EU law scholarship from a German perspective: A tale of parallel universes?

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One of the paradoxes of EU law scholarship is that there is actually no such thing as a monolithic body of EU law scholarship although EU law is about a common legal universe.

Beyond the controversies and fractions that will come with any legal discourse, researching and teaching EU law still appears to be surprisingly diverse. It is hard to say whether the dividing lines are related to different legal cultures and traditions, or just different scholarship cultures in the EU; whether the dividing lines run between different languages or correspond to different Member States.

Germany is one of the founding Member States of the European Union and the largest Member State with more than 80 million inhabitants, a size reflected in more than 40 law faculties. German is the language that has the highest number of native speakers in the EU.
Considering this, the concept of 'German EU scholarship' and the assumption of its impact on EU law has some plausibility. After more than 70 years of European integration, the role and shape of EU law scholarship in Germany and from Germany should not be that difficult to explain. Looking closer, the picture appears to be more complicated, though. There are at least two versions of the story.

German EU law scholarship can easily be told as an ongoing success story

The success story

The story of German EU law scholarship can easily be told as an ongoing success story. In that version of the story, one would emphasise that after more than 70 years of European integration, the field is well established and has its place in the landscape of German legal academia. Numerous EU law commentaries could serve as evidence of that success, with commentaries being the hallmark of German legal academic writing. There are also well-established German language EU law journals such as Europarecht and the multi-volume EU law encyclopedia, Enzyklopädie des Europarechts. Commentaries, law reviews, Handbücher, the insignia of legal academic achievement – according to German standards – are all there. Even the influential Staatsrechtslehrervereinigung, the association of German public law scholars founded in 1922,

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seems to have accepted the importance of EU law many years ago, by introducing a working group on European constitutional law. The importance of European integration law, a field that emerged out of nowhere, has finally sunk in, and this has strengthened the role of German EU law scholarship. Today, each and every German law faculty will have a chair that is dedicated to EU law. Beyond that, EU law is not confined to a small circle of specialists. Numerous German public law professors will also have a *venia legendi* of EU law in their academic portfolio. Mainstream law journals regularly report on EU law matters. The federal statute on the judiciary – *Deutsches Richtergesetz* – that also lays down the mandatory elements for the curricula of law faculties was amended some time ago (Section 5a) in order to include EU law as a mandatory subject for the state exam that is the final, end of studies-exam for all German law students. And, as ultimate proof of relevance and weight, the powerful German Constitutional Court, after first ignoring, then resisting European integration in *Solange I*, and since the mid-80s *Solange II*, has become a European constitutional law court, regularly dealing with EU law related cases and promoting the perception that EU law matters. This should be beneficial for German EU law scholarship.

An alternate EU law universe?

It is also possible to paint the picture in darker colours, though, starting out from a simple observation and a simple question.

The observation: the law of the European Union is not at the centre of academic attention in Germany. A research institute at the level of a Leibnitz Institute or a Max Planck Institute specifically dedicated to EU law does not exist in Germany. 'Clusters' of EU law scholars do not exist, one per faculty is considered enough, sometimes more than enough. The younger generation of scholars seems to be more attracted to international law than EU law. 'Genuine' EU law academics are increasingly few and far between, at least this is a perception I hear from people who recruit EU law experts for parliamentary hearings.

The question: How is it that the largest Member State and German language contributions on EU law are not more present on the European stage of EU law scholarship?

There are numerous possible answers to this. One of the more plausible ones could be that in Germany, EU law is to some extent a victim of its own success.

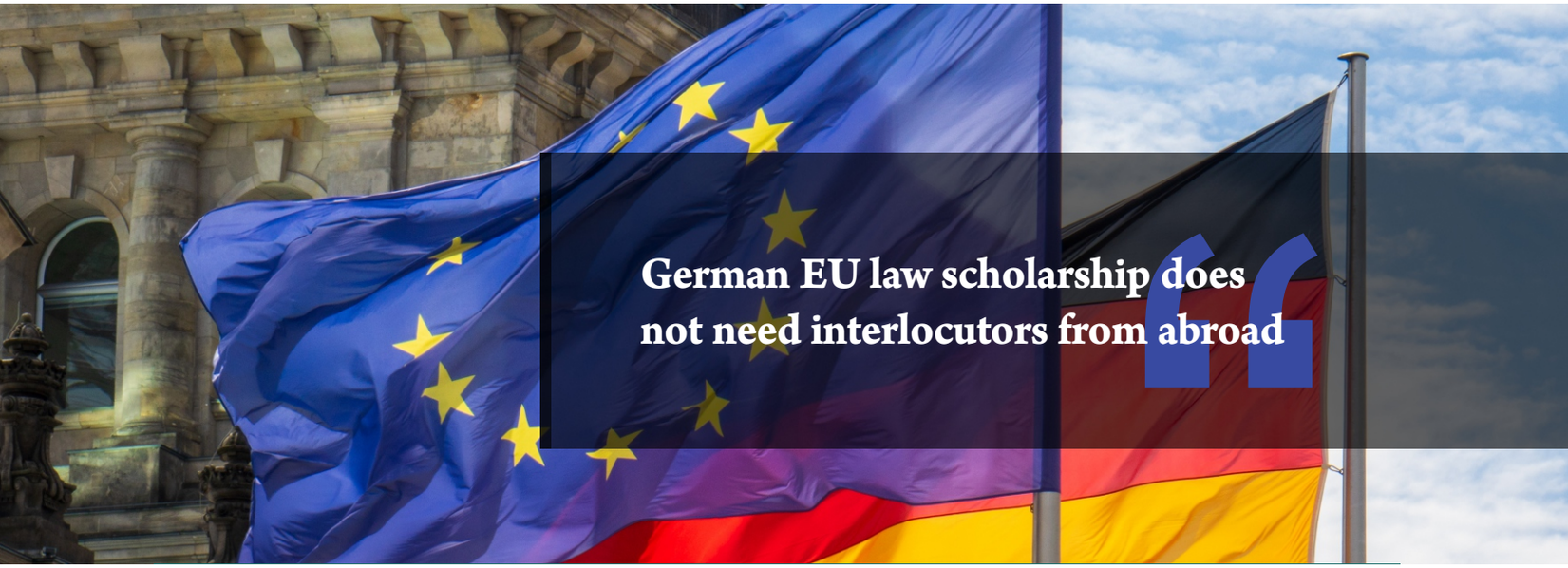
Let me explain.

Victim of its own success I

Maybe EU law has been too successful in quantitative terms. Over the years, a huge body of secondary law and numerous treaty amendments have led to a differentiation of EU law. Nobody can seriously claim today that he or she is mastering EU law in all its shapes and forms. EU competition law is an example for EU law that emerged as a distinct field quite early on with the potential to keep an entire scientific community busy. The same applies for EU asylum law, and a more recent example would be EU data protection law, where the EU GDPR brings EU law-specialists and data protection law people who have no particular background in EU law together. Similar effects can be described in the private law context, up to the point of detecting a new – and arguably: distinct – field of 'EU private law'.

I would still argue that it makes sense to speak of 'EU law scholarship'. There are specific common principles of EU law, be it primary or secondary, that justify the assumption that there is something distinct and particular about EU law and EU law scholarship. A deep understanding of EU common market law, of the case law of the Court of Justice and of the constitutional law elements of EU law may be core elements of this kind of EU scholarship. In my view there is also an aspect of distinctiveness that has to do with a particular intercultural sensitivity that emerges when one deals on a regular basis with the peculiar paradox of a law that is insisting on the unity of EU law in a multilingual context against the background of different legal systems in the Member States.

This brings me to a particularity of German EU law scholarship: The size of the legal community. With more than 40 law faculties, German academia will always be tempted to be self-sufficient. This also applies to EU law: German EU law scholarship does not need interlocutors from abroad, German EU law academics can easily stay among themselves. There is a lack of incentive here. Just one example: publishing in English is still not really career enhancing in Germany, it may even be career limiting. The risk with such a German-EU law scholarship bubble is that it may develop constructs and theories that



are detached from the more general EU law discourse. Note that all the German EU law commentaries are written in German, the same applies to the EU law related journals. This is not a German phenomenon: EU law related journals being addressed primarily at a (limited) domestic audience are also an issue elsewhere - just look at France. The Dutch case appears different and seems to prove that there may be a different way. It is probably not a coincidence that the Common Market Law Review, published in the Netherlands, in English, is often named as the most prominent - some would even say the only - EU law journal with a genuinely EU wide audience.

Victim of its own success II

European integration law may also have been too successful in qualitative terms. In 1963 the Court of Justice confirmed in *Van Gend en Loos* that European integration law was distinct from standard public international law, a reading that the German Government of the time already suggested in the ratification legislation in the 1950s. Mechanisms such as direct effect and primacy led to a highly effective body of law, increasingly closer to constitutional law than to classical international law.

At some point, the saying goes in Germany, EU law became simply too important to leave it to a bunch of EU law specialists. That's when mainstream public law became interested in and concerned with EU law. That could be called a – more or less – friendly takeover, an 'EU law mainstreaming' which did have its positive aspects, in particular in terms of recognising the importance of the field in the curricula of law faculties (see supra). At the same time, the mainstream public law scholarship perception of EU law being something 'alien', 'intruding' was never completely overcome. All this is even more com-

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plex as the German academic system does not really allow one to specialise in EU law only: a core affiliation with public law (or private law or criminal law, but EU law remains public law driven) will be the more important part of the *venia legendi*, and EU law will come on top of that and not necessarily reflect a genuine research focus. That is why the high number of EU law-venia legendi among younger scholars may be misleading. The more or less subtle antagonism between more traditional public law scholars and genuinely EU law oriented public law scholars is still around.

This is where the weight of tradition comes in. German legal scholarship is heavily shaped by tradition. Tradition explains university structures, faculty structures, the established division between private law, public law and criminal law professors which still defines the sub-structures of groups within faculties, stabilised by the genuine or perceived relevance of professional associations such as, for public law, the Staatsrechtslehrervereinigung. EU law and EU law scholars are at odds with these structures.

Karlsruhe…

And then there is the role of constitutional law. In a country such as Germany that has produced a concept such as 'constitutional patriotism', the importance of the constitution is hard to overestimate.

In addition, the constitutional law dimension in Germany involves a peculiar player that led the EU law

related legal issues at stake to a different dimension. The fact that the German Constitutional Court has become a court that deals with EU law on a regular basis impacts on EU legal scholarship in multiple ways. Note that the German Constitutional Court's case law is not shaped by EU law scholars, to put it mildly. The judge rapporteur for the German *Maastricht* decision came from tax law, the judge rapporteur for the *Lisbon* decision from administrative law. Against that background, the biggest success of EU law in Germany – being of major concern for the German Constitutional Court – can also be interpreted as its biggest problem: Since the beginning of the Euro crisis in 2010, EU law related scholarship in Germany has increasingly been absorbed by interpreting and explaining the German Constitutional Court's EU law related decisions, its attention being deflected from core EU law. With all attention turned to the German Constitutional Court and dramatic decisions such as the *PSPP* verdict of May 2020, where the German court basically completely trashed ECB and Court of Justice actions as 'ultra vires', the case law of the Court of Justice and the legal developments at the European level risk being neglected. It is no coincidence that one of the German voices perceived abroad as speaking for German EU law scholarship is Dieter Grimm, who is actually not a EU law scholar, and a former constitutional court judge, albeit not in charge of EU law during his time on the bench.

With the latest turn in the EU law related case law of the German Constitutional Court, the trend of absorbing EU related legal-academic resources in Germany may reach a new level: At the end of 2019, the German Constitutional Court decided in the two cases '*Right to be forgotten* I and II' to take the Charter of Fundamental Rights as a yardstick in certain EU related cases, applying and thereby interpreting the Charter, which means actively stepping into the turf of the Court of Justice. This has the potential to enhance the trend of the last 10 years in Germany: to look at EU law first and foremost through the lens of German constitutional law, with the respective effects on German EU law related scholarship.

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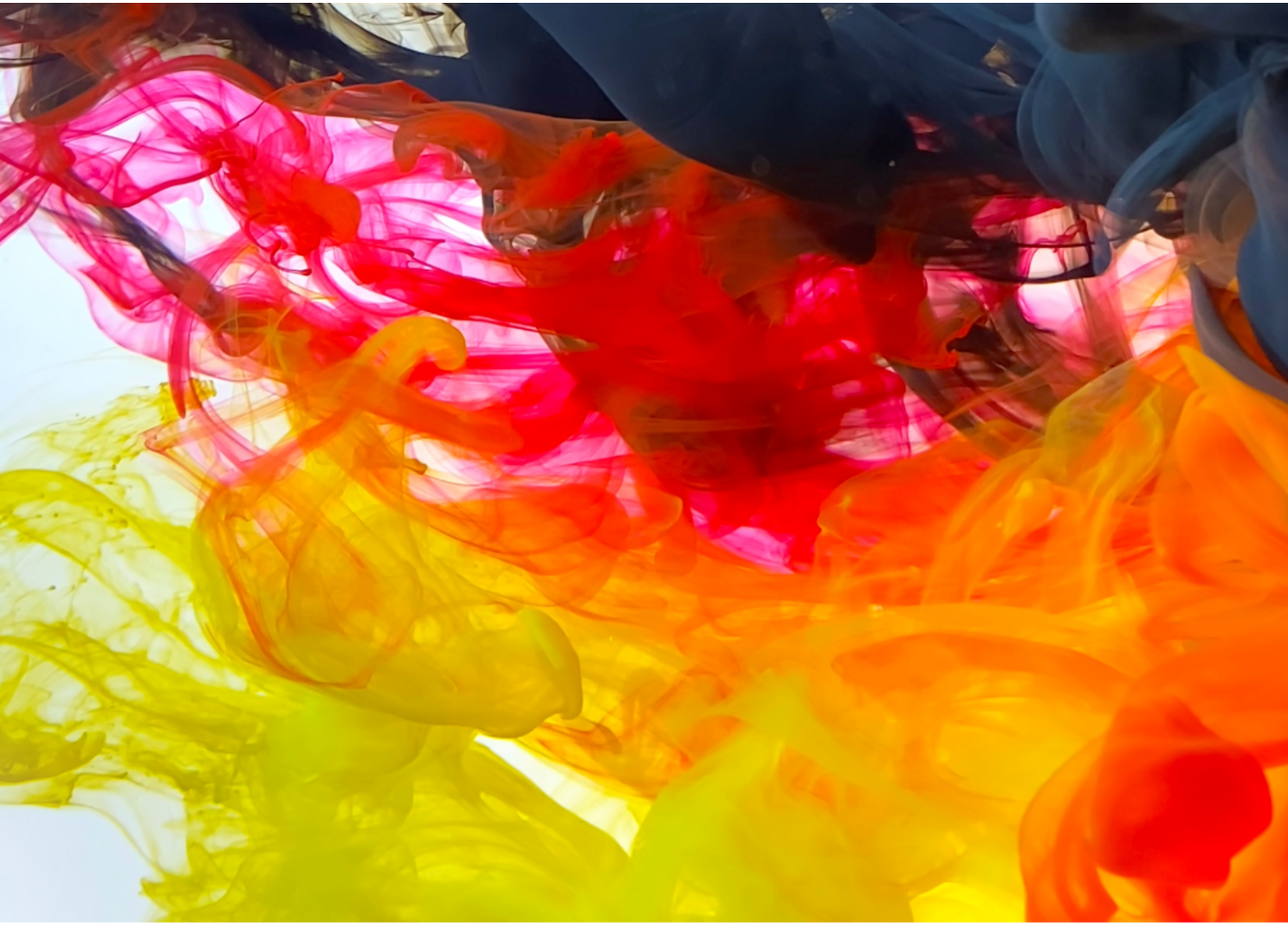
Some concluding thoughts

So where does this leave us and what is the future of German EU law scholarship?

Let me first emphasise that there still is a lot of genuine EU law expertise in and from Germany. This is also part of the success story I started out from: the lawyers in the relevant divisions of the Federal government, in the Ministry of Economics (representing Germany before the Court of Justice) and at the Federal chancellery, know their EU law. German lawyers in international law firms dealing with EU law and inside EU institutions stand out – although note that there has never been a German lawyer heading the Legal Service of the Council or the Commission, which is particularly striking when compared to the impressive French record in that respect. Nevertheless, there is evidence that German EU law scholarship remains below its capabilities, which is actually quite stunning for such a large Member State with such a law-driven political culture.

As far as the concept of distinct 'German EU law scholarship' is concerned, it all may boil down to another paradox: arguably, German EU law scholarship first needs to become more European (again) in order to be perceived (again) as an original and distinct German contribution to the development of EU law.



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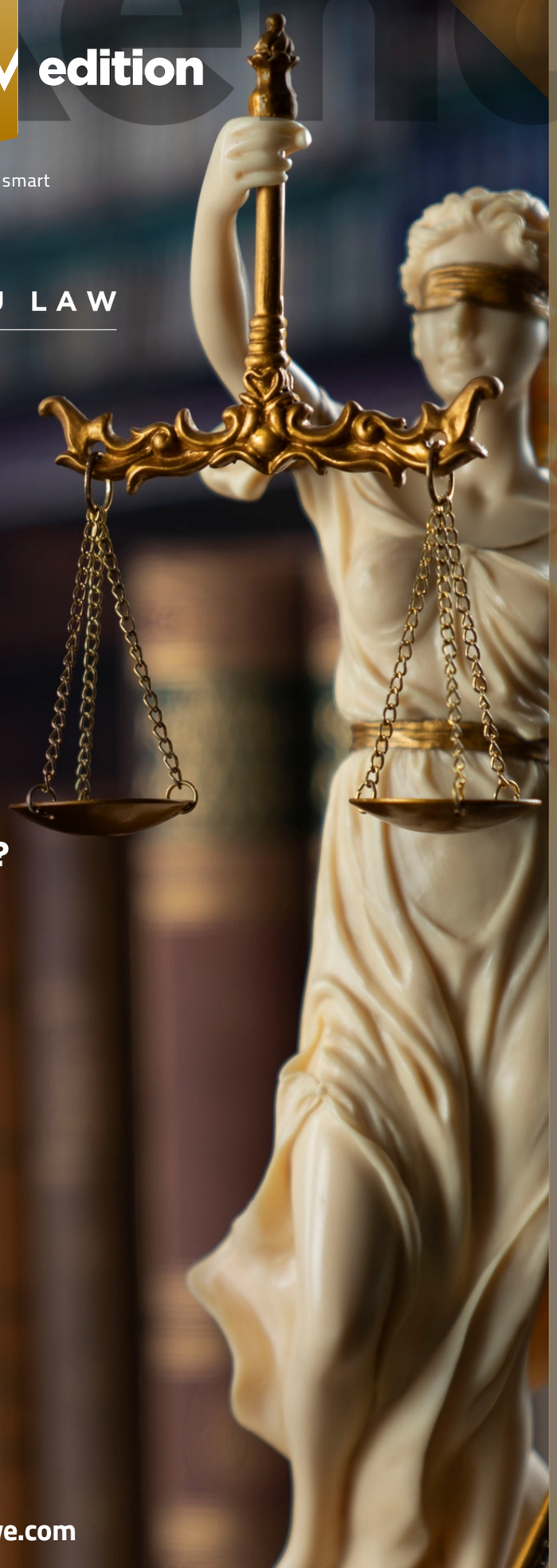

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