



Decolonising European Society

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Abstract

Who is recognised within the concept of ‘European Society’, and, more importantly, who or what remains unseen? This article critically examines European Society through a decolonial lens, arguing that EU law is detached from the lived and diverse realities of European Society. Drawing on the work of sociologist Manuela Boatcă, the authors propose a decolonial approach that excavates coloniality of power, knowledge and, especially, belonging within EU law to reimagine European Society. Analysing cases in migration and the rule of law, the article reveals how EU law perpetuates hierarchical structures of inclusion and exclusion, and invisibilises the liminal—often deploying “Western” norms, values, and lifestyles as gatekeeping tools, especially in post-colonial contexts. At the heart of this argument is the necessity to move beyond Eurocentric assumptions of universality, neutrality, and totality in legal scholarship, instead embracing plurality of perspective, creolisation, and reflexivity. The authors contend that European Society should not be treated as a rigid legal construct but rather as a dynamic and inclusive one that amplifies marginalised voices, acknowledges and accounts for the liminal, and critically examines the law’s inherent limitations. Ultimately, the article calls for a radical reimagining of European Society through its decolonisation—one that confronts historical injustices, disrupts entrenched power structures, and steers EU law toward a more just, equitable, accountable and reconstructive future.

Keywords: EU Law; Critical Theory; Migration; Rule of Law; Decolonial Theory; Coloniality

1. Introduction: European Society from Below?

I should like to suggest that EU legal studies suffer from a disconnect with social reality. If we need a method, it is one that allows us to reconnect with European societies as a bustle of unsettled forms of life, from both an existential and social perspective. Departing from classic institutional and constitutional approaches to EU law, while endorsing the critical turn in EU legal studies, I will argue in favor of a new “anti-transcendental” perspective.¹

Over the last year, the European Society² has attracted unprecedented public and scholarly attention, often as a place where hope can continue to exist in the face of disunity. Speaking of the

¹L Azoulai, ‘Reconnecting EU Legal Studies to European Societies’ (*Verfassungsblog*, 19 March 2024) <<https://verfassu.blogspot.de/reconnecting-eu-legal-studies-to-european-societies/>> accessed 31 January 2025.

²We capitalise European Society in this article to denote its meaning as an approach to Europe and European Union (EU) law that is characterised by a common methodological framework, binding together an epistemic community of scholars and practitioners. We distinguish here between the discussion of a European society and the project European Society which

European Society is a political act³ – it is at the forefront of the battle over and in defence of the values of the European Union. European Society is traversing scholarly lines into the courtroom; no longer a semantic exercise but a growing epistemic community that sees both scholars, practitioners and civil society in conversation. ‘This is a frontal and deep attack against the . . . European society’, Comission representative Klára Talabér-Ritz argued in the ongoing infringement proceedings against Hungary regarding its anti-LGBTQI*-Law (*Valeurs de l’Union*)⁴, drawing the lines of European Society unequivocally.⁵ Indeed, the *Valeurs de l’Union* case itself showcases that European Society transcends material boundaries and invites conversation on Article 2 TEU, which, in this view, articulates the shared nucleus of the European Society.

The contributions in this symposium embrace the concept of the European Society as a framework to grasp both the historical transformations of the Union⁶ as well as its current condition, characterised by multiple overlapping crises, contestations, and societal divisions.⁷ Armin von Bogdandy speaks of the promise of European Society, whilst Loïc Azoulai speaks of its challenges. In the broader pool of contributions, there remains significant divergence on the actual contours of the concept, both in legal and practical terms, resulting in no agreement as to whether we are collectively speaking of *a*, *the*, or even *multiple* European societies. However, the enterprise of these contributions is not to locate European Society in a specific definition but rather a fixed point of convergence for a growing epistemic community that shares the ambition to use European Society not only as a concept but as a *method*: a way of seeing both the promise and the problems of the legal, historical, political, economic, and social conditions of the all members of the European Society. In this article, we use this as a productive starting point to try to understand, echoing Ivana Isailović: ‘What, and who, is European Society for?’⁸

Many contributions in this symposium focus on conflicts and cleavages between Member States, societal groups, or vis-à-vis the outside world. Yet, they do not engage with the divergencies and conflicts of our own scholarly practice; of how we promote this unitary framework; or whose lived experiences and realities we highlight and whose we leave behind (and why). In order to avoid the risk of reproducing a homogenous vision of EU law, we argue that European Society’s normative ambition of inclusivity and heterogeneity has to be translated into scholarship and practice. This necessitates problematising not just who is *European* in the European Society but also what counts as *society* in the view of the European Society.⁹ We argue that European Society must be a space that enables, empowers, and fosters reflexivity towards difference, centering marginalised perspectives, voices, and communities.¹⁰ For this reason, we turn to a decolonial approach to law in this article.¹¹

connects this Special Issue, in line with other legal projects such as Global Administrative Law (GAL), Third World Approaches to International Law (TWAIL), or International Public Authority (IPA).

³A von Bogdandy, ‘On Meaning and Promise of European Society’, in this symposium.

⁴C-769/22 *Commission v Hungary* (*Valeurs de l’Union*).

⁵See L. Kaiser, A. Knecht and LD Spieker, ‘European Society Strikes Back: The Member States Embrace Article 2 TEU in *Commission v Hungary*’ (*Verfassungsblog*, 26 November 2025) <<https://verfassungsblog.de/european-society-strikes-back/>> accessed 31 January 2025.

⁶Von Bogdandy (n 3).

⁷L. Azoulai, ‘European Society and its Law: EU Law in light of Social Theory’, in this symposium.

⁸I. Isailović, ‘Introduction: Critical Legal Approaches in EU Law – Reflections on New Research Directions’ 15(4) (2024) *Transnational Legal Theory* 493–4–99, 493.

⁹We acknowledge that it is not possible to account for the sheer breadth of this conversation in the confines of this article alone. This article does not claim to be exhaustive but rather seeks to contribute to a burgeoning conversation at a pivotal moment for the future development of both the EU and the European Society.

¹⁰See I. Solanke, ‘Conclusion: Embedding Decoloniality in Empirical EU Studies’ in M. Madsen, F. Nicola and A. Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law’s Embeddedness* (Cambridge University Press 2022) 343–53.

¹¹On a decolonial approach to reimagine EU law and legal institutions that addresses emotions, histories, and questions of power and knowledge production, see also most recently I. Solanke, ‘Reimagining EU Law and Legal Institutions’ (2025) *EUI LAW Working Paper* 11.

In particular, we introduce three concepts from the decolonial perspective to the analysis of European Society, which are so far only in its infancy in EU legal scholarship: coloniality, liminality, and (semi-)periphery. *Coloniality*, which mainly emerges from the Latin American context, explains how patterns of power, knowledge, and being that were established during colonialism can persist long after the formal colonial rule has ended.¹² In this article, it is approached from a number of dimensions, particularly: coloniality of power, coloniality of knowledge, and, significantly, the coloniality of belonging.¹³ Coloniality is not only useful to understand how, eg, political, economic, racial, or social hierarchies persist, but also how people's identities and humanity are shaped by it. Viewed as a practice, it turns the gaze to the local, deliberating its impact in various legal spheres, for instance in EU human rights and migration law, with a structuring effect.¹⁴ Coloniality is transdisciplinary and in so doing it is intentional in 'growing an otherwise'.¹⁵

Liminality, a term used across disciplines, describes the indeterminate, material, and immaterial spaces of 'in-between' in which people exist.¹⁶ Liminality is used to analyse how individuals, communities, or states navigate between their own, local legal system and a dominating, colonial legal structure. The agency and identities of people are shaped by those ambiguous spaces, which often result in further marginalisation of the 'Other'. Liminal spaces are sites of learning and contestation. Scholars continue to deliberate the 'in-between' also as a space for resistance by rejecting imposed binaries.¹⁷ In EU law, liminality has been applied to EU free movement law¹⁸ and Ukraine's EU accession in the wake of the Russian invasion.¹⁹

Semi-periphery is conceptualised within Immanuel Wallerstein's World Systems Theory and refers to countries or regions that fall between the core (wealthy, industrialised, and dominant world economies) and the periphery (poorer, less developed, and often dependent economies).²⁰ Decolonial scholars have expanded the concept to consider broader core-periphery dynamics, including the coloniality of power.²¹ Semi-peripheral countries or regions experience a liminal, 'in-between' status: they are agents but also dominated; they have histories of colonisation themselves but also exploit other regions; they are often sites of mixed or hybrid cultural modernities where Western and local traditions have blended into each other. In EU law, scholars have analyzed how law is applied or unfolds differently in the periphery, including in terms of constitutionalism.²² Recent work adopting a core-periphery lense brings the Member States from

¹²A Quijano, 'Colonialidad y Modernidad/Racionalidad' 13(29) (1993) *Perú Indígena* 11–20; E Dussel, *The Invention of the Americas: Eclipse of "the Other and the Myth of Modernity"* (Continuum 1995); WD Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011).

¹³The term coloniality is outlined by Nelson Maldonado Torres, in the following terms: 'Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism'. See N Maldonado Torres, 'On the Coloniality of Being' 21 (2–3) (2007) *Cultural Studies* 240–70.

¹⁴See, for instance, T Spijkerboer, 'Coloniality and Recent European Migration Case Law' in V Stoyanova and S Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022) 117–38.

¹⁵WD Mignolo and CE Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press 2018) 101.

¹⁶H Bhabha, *The Location of Culture* (Routledge 1994); WD Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press 2000).

¹⁷Bhabha (n 16); G Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (Aunt Lute Books 1987).

¹⁸F de Witte, 'The Liminal European: Subject to the EU Legal Order' 40 (2021) *Yearbook of European Law* 56–81.

¹⁹F Bossuyt, L Amoris and M Riabchuk, 'The Subaltern Strikes Back, or how Ukraine is Claiming Agency from Russia and the European Union', 33 (4) (2024) *European Security* 644–64.

²⁰I Wallerstein, 'Semi-Peripheral Countries and the Contemporary World Crises' 3 (4) (1976) *Theory and Society* 461–83.

²¹M Boatcă, 'Semi-Peripheries in the World-System: Reflecting Eastern European and Latin American Experiences' 2 (2) (2015) *Journal of World Systems Research* 321–46.

²²D Kukovec, 'Constitutionalism and Powerlessness' in J Komárek, *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 356.

the 2004+ enlargement and accession candidates into scholarly focus.²³ It problematises the semi-periphery in Central, Eastern and Southern Europe, and includes countries such as Hungary, Poland, Romania, Bulgaria, and Malta.²⁴

The value of the decolonial perspective is that it offers options towards alternative ways of understanding the role that law plays in the European Society by highlighting paradoxical features of the European Society and in-/exclusion through law, including that: i) inclusion is conditional, ii) exclusion is structural and iii) liminality is invisible. The values it proclaims to be ‘founded on’ – democracy, human rights, equality, and the rule of law – emerge from a history entangled with colonialism and this inherent coloniality must be at the very least acknowledged.²⁵ Framed as universal, these values reflect the paradoxes of inclusion and exclusion, as set out above (ie, that inclusion is conditional and exclusion is structural) in the EU’s legal and political order. Creating European Society is thus a process without a fixed, utopic endpoint. Where European Society is boundary-creating, it becomes imperative to understand who and what it is excluding and taking in, and who is in-between.²⁶ What this means to us is simple: we must be able to view European Society from below, focusing on the ‘Otherised’ members of the European Society to account for and act on different ways of knowing.²⁷

As critical scholars, we acknowledge that (EU) law won’t save us. Yet, we reject the claim that the promise of a society based on fundamental values for all included in Article 2 TEU is irredeemable.²⁸ Instead, in line with others in this project, we take the promise of Article 2 as our common (scholarly) responsibility and obligation by opening options for contention with it. This requires both a methodological and substantive reexamination of EU law towards the rehabilitation of the marginalised members of European Society. Mostly, it necessitates a change in scholarly practice – the way we *speak* EU law. A minimal and maximal approach can be followed; neither can come to fruition all at once or have a utopic end point²⁹: A minimal, decentering approach requires a focus on overlooked and excluded perspectives, experiences, and communities in our scholarly analysis, charting how law reproduces hierarchisations, dominations, and exclusions. This is where most of the emerging critical analysis of EU law takes place. A maximalist approach, which the European Society invites us, at least implicitly, to undertake through its orientation towards Article 2 TEU, would see disruption of the dominant paradigms of EU law. It would look at its mono-cultural, totalising, and homogenising imagination and offer a means of seeing *otherwise* by tapping into its emancipatory potential. The approach taken in this article builds on intersectional work, particularly in EU anti-discrimination law³⁰ which aims for law to be sensitive to accommodating the diversity and plurality of the people and communities that make up the European Society.

²³Kukovec argues that without contention with the conditions of the periphery, the ‘universal narrative of the Union’ cannot ever hope to break with a universalisation of the ‘particular of the centre’, *ibid.*, 351. Recent work looks at constitutional heritage and blindspots in the mental mapping of European constitutionalism: J Scholtes, ‘The Venice Commission and the Mental Map of European Constitutionalism’ (2025) *Hague Journal on the Rule of Law*.

²⁴B Iancu, ‘Core, Periphery, and Universals in Rule of Law Promotion: Contextual (Dis)incentives, Conceptual Shifts’ 16 (2024) *Hague Journal on the Rule of Law* 465–78; D Kukovec, ‘Law and the Periphery’ 21 (3) (2015) *European Law Journal* 406–28; J Orlando-Salling, ‘The Digital Services Act in the European Peripheries: Critical Perspectives on EU Digital Regulation’ 3 (4) (2024) *European Law Open* 849–64.

²⁵See also the contributions in H Eklund (ed), *Colonialism and the EU Legal Order* (Cambridge University Press 2025).

²⁶E Balibar, *We, the People of Europe?: Reflections on Transnational Citizenship* (Princeton University Press 2004).

²⁷On different ways of ‘knowing’ in EU law, see MW Hesselink, ‘Knowing EU Law: how Epistemic and Ontological Commitments Shape Different Understandings of European Law and why it Matters’ 6 (2024) *European University Institute Working Paper*.

²⁸On the transformative potential for Article 2 for a democratic European Society, see also A von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024).

²⁹This is in line with Orbie’s differentiation between decentering and decolonising, see J Orbie et al, ‘Editorial: Decolonizing Rather Than Decentring “Europe”’ 28 (1) (2023) *European Foreign Affairs Review* 1–8.

³⁰See, for instance, D Schiek and J Mulder, *Intersectionality in EU Law: A Critical Re-appraisal*, in A Lawson and D Schiek (eds), *European Union Non-Discrimination Law and Intersectionality* (Routledge 2011) 259–74; D Schiek, ‘Revisiting

A decolonial reading³¹ of European Society is offered over three parts. First, we reflect on how European Society as a method is currently applied in this ‘common scholarly navigation’.³² In particular, we propose moving through European Society using the decolonial approach, highlighting the work of Manuela Boatcă and Anca Parvulescu.³³ In the second step, we challenge the Eurocentric understanding of European Union (EU) law that underpins the European Society project.³⁴ Third, we seek to problematise how EU law currently structures *being* and *belonging* in and to European Society, particularly in the realms of migration and in invisibilising the (post-) colonial periphery using recent case law of the CJEU. European Society is *one* way of many ways – it is a space and place of many existences and realities – but it is not a panacea, nor can it ever be a universal condition. A positive understanding of society and belonging is here put forward by gazing at the periphery and the invisibilised by proceeding to build method ‘from the bottom up and from the inside out’.³⁵

2. A decolonial approach to the law of the European Society

For European Society to function as a method to capture the transformation of the EU over time, it has to be inclusive of the methodological reflections that have progressively emerged, in particular in line with the ‘critical turn’ of EU legal studies in the last decade.³⁶ In this section, we first elaborate on why we chose, among the numerous critical postures available, a decolonial approach. Secondly, we introduce a decolonial understanding of society-formation, namely Boatcă and Parvulescu’s idea of ‘creolization’. Finally, we highlight how EU legal scholarship has so far applied decolonial approaches to understand how the European Society has historically evolved.³⁷

A. Critical approaches and the European Society

European Society has not (yet?) explicitly adopted a critical mission. Centering, confronting and conversing with conflicts between Member States, and across society, does not come naturally to EU law and legal scholarship. This assumption faces a direct challenge from the multifaceted (not binary) cleavages witnessed in Article 2 TEU discussions.³⁸ Critical approaches, arguably a broad church encompassing classical critical theory but also more modern varieties such as feminist, Marxist, critical race or postcolonial approaches, pose the more obvious starting point for accommodating the inherent plurality of Article 2. The decolonial approach does not see critical

Intersectionality for EU Anti-Discrimination Law in an Economic Crisis – A Critical Legal Studies Perspective’ 2 (2016) *Sociologia del Diritto* 23–44; I Solanke, ‘The EU Approach to Intersectional Discrimination in Law’ in G Abels et al (eds), *The Routledge Handbook of Gender and EU Politics* (Routledge 2021) 93–104. See also most recently on the importance of intersectionality in the decolonial approach to EU law, N Dube, ‘The Unbearable Whiteness of EU Law’ (2025) EUI LAW Working Paper 12.

³¹In a similar line, see L Zevounou, ‘For a Postcolonial reading of the EU’ (*Verfassungsblog*, 21 March 2024) <<https://verfassungsblog.de/postcolonial-reading/>> accessed 31 January 2025.

³²Von Bogdandy (n 3).

³³M Boatcă and A Parvulescu, *Creolizing the Modern: Transylvania across Empires* (Cornell University Press 2022).

³⁴See, for instance, J Fowkes and M Hailbronner, ‘Decolonizing Eastern Europe: A Global Perspective on 1989 and the World it Made’ 17 (2) (2019) *International Journal of Constitutional Law* 497–509.

³⁵M Boatcă, ‘Thinking Europe Otherwise: Lessons from the Caribbean’ 69 (2020) *Current Sociology* 389, 389.

³⁶See, for instance L Azoulay, ‘Editorial: The Critical Turn of EU Legal Studies’ 52 (2015) 881–8 and the contributions on the special issue on ‘Critical legal approaches in EU law’ in *Transnational Legal Theory* (2024) and the symposium on ‘Controversies over Methods in EU Law’ in *Verfassungsblog* <<https://verfassungsblog.de/category/debates/controversies-over-methods-in-eu-law-debates/>> accessed 31 January 2025.

³⁷See D Ashiagbor, ‘Decentering Europe in EU social law scholarship’ 2 (3) (2023) *European Law Open* 479–83.

³⁸P Bárd et al, ‘Treaty Changes for the Better Protection of EU Values in the Member States’ 3 (4) (2025) *European Law Journal* 499–519.

theory as its starting point. Being transdisciplinary, it does not derive from a single discipline but emerges from lived struggles, drawing from the intersections between scholarship and experiences of the subjugated towards reciprocal recognition.³⁹

Päivi Neuvonen has advocated a 'critical theory of society' that helps to advance the study of EU law. She argues that this allows 'normative critique' to 'coexist with a heightened sensitivity to methodological and epistemological choices that underpin critical projects in law'.⁴⁰ Neuvonen maps the various critical responses to the crises of the EU that triggered both rejectionist and revisionist critiques in scholarship, lamenting that critical investigations of EU law frequently stay at the substantive level, thereby neglecting engagement with underlying paradigms, such as the functionalist or instrumentalist view on the role of law that underpins the EU. Her 'guiding premise is that EU law deserves to be critiqued better', offering critical theory as a means by which to achieve an elevated level of critique.⁴¹ This argument resonated with us immensely. Echoing Neuvonen, the factors that continue to 'hinder more thoughtful critical engagement in EU law scholarship', we agree, need to be deconstructed but also contended with.⁴²

When approaching empirical cases, i.e. CJEU cases that structure belonging, we found that critical theory did not really offer concrete tools - neither from a conceptual nor methodological perspective - to engage with case law productively but also with sensitivity towards subjectivity. Critiques of critical theory highlight its Eurocentric bias, its failure to address the liminal and peripheral, and its imperial blindspots.⁴³ It is a 'starting point'⁴⁴ of many that continues to reproduce the same epistemological frames, which, by design, falls short of reflecting on structural coloniality. Critical theory has been openly challenged as overlooking plurality in '... the geographic and epistemic locations of critical theory production', falling into the same trap of totalisation. Critical legal studies, as a subset, is informed by the civil rights history of the United States. However, even in this context, it has been deemed significantly limited for similar reasons, including for its failure to transcend the public/private binary.

The decolonial approach, on the other hand, emerged mostly from a different context, Latin America where heterogeneous societies have historically been shaped by layered coloniality and forms of imperial power. A decolonial approach allows scholars to analyze colonialities of knowledge, not just power; reject binaries, such as national vs. European; and open spaces for understanding the dynamics of EU law as it unfolds from the centre to the (semi-)periphery. Part of the process of decolonising European Society as a method and legal concept is through reconstruction of the historical narratives that inform it - not as a separate subset of legal history but by weaving historical analysis into legal scholarship as well as practice. Viewing the way knowledge is controlled and directed is an intimate part of this process.

The most obvious starting point for a decolonial reading of the European Society concerns what it views as 'Europeanness'. Distinguishing who is 'European' in the Law of European Society is a historically, politically and socially - not just legally - complex business. As Azoulai contends:

EU law is designed as a language and normative structure aimed at protecting the supranational structure, distancing it from the chaotic terrain of power relationships, social conflicts, and ideological struggles.⁴⁵

³⁹Mignolo and Walsh (n 15).

⁴⁰PJ Neuvonen, 'A Way of Critique: What can EU Law Scholars Learn from Critical Theory?' 1 (1) (2022) *European Law Open* 60-88, 62.

⁴¹*Ibid.*, 85.

⁴²*Ibid.*

⁴³M Boatcă, 'The Periphery Writes Back: Worlding the Colonial Experience' 13 (3) (2023) *Global Dialogue* 20-2, P Cipollitti Rodríguez, 'Totality and Exteriority: Categories for Decolonial Critical Theory' 13 (3) (2023) *Global Dialogue* 22-4.

⁴⁴See also S Moyn, 'Reconstructing Critical Legal Studies' 134 (1) (2024) *Yale Law Journal* 77-134.

⁴⁵L Azoulai, 'The Law of European society' 59 (2022) *Common Market Law Review* 203-14, 204.

What does it mean to speak the language of EU law? Not speaking a language is immobilising, alienating, and marginalising but in order to learn a language what is required is not just equitable access but resources and socialisation.⁴⁶ This distance and protectionism, we argue, is resulting in gatekeeping and an increased tendency towards preserving an undifferentiated and rigid approach to viewing European society. In this rigid perception of EU law, law is depicted as a transcendental site of salvation from the ‘chaotic terrain’ of the nation-state, a utopia that should be impermeable to critique.⁴⁷ But EU law cannot ignore or render itself unresponsive to the realities it is regulating. We contend that this is also not, and should not be, its function. To effectively address the issue of belonging in European Society, we must go beyond simply criticising or identifying existing conditions. Indeed, part of the way towards the deconstruction of ‘European’ as a normative category is critically examining *who* is asking the question of belonging, *who* is responding to it and *why*.

Leaning into self-reflection, we examined our own experiences as European citizens. We were sitting at the same table, writing this paper in an EU Member State, Denmark – foreign but familiar to us both – and, despite our shared Europeanness, we struggled to speak this so-called common ‘language’. Our perspectives diverged at nearly every turn as we grappled with the literature and case law. Even with our perceived common positionalities as well-educated, privileged, socio-economically and politically aligned young women in our mid-thirties, we could not detach from a central cleavage of the EU: its core-periphery dynamic and how this manifested itself in legal, social and political terms. After all, one of us comes from the perceived core of Europe – Germany – and the other from the, often overlooked, periphery of Europe – post-colonial Malta. The divergence demonstrated that the cleavage was also a discrepancy in how we identified with the purported linearity of the (his)stories of Europe. Positionality, our biases and the spaces we viewed European Society from, mattered in how we perceived the promise and potential of European Society.

To bridge the gaps between us, we initially attempted to take solace in the language of EU law⁴⁸ or EU values;⁴⁹ a common platform for dialogue in which we were both trained. Conversing with the cases chosen to evidence our arguments, we realised that our inherent assumptions were different. One of us was born European, the other is a European by naturalisation. Our socializations, narratives, contexts, and, critically, the lived experience of EU law and how we interpreted it differed in practice once applied to real-life contexts. A prominent consideration was whether European Society can accommodate this plurality and acknowledge our different ways of belonging – notwithstanding whether we speak of *a*, *the*, or *multiple* European societies.

Adopting Manuela Boatcă’s bottom up and inside out approach, we argue that European Society’s utility and effectiveness are determined by its ability to function as a discursive and dialogical method that acknowledges our respective histories and present conditions (and beyond).

⁴⁶On the spatial politics of theoretical knowledge, see for example, T Jazeel, ‘The Geography of Theory: Knowledge, Politics and the Postcolonial Present’ in A Teverson and S Upstone (eds), *Postcolonial Spaces: The Politics of Place in Contemporary Culture* (Palgrave Macmillan 2011) 164–84.

⁴⁷The biblical connotations are hard to ignore. As Pin argues, ‘Postwar European constitutionalism developed a strong skepticism toward earthly powers and called for transcendent legal values to balance them’, see A Pin, ‘Christianity and Law in Europe Today’ in J Witte Jr. and R Domingo (eds), *The Oxford Handbook of Christianity and Law* (Oxford University Press 2024). See also J Komárek, ‘Why Read *The Transformation of Europe* Today? On the Limits of a Liberal Constitutional Imaginary’ in J Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 122.

⁴⁸Azoulai (n 36).

⁴⁹von Bogdandy (n 3).

B. Creolising being in the European Society

A decolonial approach to European Society requires not only a critical reflection on what is meant by 'European' in this project but also on our understanding of society and in the lived realities of the people that comprise it. Legal scholarship alone is not best suited to propose a fully representative understanding of society beyond the law's role, including legal actors, processes, and institutions. Engaging with European Society must be trans- and interdisciplinary; viewing society as a whole rather through its component parts.

The focus on the classical canon of German, French, and Italian philosophers and social theorists, primarily male and white, has been dominating our discussions in this overall project. A decolonial (legal) reading relies on a broader vision of society than is currently developed in the social sciences. It is not something that can be *applied*. The work of sociologist Manuela Boatcă, particularly on creolisation, centralises the plurality of conditions extant in Europe, offering us pathways to contend with the breadth of European Society, see it differently and 'think Europe otherwise'.⁵⁰ From this perspective, understanding Europe is an exercise in looking at its points of overlap and intersection, as well as to the people who constitute it. To creolise the interpretation of law of the European Society, it must be seen as a discursive space capable of engaging with its (post)colonial borders.⁵¹

Boatcă, born and raised in Bucharest, Romania, currently holds a professorial Chair at the University of Freiburg in Germany. Her work has consistently challenged the epistemological assumptions of modernity, often viewed positively, particularly in critical social theory, while highlighting its neglected 'dark side': coloniality and its historical continuities in and beyond the European context.⁵² She argues that

[m]aking the colonial and imperial experience central to the analysis of the historical reality and the current materiality of power relations is still the exception rather than the rule in an overwhelmingly uncritical, presentist and Eurocentric social science from which non-Western, non-European, and non-White experiences have long been erased.⁵³

Boatcă's is not a reductionist critique. Towards 'thinking Europe otherwise',⁵⁴ she draws lessons from the comparative counterpoint of the Caribbean. The Caribbean does not only depict a particularly fitting example for a multi-cultural, multi-linguistic, and multi-religious regional society, but it is also intimately linked to European colonialism, both in history and the present through the Kingdom of the Netherlands, the United Kingdom and France. Together with literary scholar Anca Parvulescu, their groundbreaking work examines 'creolising' Europe by drawing on the Caribbean experience to address such plurality, inter-imperiality, and coloniality.

In 'Creolizing the Modern: Transylvania Across Empires', Boatcă and Parvulescu zoom in on Transylvania's rich and complex historical, political, economic, and social architecture.⁵⁵ Transylvania, a region that has changed national boundaries several times in the past century, is in Romania - an EU Member State on the political, economic, and social semi-periphery of European Society. Romania also borders Ukraine where the war waged by Russia can be seen as a fight that directly foregrounds belonging to and within the European Society. Boatcă and Parvulescu build on the concept of 'inter-imperiality', which seeks to historicise colonialism,⁵⁶ to account for Transylvania's continuous shifts in imperial domination and structural

⁵⁰Boatcă (n 435).

⁵¹*Ibid.*, 389.

⁵²M Boatcă, 'A Discussion on Coloniality and Global Social Theory' 18 (7) (2024) *Global Sociology Compass* 1–9.

⁵³Boatcă (n 43).

⁵⁴Boatcă (n 35).

⁵⁵Boatcă and Parvulescu (n 33).

⁵⁶L Doyle, 'Inter-Imperiality: Dialectics in a Postcolonial World History' 16 (2) (2014) *Interventions* 159–96.

semi-periphery, as well as a ‘Transylvanian method’ to study how we can trace imperial dominations in rural, multi-ethnic, and multi-linguistic spaces. They focus on (folk) literature as a source for understanding society, its multi-directionality as well as the intersecting experiences of women, religious, and ethnic minorities during the processes of shifting imperial authorities. Importantly, they argue that even in Europe, Transylvania is not a unique regional experience but is exemplary of a broader effort towards ‘creolising Europe’ as a decolonial approach. Creolising is therefore not only an attempt to decolonise the fundamental concept and theories of Europe but also provides a new methodology to understand how societies are formed at a more local level:

The project of creolisation involves the rethinking, reframing, and creative recomposition of the received categories structuring our respective disciplines—from Europe to Transylvania, and from the modern to the comparative method. This necessary reframing starts with an analysis of the power relations that have shaped these entities in the context of both coloniality and inter-imperality. As articulated by a growing critical literature, this deployment of the concept of creolization contests the prevailing notion of a geographically, culturally, religiously, and racially coherent entity: Europe. (...) Creolizing Transylvania therefore represents an instance of what Françoise Lionnet and Shu-mei Shih call “the becoming theory of the minor”—thinking through and with invisible, peripheral, or subaltern formations.⁵⁷

Turning to constitutionalism, gazing at Article 2 TEU, we see Boatcă and Parvulescu’s appeal for creolisation in the European Society as a productive premise of any attempts at inclusive constitutionalism. Shifting from an entrenched European constitutional imagination that advances universality, unitarism and mono-culturality, creolising Article 2 enables a relational rather than fixed interpretation.⁵⁸ This imagination has perpetuated a homogenised and hierarchical understanding of Europe, effacing its inherent diversity and the complexities of its history. Creolisation of European Society embraces plurality and acknowledges the intertwined, often contentious historical, political, economic, and social forces that shape it. It also calls into question the idea that Article 2 values are already settled rather than continuously remade. This approach sees diversity not as a challenge to be overcome but as a defining and enriching characteristic. In this context, creolisation recognises that European Society is not a monolithic or fixed entity, but a fluid, historically contingent space formed through centuries of interaction, conflict, migration, and negotiation with those excluded and invisibilised from dominant narratives.

Responding to Damjan Kukovec’s call to examine how individuals are structurally subordinated through the invisibilisation of the periphery, a ‘creolised’ European Society recognises and incorporates the perspectives, practices, and conditions emerging from peripheral or liminal spaces.⁵⁹ The impact of this differentiation is felt in both EU private⁶⁰ and public law⁶¹ and in the genealogical anxieties that underpin them. Creolising Article 2 TEU means seeing EU values not as fixed European exports, but as hybrid constructs that are constantly reshaped in the dialectical spaces where the individual, national and supranational intermingle.

⁵⁷Boatcă and Parvulescu (n 33) 4.

⁵⁸On constitutional imagination, see M Loughlin, ‘The Constitutional Imagination’ 78 (2015) *Modern Law Review* 1, 3 who describes it as follows: ‘The constitutional imagination refers to the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape – and re-shape – political reality. The phrase draws our attention to the capacity of constitutions to offer alternative perceptions of reality, revealing new ways of conceiving the boundaries of practical political action’.

⁵⁹Kukovec (n 22).

⁶⁰See MW Hesselink, ‘EU Private Law Injustice’ 41 (2022) *Yearbook of European Law* 83–116.

⁶¹See S Rehling Larsen, ‘European Public Law after Empires’ 1 (1) (2022) *European Law Open* 6–25.

C. Law and belonging in the European Society

Anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and by mitigating the backwardness of the less favoured

Preamble, Treaty of Rome

Coloniality is systemic in the European legal order; as is the distinction of the ‘backward’ peripheries. Decolonial scholars have examined the pervasive influence of Eurocentric ideologies in shaping legal frameworks, reasoning, analysis, narratives, and resultant epistemic engagement.⁶² The law here is seen as a vehicle towards the perpetuation of hierarchies of power and exclusion, privileging Western norms; marginalising alternative legal traditions, and reinforcing the colonial logics embedded within modern legal systems.⁶³

In this context, several decolonial legal scholars have analysed the language of EU law, delving into its etymological roots and attempting to decode it. Most recently, Hanna Eklund took her readers back to the beginning - to the founding aspirations of the Treaty of Rome and its symbolic opening chapeaux of ‘the foundations of an ever closer union among the European peoples’.⁶⁴ The document highlighted the transformative potential of European society. However, as Eklund demonstrates, the term ‘European peoples’ encapsulates an internal effort to achieve unity within Europe while defining its exclusionary boundaries:

The drafting of the categories of peoples, inhabitants and workers in different ways relates to the colonial legal distinctions between people who were considered ethnically and racially European citizens and people who were not but who were subjected to, or were citizens of, a member state.⁶⁵

As Eklund suggests, this was achieved methodically. It identified an ‘Other’ and, more significantly, perpetuated a colonial logic that ‘employs an ethnic and racial understanding of the nation to establish legally distinct categories of citizen’.⁶⁶ By examining the, then-colonised, populations in the overseas countries and territories – a term rooted in French colonialism – and the handling of colonial issues, Eklund illustrates how the Treaty of Rome’s foundational context (or birth defect) set a precedent for how the EU has ‘regulated people throughout its history’.⁶⁷ Eklund’s work sets the tone for how EU law structures belonging to the European Society as predicated by the assumption of equality before the law of the European society it sees.

The boundaries of in-/exclusion between peoples and peripheries are inscribed into the foundational blueprint of EU law, reinforcing coloniality. This is evident *within* Europe as the now infamous *Dano* case demonstrates.⁶⁸ Here the CJEU allowed Germany to refuse the unemployed

⁶²See for instance, H Kundnani, *Eurowhiteness: Culture, Empire, and Race in the European Project* (Hurst 2023).

⁶³See for instance, H Eklund, ‘Colonialism and EU Law: Critique and Future’ (*Verfassungsblog*, 21 March 2024) <<https://verfassungsblog.de/colonialism-and-eu-law/>> accessed 31 January 2025.

⁶⁴H Eklund, ‘Peoples, Inhabitants, and Workers: Colonialism in the Treaty of Rome’ 34 (4) (2023) *European Journal of International Law* 831–54.

⁶⁵Eklund (n 64) 834.

⁶⁶*Ibid.*, 844.

⁶⁷*Ibid.*, 834.

⁶⁸See, for instance, E Dück, Z Weisner and E Thevenin, ‘Female, Deserving, and European? The Changing European Migration Discourse in the Face of the Russia-Ukraine War’ 66 (2024) *Politische Vierteljahresschrift* 101–1024; D Krivonos, ‘Russian colonialism, Eastern Europe, and global anti-colonial struggles’ (*LeftEast*, 13 April 2023) <<https://lefteast.org/russian-n-colonialism-anti-colonial-struggles/>> accessed 31 January 2025; A Oleart and J Roch, ‘The Colonial Imaginary of “Europe” in the EU’s Asymmetrical Response to the Russian and Israeli Aggressions: Ukraine as a Member of the “Family” Whilst “Othering” Palestine’ (2025) *Journal of Common Market Studies* 1–24.

mother Ms Elisabeta Dano – a Romanian national – social assistance benefits as she did not meet the criteria laid out under Article 7 of Directive 2004/38. This rendered her incapable of relying on equal treatment per Article 24(1) of the Directive.⁶⁹ While this decision has been heavily criticised by EU migration lawyers in general,⁷⁰ the Court's re-narration of the circumstances of the case is particularly revealing. Floris de Witte unpacks the Court's use of loaded 'heavy narration' and the invisibilisation involved when it bypasses proportionality analysis to frame Ms Dano as lacking self-sufficiency.⁷¹

Echoing imperial policies of assimilation viewed and practised by European empires, the Court presents Ms Dano's 'inherent flaws'.⁷² It invisibilises the intersecting precarity of her circumstances (her gender, ethnicity, care work, socio-economic status and material dependence on her sister) on the grounds that these qualities do not fit into a homogenised archetype it intimates should be afforded protection as a European citizen.⁷³ The judgement is political and exhibits coloniality of power, being and belonging (and gender) in responding, not by bolstering the integrity of the principle of proportionality, but by eroding it – thereby preserving the solipsistic bind that 'economically inactive citizens may only apply for benefits if they have sufficient resources to support themselves'.⁷⁴ Sylvie Da Lomba and Rebecca Zahn, drawing on Edward Said's concept of 'Orientalism', illustrate how to create spaces with the outcome of the *Dano* judgment. Using a post-colonial lens, they compellingly expose the underlying assumptions and biases rooted in hierarchisation and otherisation within Europe.⁷⁵

Both Eklund's historical research and the discussion of the *Dano* case illustrate how EU law is creating and reaffirming coloniality both material and epistemological. Built on exclusionary, civilisational yardsticks, coloniality sets in motion a cycle of violence that reinforces liminality experienced by the European non-citizen or an ethnic minority from the semi-periphery. Boatcă and Parvulescu's approach applied to *Dano* adds an additional layer to the analysis, contextualising the entanglements within European Society it exposes. The unitary and mono-cultural view of the 'European' deployed in this case serves as a loaded marginalisation of the 'Other' within a homogenised and hierarchical understanding of Europe. Furthermore, the Court's narrow and desensitised interpretation lays bare a civilisational yardstick and assumption of Eastern European mobility. It makes clear what it determines as the model European citizen in this context, making clear what mobility as part of European integration is there to sustain and exclude. Coloniality here is viewed through the narratives and hierarchies that root differentiation in EU law but also through narrational choices that affect society as a whole. Applying the insights of Boatcă and Parvulescu demonstrates how discrimination is not an individual problem to be remedied by legal intervention, but an act of marginalisation or invisibilisation that seeks to flatten disparities in identities and histories of European Society to create a totality and the fiction of the whole.

In the following section, we analyse how recent case law of the CJEU has struggled to accommodate this type of plurality.

⁶⁹Case C-333/13 *Elisabeta Dano, Florian Dano v Jobcenter Leipzig* (2014) EU:C:2014:341, para 81–2.

⁷⁰See, for instance, A Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (Springer 2016).

⁷¹de Witte (n 17).

⁷²S Belmessous, *Assimilation and Empire* (Oxford University Press 2013) 27. See also J Orlando-Salling, 'Constituting Nationhood: Spiritualism, Language and Maltese Constitutionalism' in J Stanton and T Borg, *The Constitution of Malta at Sixty* (Kite Publishers 2024).

⁷³de Witte (n 18).

⁷⁴S Da Lomba and R Zahn, 'Post-enlargement (free) Movement in the EU: Who Really Counts as EU Citizen? Understanding *Dano* through the lens of Orientalism' 32 (4) (2023) Griffith Law Review 387–409.

⁷⁵*Ibid.*, 397.

3. Examining coloniality of belonging⁷⁶

Europe's coloniality *vis-à-vis* its 'Others' outside the EU has attracted increasing scholarly attention.⁷⁷ In isolated but heavily scandalised situations, it even triggered public debate – a case in point being the backlash in 2022 against then-EU High Representative for Foreign Affairs Josep Borell who described Europe as an idyllic 'garden' of prosperity and the rest of the world as mostly a 'jungle'. However, the persisting coloniality inside the legal, political, economic, and social structures of the EU has not yet triggered the same scrutiny, at least not in legal scholarship. This internal coloniality, the coloniality of belonging, the differentiation it yields and tropes it reproduces, will be discussed in this section.⁷⁸

A. Migration

In the European Society, belonging is primarily, though certainly not exclusively, structured through laws on citizenship, asylum, and mobility, such as freedom of movement. Narratives of open borders, Erasmus youth exchanges, and regional mobility across national jurisdictions have shaped our vision and the aesthetic of Europe as porous – boundaryless and boundless, even. Seen from a creolised standpoint, this narrative has never been wholly accurate, speaking to the experiences of some, while overlooking many others.⁷⁹ At the time of writing this article, we observe the inclusion of Romania and Bulgaria into the Schengen Area, 17 years after they joined the EU and more than a decade after both countries had fulfilled all required criteria.⁸⁰ The legal infrastructure of Schengen, its material structure and cultural identity,⁸¹ has thus shaped how Romanians and Bulgarians experienced European Society in their everyday life – being part but effectively relegated to a second class without full equality in freedom of movement. Strikingly, the news of full admission to Schengen on 1 January 2025 in international media was accompanied by a short video showing that the first to cross the now open Hungarian–Romanian border was a stray dog, with the border guards clapping, and international commentators asking, tongue in cheek, 'But does he have a Schengen visa?'⁸²

⁷⁶On the coloniality of belonging in the context of EU migrants in the United Kingdom, see S Varriale, 'The Coloniality of Belonging' in S Varriale, *Coloniality and Meritocracy in Unequal EU Migrations Intersecting Inequalities in Post-2008 Italian Migration* (Bristol University Press 2023) 87–112.

⁷⁷See, for instance, F Barbioux and D Bouris, 'Decentering Europe in Union Foreign Policy: Addressing Colonial Dynamics in EU–Algeria Relations' 63 (4) (2024) *Journal of Common Market Studies* 1138–157; ASM Alcazar III, C Nessel and J Orbie, 'Decolonising EU Trade Relations with the Global South' 19 (2) (2023) *Journal of Contemporary European Research* 181–206.

⁷⁸Though not further deliberated herein due to constraints of space, this point is connected to the heated debates currently underway following the judgement in the *Commission v Malta* (Investment Citizenship Scheme), which Kochenov described as a 'neo-nationalist' by the ECJ, allowing for a 'high degree of politicisation' and an institutional power grab that sees a 'robust departure from the rule of law' towards arbitrariness – a rule *by* law 'invented' by the ECJ. A new illiberal conception, Kochenov argue, forces through 'a totalitarian version of belonging . . . and for the first time at the supranational level of the law' see D Kochenov, 'Never Mind the Law, Again: *Commission v Malta* (C-181/23)' (SSRN, 29 April 2025) <<https://ssrn.com/abstract=5250707>> or <<https://doi.org/10.2139/ssrn.5250707>> accessed 20 July 2025. For the opposite view, see LD Spieker, 'It's solidarity, stupid! In defence of *Commission v Malta*' (*Verfassungsblog*, 7 May 2025) <<https://verfassungsblog.de/its-solidarity-stupid/>> accessed 20 August 2025.

⁷⁹See for instance the fate of EU labor migrants, A Loxa, 'EU Law, Migration and Racial Capitalism: Encounters at the Neoliberal EU (b)order' 24 (4) (2024) *Nordisk juridisk tidsskrift* 11–36; A Schrauwen, 'Essential, Invisible, Discriminated and Exchangeable: Labor Migrants in the EU' 14 (4) (2024) *Transnational Legal Theory* 572–90.

⁸⁰Despite expansion of the Schengen Area, several Member States have reintroduced border controls often levelling 'security concerns' as the reason, see Laura Dubois, 'Schengen anniversary overshadowed by returning border checks' (*Financial Times*, 13 June 2025) <<https://www.ft.com/content/6bc49946-d611-4f9d-94c7-3c0573ee467>> accessed 23 July 2025.

⁸¹See WH Byrne and T Gammeltoft-Hansen, 'Untangling the Legal Infrastructure of Schengen' 9 (1) (2024) *European Papers* 157–77.

⁸²This takes us back to the ambitions expressed in the preamble of the Treaty of Rome, with its founding intent to aspire to 'mitigate the backwardness of the less favoured', rooting the distinction between the core and the periphery into its founding moment.

In citizenship and asylum law, coloniality emerges most clearly through legal criteria that regulate (conditional) inclusion and (structural) exclusion, simultaneously invisibilising those who occupy liminal spaces.⁸³ Recent scholarship in EU migration law has captured the glaring structural disparities between the EU citizen and non-citizens, both at the borders⁸⁴ and, notably, inside Europe.⁸⁵ EU migration law is not simply blind to the fate of the non-citizens, whether they are a refugee or a worker, but provides the tools to legally and intentionally exclude them from the rights and freedoms of the Union. European Society, as a framework that explicitly includes non-citizens, has not addressed how the unequal and exploitative treatment of non-citizens in their everyday life aligns with the values of Article 2. Moreover, it has focused predominantly on the internal-external binary, itself a blindspot.

Thus far, European Society has tended to approach migration through the lens of conflict(s), treating it as a trigger for supposedly homogenous communities, rather than starting from lived experiences on the ground, as we argue for in this article. This reinforces the perception of migrants as ‘Others’ - non-citizens, and threats to an imagined homogenous community. Naturally, we recognise that migration is a major source of division in many EU member states; one that lies at the heart of European cohesion and solidarity debates. It is, however, a state of being – an inherently human activity. Upholding this vision in line with Article 2 is one of the major tasks faced by EU law today, especially in light of a populist-right wing political backlash that vilifies and exploits migration to ignite further societal division.

As Azoulai analysed in his contribution, the CJEU has so far mostly failed to accommodate the pluralism inherent to migration.⁸⁶ Looking at the law of the European Society from the perspective of (conditional) inclusion and (structural) exclusion, we would go even beyond Azoulai. In its migration case law (and also partly in its case law on religious identity),⁸⁷ the CJEU does not only neutralise tensions and ignore discrimination but it is also asked to uphold a narrative of a European Society and a ‘European way of life’⁸⁸ that is inherently rooted in structural discrimination and inequality. More concretely, what we observe in a number of current cases at the CJEU is the link to ‘Westernness’ as a proxy for ‘Europeanness’ that determines belonging to the European Society. In the following, we take a creolised reading of two cases at the CJEU that show how this proxy has been instrumentalized against marginalised communities through the language of law and European values.

Being ‘Western’

The first case concerns the Danish ‘Ghetto Law’,⁸⁹ a controversial set of policies aimed at reducing the amount of ‘parallel societies’, particularly in low-income immigrant neighborhoods.⁹⁰ Denmark has long developed a tougher position on migration than other European states,

⁸³The scholarship of Boatcă deliberates the coloniality of citizenship from a gendered perspective as itself having a colonial history, with sovereignty trade-offs, see M Boatcă and J Roth, ‘Unequal and Gendered: Notes on the Coloniality of Citizenship’ 64 (2) (2015) *Current Sociology* 191–212; M Benson and M Boatcă, ‘Global Social Inequalities and the Coloniality of Citizenship, Past and Present: A Conversation Between Manuela Boatcă and Michaela Benson’ 6 (2023) *Migration and Society: Advances in Research* 150–8.

⁸⁴See S Ganty and D Kochenov, ‘EU Lawlessness Law’ 30 (1) (2024) *The Columbia Journal of European Law* 78–156.

⁸⁵Loxa (n 79).

⁸⁶Azoulai (n 7).

⁸⁷see also Azoulai.

⁸⁸This narrative, originally proposed by Ursula von der Leyen in the 2019 European elections, has been developed into a core priority of the Commission, ‘Culture and Creativity’ (European Commission) <<https://culture.ec.europa.eu/creative-eu-rop/projects/priorities-2019-2024/european-way-of-life>> accessed 31 January 2025.

⁸⁹Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge v MH, EH et al.* The following section is elaborated upon in S Steininger, ‘They Not Like Us: Why the Danish “Ghetto Law” violates EU law’ (*Verfassungsblog*, 10 March 2025) <<https://verfassungsblog.de/they-not-like-us/>> accessed 14 August 2025.

⁹⁰See generally, A Seeman, ‘The Danish “Ghetto Initiatives” and the Changing Nature of Social Citizenship, 2004–2018’ 41 (4) (2021) *Critical Social Policy* 586–605.

using its opt-out under the Maastricht Treaty.⁹¹ Officially called the ‘*Parallel Society Package*’, it was introduced in 2018 by the Danish government to integrate ‘non-Western’ immigrants and reduce crime and unemployment in designated areas. A major point of contention concerned the designation of certain neighbourhoods as ‘ghettos’ that would fail to live up to set standards of lawfulness, employment, income, and education levels, something that the Danish authorities have worked on since 2010.⁹² If more than half of the residents of such a neighbourhood are characterised as coming from a ‘non-Western background’, state authorities can take action to reduce this, including sales of public housing, forced evictions, and demolitions. Additionally, children born into families from ‘non-Western backgrounds’ in state-designated ghettos must attend a special daycare for a minimum of 25 hours per week where they will be taught Danish values and language. Crimes committed in these areas are penalised more harshly than elsewhere. According to the Danish authorities, the loaded designation of ‘non-Western’ includes everyone whose ‘ethnic origin’ is not from the EU, EFTA, United States, Canada, Australia, and New Zealand, *including* Danish-born individuals or even citizens.

Is the designation, and consequently the unequal treatment, of ‘non-Western’ people in conformity with Directive 2000/43,⁹³ the so-called Race Equality Directive? The Eastern High Court referred the matter to the CJEU on 6 July 2023, asking whether the term ‘ethnic origin’ in the Race Equality Directive also covers ‘immigrants and their descendants from non-Western countries’.⁹⁴ The Race Equality Directive, originally adopted in 2000 under then-Article 13 EC, had been a surprising development. The first Directive to expressly address racism in the EU, its emphasis on discrimination also in the social sector, such as education, healthcare and housing, marked an expressive turn from the primarily labour-market-focused anti-discrimination law in the EU. It was passed rapidly, within six months, with the spectre of EU enlargement towards the East looming, which included several new member states with a large Roma population.⁹⁵ As a Commission official stated, the Directive sends ‘a clear message for the candidate countries that the *acquis* of the Community is also an *acquis* about the respect of fundamental rights’.⁹⁶ Other commentators argued that it was the success of Jörg Haider’s far-right Freedom Party in joining the Austrian governing coalition that increased pressure to adopt the Directive.⁹⁷ The Directive was thus as much a civilisational achievement as a civilising tool.

The Directive covers both direct and indirect discrimination as well as harassment and victimisation but does not provide a clear definition of concepts such as ‘race’ and ‘ethnic origin’, which became the cornerstone of the Danish Ghetto Law case. Interestingly, it was only invoked in a handful of preliminary references to the CJEU⁹⁸ and, so far, only in two, the Court found discrimination: in 2008, when a Belgian company announced that it would not employ Moroccan

⁹¹The opt-out allows Denmark to partially exempt itself from certain aspects of the Maastricht Treaty. Danish voters had initially rejected the Treaty in 1992 in a referendum, which led the Danish government to negotiate four opt-outs in the areas of Economic and Monetary Union, Common Security and Defence Policy, Justice and Home Affairs, and citizenship of the European Union. In three referenda since 1993, the Danish voters decided against abolishing the opt-outs.

⁹²S Hedlund, ‘Denmark’s uprooting of settled residents from ‘ghettos’ forms part of aggressive plan to assimilate nonwhite inhabitants’ (*The Conversation*, 2024) <<https://theconversation.com/denmarks-uprooting-of-settled-residents-from-ghettos-forms-part-of-aggressive-plan-to-assimilate-nonwhite-inhabitants-243424>> accessed 31 January 2025.

⁹³Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin, OJ L 180.

⁹⁴Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge v MH, EH et al* (2023), Summary of the request for a preliminary ruling pursuant to Art 98(1) of the Rules of Procedure of the Court of Justice.

⁹⁵C Brown, ‘The Race Directive: Towards Equality for All the Peoples of Europe?’ 21 (1) (2001) *Yearbook of European Law* 195–227.

⁹⁶As cited in *ibid.*, 197.

⁹⁷E Guildt, ‘The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations’ 29 (4) (2000) *Industrial Law Journal* 416–23.

⁹⁸JC Suk, ‘New Directions for European Race Equality Law: *Chez Razpredelenie Bulgaria Ad v. Komisija Za Zashtita Ot Diskriminatsia, Anelia Nikolova*’ 40 (4) (2017) *Fordham International Law Journal* 1211–24.

workers,⁹⁹ and in 2015, when electricity meters had been installed at an inaccessible height in Roma communities in Bulgaria.¹⁰⁰

Following hearings in September 2024,¹⁰¹ AG Ćapeta published her Opinion on the case on 13 February 2025. Ćapeta's Opinion is noteworthy in several respects. First, she found that the Danish legislation on public housing constitutes direct discrimination on grounds of ethnic origin. Pertinently for the purposes of European Society, she forcefully spells out how racial and ethnic discrimination runs counter to the values of Article 2.¹⁰² She highlights how Recital 12 of the Directive aims to 'ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin'.¹⁰³ Most importantly, she turns the perspective upside down – instead of focusing on the 'non-Western' migrant and its problems, she advocates that it is in fact acceptance of diversity and plurality that must characterise the European Society under Article 2:

The development of a society that is tolerant to ethnic differences would entail the recognition of equal rights for 'them', despite the belief or perception that 'they' possess different characteristics to 'us'.

She acknowledges that the term 'ethnic origin' is not defined in the Directive and that, in contrast to earlier cases featuring, eg, Roma, the communities affected by the Danish 'Ghetto Law' are characterised by ethnic diversity. In the words of the Danish authorities:

The extremely broad range of persons covered by the category 'immigrants and their descendants from non-Western countries' has no common features in terms of nationality, language, cultural and traditional origins and backgrounds, or common customs, beliefs, traditions and characteristics stemming from a common or presumed common past.¹⁰⁴

However, Ćapeta convincingly argues that it is in fact the designation of 'non-Western' by the Danish authorities that creates a common characteristic that is shared among all members of the group. She explains how this legal 'otherizing' of non-Western migrants does not need to be based on factual differences but can equally relate to perceived differences that effectively create a 'us' versus 'them' differentiation:¹⁰⁵

In such a context, the notion of 'ethnic origin' may be understood as referring to a perception of a person or of a group of persons as strangers or foreigners. As such, a division on the ground of 'ethnic origin' can be understood as a division between 'us' and 'them'; the dividing line being dependent on certain physical and socio-cultural characteristics or, at least, on the perception that differences in those characteristics exist.

Accordingly, this 'perceived ethnic 'otherness''¹⁰⁶ that the Danish law creates makes the Race Equality Directive applicable. Excluding non-Western immigrants and their descendants on

⁹⁹Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397.

¹⁰⁰Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* ECLI:EU:C:2015:480.

¹⁰¹'EU Top Court to Review Denmark's "Racially Discriminatory" "Ghetto Package"' (Open Justice Initiative 17 June 2024).

¹⁰²AG Opinion, Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge v MV, EH, et al*, ECLI:EU:C:2025:98, para 70.

¹⁰³*Ibid.*, para 71.

¹⁰⁴Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge v MH, EH et al*, Summary of the request for a preliminary ruling pursuant to Art 98(1) of the Rules of Procedure of the Court of Justice, para 21.

¹⁰⁵AG Opinion, Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge v MV, EH, et al*, ECLI:EU:C:2025:98, para 73.

¹⁰⁶*Ibid.*, para 92.

accessing public housing and unilaterally terminating their leases thus amount to direct discrimination, regardless of whether this discrimination was intended. *Ćapeta* capably centers the experiences of marginalized and discriminated communities and their rights as equal members of the European Society, relying on UN human rights reports to show how the law has created ‘stereotyping and stigmatization’:¹⁰⁷

There is a saying that ‘the road to hell is paved with good intentions’. The effort to diversify neighbourhoods might indeed be well intended. Nevertheless, such diversification cannot be achieved by placing an already disadvantaged ethnic group in a less favourable position.

The AG’s Opinion demonstrates how EU law could be used not only as an instrument but also as a possible remedy towards domestic legislation that imposes Western Eurocentrism through racialisation.¹⁰⁸ The undetermined concept of ‘ethnic group’ in the Directive demonstrates both the problems and potentials of stretching this concept to account for the lived experiences of people. Racial discrimination does not only hurt the affected individuals and communities, it is a clear violation of the values and the vision of a tolerant and democratic European Society. The Opinion is a hopeful start that acknowledges the layered colonialities at play.

Becoming ‘Western’

A notable addition to the discourse on ‘Westernness’ as a proxy to account for belonging to the European Society is found in asylum law. Decided in June 2024 by the Grand Chamber, the case *K and L v Staatssecretaris van Justitie en Veiligheid* concerned two teenage girls from Iraq who had applied for international protection in the Netherlands after they had arrived with their parents in 2015.¹⁰⁹ After their claim was denied, the District Court of The Hague sent a preliminary reference to Luxembourg. The CJEU was required to assess whether third-country nationals who have resided in a Member State for a substantial portion of their lives, and who have shaped their identities through the adoption of Western norms, values, and practices, may qualify as members of a ‘particular social group’ within the meaning of Article 10 (1) (d) of the Qualification Directive 2011/95.¹¹⁰ The so-called Qualification Directive was adopted in 2011 in an attempt to harmonise and render uniform minimum standards for asylum protection in the EU. However, following its limitations and a changed European asylum context post-2015, a new Qualification Regulation 2024/1347¹¹¹ was negotiated over eight years and finally adopted in 2024.

Does belonging to the European Society require adherence or belief in a certain ‘Western’, liberal democratic lifestyle? Or, conversely, do people that not adhere to a Western lifestyle not belong to the European Society? *K and L* had claimed that ‘they have adopted the norms, values and conduct of young people of their age and have thus become ‘westernized’’.¹¹² This ‘westernization’, according to the referring Court, ‘refers to equality between women and men and, in particular, to the right of women to be protected against all gender-based violence, the right not to be forced into marriage, the right to subscribe (or not) to a belief, and the right to have their own

¹⁰⁷*Ibid.*, para 152 (n 99).

¹⁰⁸See also S Ganty and K de Vries, ‘Manufacturing Integration: Ethnic Engineering in the Danish “Ghetto Case”’ (*Verfassungsblog*, 25 March 2025) <<https://verfassungsblog.de/denmark-ghetto-law/>> accessed 14 August 2025.

¹⁰⁹Case C-646/21 *K and L v Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2024:487.

¹¹⁰Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, L 337/9.

¹¹¹Regulation EU 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council.

¹¹²*Ibid.*, para 24 (n 109).

political opinions and be able to express them'.¹¹³ However, it argued that 'westernized women' would be too diverse a group to avail themselves of the protection as a 'particular social group' under the Qualification Directive.¹¹⁴

The civilisationalism is hardly veiled. Faced with consideration of a 'Western lifestyle' or 'Western women's rights', the CJEU rephrased the question to focus on EU values. Instead of 'Western norms, values and conduct', it asked whether the 'women genuinely come to identify with the fundamental value of equality between women and men and wish to continue to benefit from that equality in their daily lives'.¹¹⁵ Could belief in gender equality as a fundamental value of the EU account as an 'innate characteristic' or 'common background that cannot be changed' and thus create 'a particular social group' that deserves protection under the Directive? The CJEU answered in the affirmative:

In that regard, first, as the Advocate General points out in point 34 of his Opinion, the fact that a woman genuinely identifies with the fundamental value of equality between women and men, in so far as it presupposes a desire to benefit from that equality in her daily life, entails being free to make her own life choices, particularly in relation to her education and career, the extent and nature of her activities in the public sphere, the possibility of achieving economic independence by working outside the home, her decision on whether to live alone or with a family, and the free choice of a partner, choices which are fundamental to her identity. In those circumstances, the fact that a woman who is a third-country national genuinely comes to identify with the fundamental value of equality between women and men may be considered 'a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it'.¹¹⁶

The ultimate outcome is welcome and arguably in line with a feminist turn towards gender sensitivity in European asylum law.¹¹⁷ Throughout the decision, the CJEU aims to avoid the language of 'Westernness' as much as possible, instead speaking generally (rather than reverting to the particularities) about gender equality and the political, economic, and social rights of women.

Yet, it remains strained in its over-emphasis of European values as holding gatekeeping, universal qualities. Moreover, in its conclusions, it throws the ball back to the domestic authorities, which are tasked with assessing whether this 'genuine belief' exists on an individual basis and in a manner that poses a risk in the country of origin. How should national authorities assess this instead of examining obvious and visible lifestyle choices? The CJEU remains silent on this question. Furthermore, as Sabine Mair argues, the CJEU reveals that it considers gender equality mainly from a liberal feminist paradigm, ignoring intersectional conditions and highlighting how it shapes conditions in the public sphere, rather than the private.¹¹⁸ This binary oversimplifies and reduces the lived context of these women. She accentuates the public/private divide underlying the Court's thinking, where the belief in gender equality has to be visible in the public space as part of one's identity, while neglecting to account for private expressions of this belief.

By focusing on gender equality as actual practice in public, the CJEU again reinforces 'Western conduct' as a Eurocentric and exclusionary proxy for gender equality. We find the lack of an

¹¹³*Ibid.*

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*, para 33 (n 109).

¹¹⁶*Ibid.*, para 44 (n 109).

¹¹⁷S Steininger, 'The CJEU's Feminist Turn? Gender-based Persecution as a Ground for Protection' (*Verfassungsblog*, 20 February 2025) <<https://verfassungsblog.de/the-cjeus-feminist-turn/>> accessed 31 January 2025.

¹¹⁸S Mair, Rethinking EU Law Beyond the Liberal Feminist Paradigm (*Verfassungsblog*, 18 September 2024) <<https://verfassungsblog.de/rethinking-eu-law/>> last accessed 31 January 2025.

intersectional perspective on this issue particularly striking, as it reduces gender to an isolated condition of being rather than recognising it as part of a more complex lived reality. Would the Court have accounted for the existence of a ‘genuine identification’ with the value of gender equality also for a person who wears a headscarf or chooses to work from home? A European Society grounded in plurality and the values of Article 2 must avoid imposing a narrow vision of female emancipation and gender equality that becomes totalising and exclusionary. European values by assimilation, used to turn the ‘Other’ into Europeans, closes the space for conviviality and co-existence, and exhibits coloniality.¹¹⁹

Managing the ‘Other’

The structural exclusion underpinning Denmark’s ‘Ghetto Law’ and the conditional inclusion applied to the Iraqi girls both reveal the dual dynamics of how law *sees* and governs belonging in European Society. In both cases, we observe how ‘Westernness’ or ‘Europeanness’ is used synonymously to ‘Whiteness’ in order to account for belonging to the European Society.¹²⁰ The legal arguments in both cases centre around ‘group thinking’, ie, belonging to an ‘ethnic group’ or a ‘particular social group’ that is fundamentally different to a comparator, mostly the majority society found in the core.¹²¹ Regardless of whether belonging to a different group is imposed by the authorities or claimed by the applicant, what becomes clear is that it denotes a clear hierarchisation and ultimately racialisation of the affected individuals as ‘Others’. As AG Ćapeta demonstrates, those legal categories, while allegedly neutral, require a deep and intersectional contextualisation of their actual impact on affected individuals and communities to understand how their ‘Otherness’ is being created and reproduced by the legislator. Turning to Article 2, she demonstrates how European Society as a method might be able to contribute to a richer understanding of migration, not only as an obligation for the migrant to integrate into the majority society, but also a fundamental obligation of a democratic and tolerant society to not discriminate towards the most vulnerable.

Law functions as a boundary-making practice, distinguishing between those who belong and those who do not. This is its fundamental task. However, what both cases demonstrate is that by not reflecting on the underlying structures of discrimination inherent to claims of ‘Westernness’ or ‘Europeanness’ that are imbued in the law, those boundaries are instrumentalised, not only to the detriment of affected peoples but also to the European Society more broadly, creating a much weaker, poorer, and less democratic society.

B. The rule of law

The complex and historically contingent relationship to ‘values’, specifically the rule of law, is seen differently from a liminal space, particularly Europe’s post-colonial peripheries. Malta, the EU’s smallest Member State, gained independence from the United Kingdom in 1964, becoming a Republic in 1974. The British army withdrew in 1979, marking the transition to independence in both law and practice. Its Constitution, despite some notable reforms, preserves significant legal

¹¹⁹Aime Césaire reflects on the process of making the ‘African . . . a Frenchman’: ‘Until that time, until my generation, the French and the English – but especially the French – had followed the politics of assimilation unrestrainedly. We didn’t know what Africa was. Europeans despised everything about Africa, and in France people spoke of a civilized world and a barbarian world. The barbarian world was Africa, and the civilized world was Europe. Therefore, the best thing one could do with an African was to assimilate him: the ideal was to turn him into a Frenchman with black skin’ in A Césaire and R Depestre, ‘On Negritude’ in J Rothenberg and D Rothenberg, *Symposium of the Whole: A Range of Discourse Toward an Ethnopoetics* (University of California Press 2016).

¹²⁰See also A Lewicki, ‘East-west Inequalities and the Ambiguous Racialisation of ‘Eastern Europeans’ 49 (6) (2023) *Journal of Ethnic and Migration Studies* 1481–99.

¹²¹See N Dube, ‘A Typology of Comparators and Comparisons in EU Equality Law’ 62 (2) (2025) *Common Market Law Review* 49–84.

continuity with the British colonial period into the present.¹²² While Malta did not belong to the Overseas Countries and Territories of the EU, its status as a former British colony in the EU offers a unique portrait of the living legacies of colonialism in its national legal and political infrastructure. Its invisibilisation in the mental maps of the constitutional heritage underpinning European legal order speaks of its imperial blindspots¹²³ and presents a distinctive narrative when interpreted from a decolonial perspective. The *Repubblika* judgement serves as a key entry point for engaging with these contentions.

Repubblika and regression

In 2021, *Repubblika* – one of the very rare cases of a preliminary reference from Malta under Article 267 TEU – unexpectedly established the principle of non-regression.¹²⁴ Initially anticipated as a bread-and-butter judicial appointments case (concerning Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the EU) which deliberated the role of the Prime Minister in appointing members of Malta's judiciary, the establishment of the principle made the case a seminal one in EU law.¹²⁵ The accompanying AG Opinion showed no indication that the principle was to be contemplated or created. It nevertheless provided notable reflections on, for example, the Venice Commission's function in shaping legality assessments in EU law (despite its evidently 'political' character), as well as constitutional models of separation of powers. Here it is observed that '... there is no single 'model' which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary'.¹²⁶ Throughout the Opinion, the colonial context in which the Maltese Constitution was drafted remains invisible. This omission may stem from the Court's assumption of a constitutional 'geographical and cultural proximity' to a known core constitutional tradition, an assumption reinforced by its reliance on the core as the primary comparative constitutional counterpoint.¹²⁷ The Court glosses over historical context, highlighting that the constitutional provisions relating to judicial appointments 'remained unchanged from their adoption in 1964 until the 2016 reform of the Constitution' and it was 'on the basis of the provisions of the Constitution in force prior to that reform that the Republic of Malta acceded to the European Union under Article 49 TEU'.¹²⁸ Viewed, therefore,

¹²²A text by British design, the Constitution of Malta bears a striking resemblance to many other Commonwealth constitutions borne of the same period. It is notable for its preservation of an array of colonial artefacts, which prejudice its function. See J Orlando-Salling, 'The Curious Case of Malta: (Post-)Colonial Constitutionalism in the EU' in Special Issue on, Europe After Empires (forthcoming, 2026) World Comparative Law.

¹²³Scholtes (n 23).

¹²⁴See M Leloup, 'Repubblika: Anything New under the Maltese Sun?: The ECJ Rules on the System of the Appointment of Judges in Malta' (*Verfassungsblog*, 21 April 2021) <<https://verfassungsblog.de/repubblika/>> accessed 31 January 2025.

¹²⁵Decided in 2021, a judgement on a preliminary ruling to the CJEU under Art. 267 TFEU communicated from the Maltese First Hall of the Civil Court was issued, sitting as a Constitutional Court in Malta, concerned the conformity of the Constitution of Malta's provisions governing judicial appointments made in April 2019. It is perhaps pertinent to mention that two cases concerning Malta, including this one, sent shockwaves through EU scholarship in under five years. Both deliberated Malta's (post-)colonial legal order, decentering the afterlives of colonialism in its legal governance. See also Case C-181/23 *Commission v Republic of Malta* EU:C:2025:335, Judgment of 29 April 2025.

¹²⁶AG Opinion, Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2020:1055, paras 88–9. See also Scholtes (n 23).

¹²⁷The 'models' listed include 'two of the world's most prominent and influential courts... nearly all of whose members were associated with particular political parties and political traditions' the US Supreme Court and the German Constitutional Court. Hogan additionally notes the French, Belgian and Italian examples, intimating that these are the yardsticks to be followed and that, therefore, given the models levelled, 'there is no doubt that all of these courts have proved to be resolutely independent vis-à-vis the other branches of government'. If this is status quo in these countries, then Hogan's reasoning is that the approach is passable. *Ibid*, para 57. See W Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012), in Scholtes (n 23).

¹²⁸Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311, para 59–60.

from this vantage point – the known and the core or ‘imperial route’ – the particularities of the Maltese case are flattened and stripped of critical nuance.¹²⁹

Notwithstanding extensive amendments in the last decade, Malta’s (post-)colonial Constitution retains continuity with successive colonial constitutions, together with aspects of the legal and administrative framework that underpinned colonial rule. This allowed the Prime Minister to retain substantial control over judicial appointments – an arrangement that, as both the Opinion and the Judgement emphasise, was not in itself extraordinary.¹³⁰ The Court found in favour of the Prime Minister. In the judgement, the Court’s reasoning displayed EU accession as the dividing line between ‘us’ and ‘them’ as well as the core, or ‘old’ Member States, and the ‘newer’ periphery. Accession is portrayed as a utopic endpoint – this so-called dividing line:

The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.¹³¹

While constitutional reforms in Malta were substantial particularly since 2016, EU accession nevertheless occurred despite a (post-)colonial constitutional order characterised by persistent separation of powers deficiencies. Thus, at the point of accession in 2004, substantial shortcomings and colonial artefacts had remained unchanged since the colonial period, prejudicing law and governance.¹³² These existed largely under the radar. Even following the extensive reforms of the last decade, Malta’s Westminster Constitution¹³³ arguably evades the highly relevant historical and political scrutiny seen in other rule of law cases. We argue this could be *because* of its colonial inheritance, which conditions and even tempers its interaction with European constitutionalism. Deploying a ‘core’ model (see AG Hogan’s reasoning above), Malta’s extant (post-)colonial constitutionalism exposes the major problem with imperial invisibilisation in practice insofar as it ultimately – through lack of contention – limits the potential for both substantive and structural transformation at a national and supranational level. Imperial invisibilisation in *Repubblika* arises from the Court’s overlooking of colonial artefacts within the executive function under review, despite their ongoing legal and institutional significance.

Repubblika is to be considered a critical juncture for EU rule of law and values protection because, building on the ‘constitutional pre-commitment’ that connects Articles 2 and 49, as made clear in *Wightman*, it implies that member states are bound at the point of accession to protect EU values based on mutual trust.¹³⁴ This principle prohibits the reduction of the level of protection of those values and the rule of law. The Court held that the regulations and procedures in place do not ‘appear’ to ‘...give rise to legitimate doubts in the minds of individuals, as to the imperviousness of appointed members of the judiciary to external factors’.¹³⁵ This non-regression principle widens the scope for ‘rethinking of the potential limits of EU competence’.¹³⁶ However,

¹²⁹Parvulescu and Boatcă (n 33) 51.

¹³⁰See Leloup, Kochenov and Dimitrovs (n 132); J Scholtes, ‘Constitutionalising the End of History? Pitfalls of a Non-regression Principle for Article 2 TEU’ 19(1) (2023) *European Law Review* 59–87.

¹³¹*Ibid.*, Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311, para 64.

¹³²‘Black holes’ and colonial artefacts remain evident in the execution of the function of the Office of the President with the legacy of the ‘Governor-General’ and the function of the monarch continuing to loom large on the constitutional structure of the Office; the constitutional supremacy clause in the Constitution and its operability in practice and, as exhibited in the *Repubblika* case, separation of powers and the role of the executive. Elaborated further in Orlando-Salling (n 122). See also J Stanton, ‘Small States and Constitutional Reform: Democracy in Malta’ in C Morris (ed) *Making and Changing Law in Small Jurisdictions. The World of Small States* (Springer 2024) 31–56.

¹³³Orlando-Salling (n 72).

¹³⁴Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 63.

¹³⁵*Ibid.*

¹³⁶M Leloup, D Kochenov and A Dimitrovs, ‘Non-Regression: Opening the Door to Solving the “Copenhagen Dilemma” All the Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*’ 12 (5) (2021) *European Law Review* 692–703.

the principle of non-regression envisages that notional regression and progress are civilisational and linear with *accession* as its baseline.

Repubblika impliedly denotes a paternalistic approach that views Malta as a developing state, further compounding criticism regarding the Court's consistency on European rule of law cases. EU values, also through the progress narrative in the principle of non-regression, take on a civilisational standard and are put forward as universal. The case demonstrates the hierarchical distinction between core Western European traditions (in this case, British Public Law with its heavy influence on Maltese Constitutional Law and its legal system) and privileges them as universal.¹³⁷

The complexities of the Maltese case are reduced to a position on a sliding scale towards or away from 'civilisation', privileging ahistoricism and atemporality. In doing so, the principle of non-regression is recast as a civilisational narrative, once again exposing EU law's solipsistic bind and the colonialities that undergird it.

Prominently, it lays bare the distinctions between the treatment of post-colonial and post-communist Member States¹³⁸ – running along the West-East divide.¹³⁹ *Repubblika* sees only mild intervention, with no real deliberation on whether the existing safeguards (such as the role of the House of Representatives in rendering the Office of the Prime Minister accountable) work in material terms. The difficulties wrought by legal continuity with the colonial constitution and constitutionalism, which have significantly impacted the separation of powers in Malta, are brushed aside. As elaborated from a core-periphery perspective by Julian Scholtes, the approach taken in *Repubblika* starkly contrasts with that taken in cases in post-communist Hungary and Poland. There, a more interventionist and formalist approach is often employed; one that views the rule of law within a broader legal and political context which the Court circumvents in *Repubblika*.¹⁴⁰ The inconsistent enforcement of laws (and values) of the European Society facilitates, rather than deters, the erosion it hopes to prevent, insofar as it arguably leads to double standards ultimately compounding asymmetries and inequalities among member states. The result is legal uncertainty through selectivity.

The trouble with progress

The sliding scale of progress is the premise of the non-regression principle, which views accession as the end of history. The EU self-perception as a transformative and inclusive space is arguably undermined in *Repubblika* because of its surface-level treatment. This thin red line divides countries that emerged from a socialist/soviet legal system and those that did not.¹⁴¹ In real terms, the Maltese Constitution preserved a colonial contiguity – and a hegemony – that would probably fall short, if it had been appropriately contended with, of the EU values exhibited in Central Eastern European rule of law case law.¹⁴² So, the approach taken by the Court begs a number of questions: Is it the case then that this would have also been acceptable had no later reforms taken place in Malta? Could this mean that a Maltese government could slide back to 2004 and still pass the EU values or rule of law test? Or, again, hypothetically, could it regress differently and enact hollow reforms that serve a checklist function and simply evade contention if, on paper, it is

¹³⁷A Diceyan conception of the rule of law is put forward as informing the Venice Commission's understanding of what constitutes the European rule of law. See D Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' 81 (5) (2018) *Modern Law Review* 739–64. See T Borg and J Stanton, *The Constitution of Malta at Sixty* (Kite Publishers 2024).

¹³⁸See G Mallard, 'The concept of European society in a historical perspective: a legacy from the Twentieth century' in this symposium.

¹³⁹Further elaborated on in Scholtes (n 23).

¹⁴⁰See for example, Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:615.

¹⁴¹Scholtes (n 130).

¹⁴²Orlando-Salling (n 72).

following the prescribed EU rule of law checklist? And what if regression is critical to the democratisation process, as shown by Licia Cianetti and Seán Hanley's work? How is this accounted for, if at all?¹⁴³

Repubblica crudely suggests that if progress slides away from the already ahistorical line of accession, then the rule of law is – simplistically – progressing, not regressing. This lumpen mass approach to the rule of law renders it prone to either essentialism or obliviousness. Gauging progress on amendments, instead of their application and enforcement, arguably further entrenches a 'model-based' or checklist approach to the rule of law. This is done without investigating meaningfully the rule of law itself or applying it consistently towards inclusive constitutionalism (if this can be achieved at all). According to the CJEU's determination, the arrow of progression points steadily away from the pre-accession state of being along the imaginary lines of progress. What this utopia looks like is defined along recycled lines, invoking the unidirectional 'integration through law' paradigm elaborated above.¹⁴⁴ 'Certain institutional arrangements' as articulated in Scholtes, which are found in so-called 'established democracies', 'become unequivocal markers of constitutional progress'.¹⁴⁵

Connected to this and alluding to Cianetti and Hanley, Scholtes elaborates that 'not all "steps back" pertaining to safeguards for certain values necessarily endanger those values'.¹⁴⁶ Conversely, progress does not always amount to better - or even functional - rule of law reform, still less the transformative change the EU rule of law space claims to represent. Thus, the progress/regression binary tied to Article 2, 'threatens to reduce constitutional developments and changes to an inadequate linear trajectory between progress and backsliding often basing this judgement call on the *sole measure* of judicial independence'.¹⁴⁷ This narrow and hollowed-out approach, which relies on conceptual minimalism and follows a maximalistic and asymmetrical application, has far-reaching and dire consequences. In peripheral countries such as Malta, where abortion is still criminalised and reforms to media law, including Strategic Lawsuits against Public Participation (SLAPP), have stalled, the adoption of a narrow approach misses an opportunity to address deeper structural issues representative of extant coloniality.

This question resurfaces: what are the values of European Society, and to whom do they belong? As has been shown, Malta's place in European Society nuances dominant narratives that frame membership as a linear trajectory of progress, highlighting its core-periphery relationship and the pitfalls of ahistoricism and Eurocentrism in the law of the European Society.¹⁴⁸ Malta's legal and political system reflects its colonial past and, particularly, coloniality of power.¹⁴⁹ Its interaction with EU legislation and the evident asymmetries manifests in a post-colonial setting such as Malta's is nuanced elsewhere from a core-periphery lens and shown to be systemic.¹⁵⁰

These examples have endeavoured to show the multiple ways to problematise European Society, appealing to the lived realities of the law as seen from liminal and marginal spaces, where systemic inequalities, colonial legacies and afterlives, and exclusionary legal frameworks continue to shape who: is, is seen, heard, belongs and granted full participation within the European Society.

¹⁴³Cianetti and Hanley argue that 'non-linear dynamics [that] need to "be understood as alternative directions, not way stations" on a journey between autocracy and democracy'. See L. Cianetti and S. Hanley, 'The End of the Backsliding Paradigm' 32 (1) (2021) *Journal of Democracy* 66–80.

¹⁴⁴P-A Van Malleghem, 'Legalism and the European Union's Rule of Law' 3 (2024) *European Law Open* 50–89.

¹⁴⁵Scholtes (n 23).

¹⁴⁶Scholtes (n 130) 3.

¹⁴⁷*Ibid.*, 4.

¹⁴⁸This section is adapted from J. Orlando-Salling, 'Decolonising European Constitution(alism): Perspectives from Malta' (unpublished, PhD Thesis, 2026).

¹⁴⁹Orlando-Salling (n 72).

¹⁵⁰Orlando-Salling (n 24).

4. Concluding reflections

... Our Union would always stand up for universal rights, the freedoms and the dignity of all people on this great continent The last five years have shown that our Charter and Treaties are more than words on paper. They are a legacy to protect ... Today, we vow to be the Guardian of the Treaties. ‘Le Gardien des Traités’. But our Union is not just a treasure to be guarded. Protecting our Treaties and filling them with life is a daily task. Our values are universal; they do not change.¹⁵¹

Commission President von der Leyen made a rousing speech at the CJEU while we were concluding the writing of this article in early 2025. The speech had a lot to unpack but one thing that struck us was the civilisational and universalist narrative underlying it. It was not veiled; it was explicit and has become commonplace, speaking volumes of the European Society envisaged in legal and political discourses. Her speech reinforces that EU values are fixed and universal, and that the Commission and Court are the guardians of those universal rights. The assumptions of singularity speak to the self-perception that the EU’s legal and institutional frameworks are the ultimate sites as well as arbiters of progress and civilisation – the ‘us’ and not the ‘them’. Claims that these values are unchanging. Even monolithic, ignore the global evolution of democracy and rights. Europe, here, is presented as interchangeable with modernity, personifying exceptionalism. While the ‘daily task’ of the EU is the protection of these values – a ‘treasure’ or ‘civilisational gift’ to be guarded and a ‘legacy’ – Von der Leyen makes plain what history and legacy buoy these assertions. The inconsistencies we have spoken to lay bare the dynamics of belonging in the European Society such as in the treatment of migrants, access to services, the movement of European citizens, and the resulting invisibilisation of colonial legacies in the liminal spaces of Europe within the rule of law case law.

We have endeavoured to demonstrate the following. First, decolonial approaches expose and empower voices from previously overlooked places, perspectives and people insofar as they engage the function of belonging and boundary-making inherent to law-making. Second, we have argued that an effective application of Article 2 TEU necessitates the bridging of the gap between the values it promises and its lived, social realities. This is not just about pointing to a problem or offering assimilationist solutions, but seeking means to effect material, and systemic changes. Disruption, aimed at fostering reconstruction, is essential to this process and there is no right way to go about it. Third, and vitally, we appeal for a commitment to reconstruction in the embedded code of EU law, which roots exclusionary (and ahistorical) tendencies that compound stratification in European Society. If the law is a language or, indeed, a code, who can decode it becomes all the more essential to the question of in-/exclusion and, crucially, of belonging.

Critical approaches more generally present options and opportunities for decoding by widening the catchment of *who* and *what and where* is embedded into the construction but also the application of this language and of the storytelling of the EU. These challenge the foundational assumptions of EU legal norms, such as neutrality, objectivity, and universality, exposing underlying power asymmetries and historical legacies, including colonialism. What is evident is that the methodological divide between empirical focus and theoretical critique has resulted in limited interdisciplinary dialogue. Leaning back into the creolising, we argue that to conceive of Europe as a creolised space requires drawing attention to the intersections, multiplicities, and pluralities that exist in its society.¹⁵²

¹⁵¹European Commission, ‘Speech by President von der Leyen at the solemn undertaking of the College of Commissioners before the European Court of Justice’ European Commission Speech (27 January 2025) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_25_330/SPEECH_25_330_EN.pdf>.

¹⁵²This task is not exclusive to legal scholarship, see M de Silva and F Lehmann, ‘European Studies as an interdisciplinary research field? A comprehensive empirical analysis of interdisciplinarity in European Studies’ in A Moberg (ed), *Towards Non-Unidisciplinary Research in European Studies* (DeGruyter Brill 2025) 61–80.

Using a decolonial approach to examine European Society, this article's contribution is to uncover a key divergence in the underlying assumptions about its nature and the role of the EU. The present methodological divide has meant limited opportunities for meaningful trans- and interdisciplinary dialogue. The assumptions these have yielded envision EU law primarily in terms of its perceived utility (and infallibility) for achieving shared goals, such as advancing human rights and reducing economic inequality. The decolonial approach reveals how EU law can and does reinforce structural and systemic divisions. The enterprise of critical legal scholarship is to expose this dual (even plural) nature of law, demonstrating it is a site of unity, division but also stasis, marginalisation and inequity. The article further attempts to challenge the binary thinking of good vs. bad law that further aggravates this observable self-referentiality in EU law.

Thus, at the heart of this article has been the question of how European Society, and the legal structures that govern it, reproduce colonial legacies and prioritise assimilation over equity. We have viewed coloniality with and within European Society – focusing on belonging and liminality. We remain somewhat puzzled that, as Isailović strongly argues,¹⁵³ EU law – and who constitutes it – continues to have such a distinct blindspot.¹⁵⁴

Whether EU legal scholarship is able to conjure the necessary imagination to overcome this self-referentiality remains to be seen. Thus far, we observe a legal order that is not ready to be laid bare; subjected to moral relativism that could prove to be 'normatively problematic'.¹⁵⁵ The near messianism and certainly protectionism of the law,¹⁵⁶ the Eurocentric ideology underpinning it, and the European Society it sustains, assert a 'totality of knowledge' that bolsters perceived infallibility. This is where the value of critique comes in to render it consistently accountable, also to the demos.¹⁵⁷

A key issue facing European Society, as we have argued, is the question of what (and who) is 'European' *in* the Law of the European Society and *to it*. We argue that this is a question best answered and asked repeatedly from *below*. Rather than arguing for 'more' or a 'better application' of the law, a critique of the underlying assumptions of the European Society must turn on 'how the law and its underlying logics are part of the problem in the first place'.¹⁵⁸ We mount a central challenge to the perceived ideological superiority embedded within the law – or its 'totalizing universe'¹⁵⁹ – exposing its role in flattening the experiences of European Society in its multiple, intersecting lived realities. Acknowledgement is a small but important step towards rendering European Society more accountable.

This article has been an attempt to show European Society in conversation. A European Society of hierarchies and asymmetries is a European Society that remains a civilisational gatekeeper. The business of critical approaches has no utopic end, nor is there an ideal formula that can (and should) be deployed and applied. Neither is it a finite pursuit. European Society is and should be a dynamic space; grappling with it necessitates intellectual plasticity, accountability of its complex intersections, a fertile imagination, and a commitment to active and continuous reconstruction.

¹⁵³I Isailović, 'Critical approaches in EU law – still a blindspot' (*Transformative Private Law Blog*, 28 September 2023) <<https://transformativeprivatelaw.com/critical-approaches-in-eu-law-still-a-blindspot/>> accessed 31 January 2025.

¹⁵⁴See also R Schütze, 'Integration-through-Law': Grand Theory, Revisionist History' 4 (82) (2025) *European Law Open* 162–200.

¹⁵⁵Isailović (n 153).

¹⁵⁶A Abat I Ninet, 'The Messianic Thought of the Rule of Law' 47 (3) (2019) *Philosophia* 733–55.

¹⁵⁷MD Dubber, 'New Historical Jurisprudence: Legal History as Critical Analysis of Law' (2015) 2 (1) *Critical Analysis of Law* 1–18, 9.

¹⁵⁸Isailović (n 153).

¹⁵⁹T Marzal, 'Between Integration and the Rule of Law: EU Law's Culture of Lawful Messianism' 24 (4) (2023) *German Law Journal* 718–7–34.

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