all too fragile on that front.

We would highlight further three vulnerabilities of the EU legal order's particularity in terms of the challenges that it must be properly equipped to face in supporting the Union as a geopolitical union: structural overcomplexity; constitutional underdevelopment; and the global weakening of the value of law.

First, from both inside and outside the Union, the particularity of the EU legal order is at risk because it is simply not easy to understand. It never has been. Particularity has both transmuted national and international systems and created complex balances and processes that are too convoluted to be conveyed straightforwardly. What we see recently, in the more fraught global trade environment, for example, is the turning of that complexity against the EU, as it can easily be misunderstood or even manipulated.

We suggest that what has been happening in the case law outlined at the end of Section 2 above – that is, the more deliberate blending of particularity with the generality of law and of values – marks a turning point in the maturity of both the EU legal system and its narrative of integration. In short, the newer narrative of integration should be easier to 'sell' both internally and externally. The EU is, after all, an integrated political community and its legal system mirrors values and principles that are at the heart of constitutional, liberal States; States which are, in turn, the very components of the EU, its Members. There would be States without a Union, but there can be no Union without States.

Nevertheless, care needs to be taken, too, not to dilute too far the very particularity that creates and sustains the Union's system. This is the

47. Lenaerts, *ibid.*, 807.

48. This debate has been addressed recently through analysis of Case C-778/21, *Front Polisario*, EU:C:2024:833 by Luigi Lonardo, 'A Constitutional Reading of the Judgment in *European Commission v Front populaire pour la liberation de la Saguia-el-Hamra et du Rio de oro* (Front Polisario) (C-778/21 P and C-798/21 P)' (2025) 50 *EL Rev* 335 at 343–349.

49. Discussing how the EU and its CJEU interact with both national courts and the ECtHR, see the contribution by Siofra O'Leary in this issue.

paradox that sets the challenge – that *both* particularity and generality have vital parts to play. The complexity of this particular-general structure and the balance between Member State and EU competences cannot, in other words, be *oversimplified* either.

Second, while the particular principles of the EU legal system, such as primacy and direct effect, continue to be shaped and better understood, the meaning and implications of the Article 2 values have yet to reach the stage of substantiation: of knowing what these values mean, or when breaches of them cross a threshold of legality, or ‘whose’ values they are – of how much room there really is for diversity and difference on these questions in the Union’s ‘constitutional dialogue’.<sup>50</sup> The case law underlines that ‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given *concrete expression* in principles containing legally binding obligations’:<sup>51</sup> and which, as the Court has recently added, must be complied with ‘both by the European Union and the Member States’.<sup>52</sup>

In *Commission v Hungary*, Advocate General Čapeta went beyond the ‘concrete expression’ idea by examining the threshold for breach of Article 2 TEU on its own terms.<sup>53</sup> Her perspective on ‘[t]he vision of what a good society is in the EU constitution’<sup>54</sup> furthers an important conversation about how the values of the EU, shared with the Member States, are defined and applied, and about who defines and develops them. In her view, ‘when acceding to the European Union, new Member States also accede to the constitutional choice of a good society as expressed in Article 2 TEU’<sup>55</sup> and, throughout that membership, they should face consequences when they effect a ‘negation’ of those values.<sup>56</sup> Lenaerts and Gutiérrez-Fons go further

50. AG Čapeta in Case C-769/22, *Commission v Hungary*, para 248.

51. Case C-808/21, *Commission v Czech Republic*, para 160 (emphasis added); Case C-502/19, *Junqueras Vies*, EU:C:2019:1115, para 63.

52. Case C-119/23, *Valančius*, EU:C:2024:653, para 47.

53. See eg the range of perspectives responding to these developments on *Verfassungsblog*, including Lena Kaiser, ‘From Dialogue to Discord: Some Reflections on Advocate General Čapeta’s Arguments Regarding Art. 2 TEU’ (*Verfassungsblog*, 6 October 2025) <verfassungsblog.de/opinion-hungary-advocategeneral/> (all websites last visited 19 November 2025); Narin Nosrati and Davide Tomaselli, ‘Whose Values? Rethinking the Use of Values in EU Law Through the CJEU’s “Feminist” Asylum Cases’ (*Verfassungsblog*, 16 June 2025) <verfassungsblog.de/ecj-western-values-gender/>; and Martijn van den Brink, ‘Why Bother with Legal Reasoning? The CJEU Judgment in *Commission v Malta* (Citizenship by Investment)’ (*Verfassungsblog*, 5 May 2025) <verfassungsblog.de/why-bother-with-legal-reasoning/>.

54. AG Čapeta in Case C-769/22, *Commission v Hungary*, para 157.

55. *ibid.*, para 177.

56. *ibid.*, para 237 (an idea continued and fleshed out through to para 275).

still, perhaps, in their idea that '[t]he EU endorses a new type of identity that operates outside the paradigms of the nation-State. The identity of the EU brings all Europeans together, since we can all identify with the values contained in Art. 2 TEU, regardless of our national identity'.<sup>57</sup> But they suggest, at the same time, that '[v]alue alignment must not be confused with constitutional modelling', that is 'the rule of law within the EU does not seek to impose "a particular constitutional model" to which all Member States must aspire'.<sup>58</sup> This may be what the motto 'united in diversity' meant after all.

The EU legal order seems inescapably defined through a set of paradoxes. Confronting them remains part of the delicate work of locating the optimal balance between particularity and generality, since going too far in either direction would, we suggest, undermine both the necessary particularity of the EU legal order and the necessary reckoning processes that this system must accept and go through in terms of the more general demands of a contemporary *legal* order specifically.

Third, and perhaps the most difficult challenge of the times: quite frankly, we fear not only for the rule but for the *role* of law too, for the force of law itself. And if law as concept is vulnerable, then the particularity of a system and a systemic identity both built *around* and *by* law is intensely vulnerable too.

Returning to the foundational idea of the EU as a 'Community of law',<sup>59</sup> we cannot avoid a feeling of coming full circle, at one level: of law trying to navigate political chaos and contain political excesses once again. However, now there is a difference: the fragility of respect for law – and thus of law itself – as politics seeks more to evade than be guided or restrained by law. As politics seeks to understand, never mind tackle, ecological and technological challenges at a scale that was scarcely imaginable in the 1950s. As politics seeks to excuse itself from subjection to law. As divisions then deepen along short-termism and more selfish lines. As might seeks to assert itself. As the inequities that all of this produces mount and distress.

The rule of law crisis, both internally and at the global level, is a crisis of law itself, in other words. The steadiness and the boundaries that law institutes and secures are valued much less these days: law is more of an obstacle, an inconvenience to overcome; or to ignore. For our purposes, these developments threaten the role of law as integrator.<sup>60</sup> Thus, the main risks looming

57. Koen Lenaerts and José Gutiérrez-Fons, 'Epilogue. High Hopes: Autonomy and the Identity of the EU' (2023) 8 EP 1495 at 1499.

58. *ibid.*, 1505; referring to, *inter alia*, Case C-430/21, *RS*, para 43.

59. Walter Hallstein, 'Die EWG—eine Rechtsgemeinschaft (1962)' in Thomas Oppermann (ed), *Europäische Reden* (1979) 342.

60. Julio Baquero Cruz, *What's Left of the Law of Integration?* (OUP 2018).

over the EU concern both *using* law to deal with political questions, on the one hand,<sup>61</sup> and *eschewing* law to deal with them, on the other.

The relative strength of EU law makes the content of EU policies very powerful. But the policy-oriented nature of the EU legal order<sup>62</sup> makes the EU as a legal/political structure still confused with the EU as a content creator, with its politics.

As citizens of States, we can disagree with governments and their policies. We can question their effectiveness. But doing so does not always, or even often, call into question the existence of the State or its internal or external polity-hood. The EU is still immature from this point of view: it cannot be taken for granted. Its existence continues to be justified in terms of output legitimacy. Its identity is to a great extent confused with its 'government' at any given point. Populism both inside and outside the EU fuels this phenomenon: the EU is, they scoff, a mere functional construct, it is superficial; it is entirely *dispensable*.

The narrative taking shape in the recent case law – the blending of the particularity of the EU legal order with universal values – comes across to us, however, as a promising antidote. For the geopolitical Union, this maturing of the legal order is crucial both for its effectiveness and for its functionality. It cannot, furthermore, be overstated how the fact that Member *States* are at the core of the process does not undermine the EU's particularity, but rather is the heart of it: they are creators and full partners in the shaping and sustaining of the EU system.

Let us underline too that the key constant of the entire process must endure: the individual always has been and must remain central to the EU mission. Self-identifying as a geopolitical Union should not disregard that fundamental point – that fundamental *particularity*. For without the person, there would be neither Union nor States.

61. See further the contribution by Michael Dougan and Christophe Hillion in this issue.

62. This being identified as one of the key particularities of the EU legal order, see Kaarlo Tuori, *European Constitutionalism* (CUP 2015).

