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Diana Wallis  
Heinz Weil *Editors*

# The Future of Legal Europe: Will We Trust in It?

Liber Amicorum in Honour of  
Wolfgang Heusel

 Springer

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Dr. Wolfgang Heusel

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# **Foreword by Pauline Koskelo**

## **A Tribute to Wolfgang and a Lament on Shared Worries**

This is a *Liber Amicorum* in the truest sense of the term. Over the years, Wolfgang Heusel has won the collegial and personal friendship and high professional appreciation of so many people with whom he has worked and come into contact with in the field of European legal affairs. While their circle extends far beyond the present authors, it is my pleasure to thank all those who have been able to take the opportunity to contribute to this publication.

## **Wolfgang Heusel as the ERA “Baumeister”**

The history of ERA is very closely linked with Wolfgang’s professional life. He has accompanied ERA from the very beginning and played a pivotal role, first as Deputy Director and then Director of ERA, throughout its three decades of remarkable institutional evolution.

At the same time, the developments in Europe during this period have largely defined the issues which ERA, under Wolfgang’s leadership, has been involved with, and the challenges it has met in the course of its existence. In its activities as an institution for professional training, exchanges of experience and debate in matters of European law, ERA is constantly at the fore of current European affairs. Thus, Wolfgang’s work history and achievements are European “*par excellence*”.

By the early 1990s, the need for establishing a multilateral “Academy of European Law” for legal professionals working in the various countries and all the substantive fields impacted by the common legal framework had become all the more obvious and pressing, as both the scope and the importance of Community law (as it then was) were growing, especially with the implementation of the Internal Market and the Schengen Area. The formal inauguration of ERA, in March 1992,

almost coincided with the adoption of the Treaty of Maastricht, another landmark establishing the European Union, introducing, inter alia, the EU citizenship and providing for the economic and monetary union.

In the course of that first decade, ERA's field of activity grew further in terms of both geography and substance. The EU enlargement of 1995 brought in Austria, Finland and Sweden and was soon followed by the launch of the pre-accession process for Eastern Europe. The Treaty of Amsterdam set out the Area of Freedom, Security and Justice, also incorporating the Schengen regime.

Soon after, further important steps followed with the Treaty of Nice preparing the EU for the big enlargement that took effect in 2004, with a continuation in 2007 and 2013. Another major step was the adoption of the EU Charter of Fundamental Rights in the year 2000, later completed by the Treaty of Lisbon whereby the Charter became a legally binding part of EU primary law.

This short recapitulation of the main EU milestones on both sides of the turn of the century deserves to be mentioned in the present context especially because it highlights the broad range of themes and issues which have also made their mark on the development, scope and reach of ERA and its activities during Wolfgang's long service at the helm of the institution. It also serves to recall the very wide range of the intellectual and managerial sphere of activity to which Wolfgang has so impressively devoted his attention and energies in all these years.

Undoubtedly, the most positive dynamics and hopeful prospects of all those developments helped provide the ambition and the motivation that have been necessary for all the huge efforts and long hours Wolfgang has invested for the benefit of ERA's institutional and operational progress. From a rather humble start, what has emerged over the years is a well-known and well-reputed European organisation which today not only counts all the EU Member States as its patrons but is able to rely on a large pan-European network of high-level experts and institutional actors to engage as speakers at its wide range of events.

The particular focus of ERA's activity, namely to bring together people from all the legal professions involved in EU law matters throughout Europe, has required a broad outreach to all the relevant circles and organisations at both national and European levels. Another point of crucial importance is the financial framework on which the sustained activity depends, as well as the ability to attract and retain high-quality staff. It has been important to shape for ERA a profile, and record, of high quality and responsiveness both as a provider of training and as a forum for debate on topical issues of EU law.

In all the above respects, Wolfgang's unrelenting personal commitment together with his professional and social skills have played a key role. It is with good reasons that I have referred to Wolfgang as the "Baumeister", or Master Builder, of ERA. A "Baumeister" never works alone but, guided by his vision and a plan, he involves himself actively, "hands-on", in moving matters ahead and in responding to the challenges that arise. ERA owes a great deal to its Baumeister of the past three decades.



## The Current Rule of Law Crisis: An Impulse for Sustainable Corrections or an Existential Threat?

The “European Project” has never been without difficulties, complications, setbacks and disappointments. Achieving progress is often a hard and drawn-out process. The EU has gone through crises of various kinds and magnitudes. In the last decade, there has been an accumulation of these: the financial crisis threatening the sustainability of the EMU in particular, the protracted tragedy of Brexit, the influx of refugees and migrants from third countries and most recently the ongoing pandemic.

On many past occasions, the way forward has been found through a crisis of some sort. Indeed, it is not unusual for crises to become significant impulses for action. In the past decade, however, a very fundamental problem has emerged, namely the decline in several Member States of respect for the rule of law and the willingness to adhere to the core values on which the EU is based. It goes without saying that this topic has not been neglected on the agenda of ERA events. Unfortunately, it will no doubt have to remain there.

Indeed, this crisis is of a most serious and dangerous kind because it entails a crumbling of the very foundation of the European Union. What is more, the EU is dangerously weak in upholding its constitutional core principles. I have referred to the current dilemma as a situation of entrapment for those committed to these core principles.<sup>1</sup>

Article 2 TEU proclaims that the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Agreed and enshrined at the highest normative level, these core values set out the union’s *legal* foundation by which all Member States are bound. These are *mutual* commitments, no longer mere matters of national choice or interpretation.

The values in Article 2 TEU form an interconnected whole. This interlinkage is reflected in the contemporary notion of rule of law, as worked out by the Venice Commission and adopted within the Council of Europe. In this sense, the rule of law is a keystone notion also in the context of Article 2 TEU. It is implausible to argue that the basic requirements of the rule of law are obscure in their essence.

The role of separated powers and a truly independent judiciary as the ultimate guarantor of the rule of law and the rights of individuals is crucial. Effective and equal legal protection will not be ensured without genuine judicial independence. The requirements of such independence, both structural and individual, entail high demands not just for the judiciary itself but for the political, institutional and societal environment in which the justice system functions.

In the EU, the uniform application of Union law is of vital importance for the maintenance of the “level playing field” and for the reality of the rights arising under Union law for individuals and economic operators. The acceptability and

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<sup>1</sup>The State of the European Union—entrapment for those committed to its core values? Thyssen Lectures on “The EU as a Community of European Law and Values”, Fritz Thyssen Stiftung 2020.



workability of mutual recognition as a key element of Union law depend entirely on the premise that the rule of law prevails and that the relevant judgments, decisions and requests originate from truly independent and impartial judicial authorities.

The EU simply cannot function in accordance with its basic principles unless respect for the rule of law is effectively guaranteed and preserved in all Member States. The decline that has emerged over the past decade, as the respect for the rule of law has been seriously undermined in certain Member States, is dangerous. To sustain a Union that is meant to be permanent, the commitment to the jointly adopted core constitutional values must also remain stable and intact. Without a shared value basis, the stability, the functioning and the legitimacy of the Union are at great risk.

While Article 2 TEU is meant to be the bedrock of the Union, its solidity depends entirely on the institutional mechanisms of support and enforcement—and ultimately on the vigilance of civil society. The inadequacy and fragility of the existing institutional framework are obvious.

No Member State can be expelled from the EU, even on the grounds of a systemic failure to abide by its foundational norms. The mechanism in Article 7 TEU is thwarted by its procedural requirements, whereby the *upholding* of the agreed core values also depends on unanimity, with the sole exception of the “defendant” State. Once the problem has expanded (been allowed to expand) beyond a single Member State, the mechanism is paralysed: the more the problem spreads, the weaker the potential response. The new monitoring mechanism under the Commission’s “Rule of Law Framework” is unlikely to bring about any reversal of already entrenched situations.

Plans to link EU financial subsidies with rule of law compliance have also been thwarted, not only due to political resistance from those who might be adversely affected but also because of the lack of a proper legal basis for the introduction of such conditionality. It appears that no restrictive measures can be envisaged without a direct link between the deficiency and the use of EU funds, which of course entails a severe limitation at the outset.

Judicial enforcement through the EU Court of Justice has so far yielded the most positive results—which again underlines the importance of an independent judiciary for the rule of law. Some important developments have emerged in CJEU case-law, especially in the reinforcement of the legal basis on which the Commission can proceed against domestic measures that impair judicial independence. Recourse to infringement proceedings—through which the CJEU may establish a failure by a Member State to fulfil its Treaty obligations—may also, ultimately, lead to financial sanctions being imposed for non-compliance. As a court, however, the CJEU can never act of its own motion. Any enforcement of Treaty obligations will always require action to be taken by the Commission as “guardian of the Treaties”. The outcomes will therefore also depend on the firmness and determination of that institution.

Preliminary reference procedures are another avenue for the judicial enforcement of EU law. Given that these proceedings function in the context of domestic adjudication, they depend on references being made by the competent domestic

courts and on the rulings being implemented. This presupposes the relevant domestic structures still being intact for the exercise of those functions.

In mutual recognition, the courts of the executing Member States risk becoming directly involved in any dysfunction that may vitiate the proceedings and judicial decisions taken in the Member State of origin. The outcomes of mutual recognition can be fair and proper only if the quality of the rule of law is trustworthy at both ends. This premiss no longer holds, and a peculiar paradox has emerged. According to the CJEU, the requirement of judicial independence is part of the essence of the fundamental right to a fair trial. Yet, in the face of established systemic deficiencies in this regard, the requested court must inquire into whether the individual concerned has a specific need for this core requirement being assured in the state of origin. Thus, the operative conclusion undermines the first proposition. This can hardly be a sustainable path to follow.

The deficiencies in the union's ability to uphold its foundational core principles create a situation of entrapment for those Member States which do remain committed to the rule of law. They not only find themselves stuck with Union partners where the rule of law may be in serious decline, even abandoned, but also remain bound to keep contributing to massive financial subsidies for the benefit of such States, thereby in effect promoting the decay of foundational values. At the same time, the Union risks becoming more and more dysfunctional.

Notwithstanding declarations that “without respect for the rule of law there can be no European Union”, actual prospects unfortunately appear gloomier. In the absence of any effective pressure, nor any incentive, for non-complying Member States to exit, the only ultimate scenario for upholding the values enshrined in Article 2 TEU would consist in the exit of those Member States which remain serious in their commitment to those values—with a relaunch in a new union better set up to ensure that the foundational commitments remain effectively in place. Such a breakaway, however, does not appear likely in a foreseeable future. Political inertia, geopolitical considerations and economic interests in the preservation of an internal market in the current format probably stand in the way.

The worst alternative, however, would be resignation. Resisting the erosion of the rule of law within the EU remains essential. Resolving the problem will take much more than declarations on the importance of the core principles. Although words may sometimes amount to deeds, in this context they cannot replace deeds. Whether such efforts can be successful despite the deficient legal and institutional framework remains to be seen. Unless the internal decay is overcome, there can be no good future for the EU as we know it.

The troubles within the EU are in part reflections of wider global phenomena. It is disheartening to see how the possibilities for the easier exercise of freedom of expression made possible by modern means of communication do not merely serve to enhance transparency, access to information, exchange of knowledge and ideas and critical but ultimately productive efforts to uncover and help resolve issues: increasingly, we discover how such modern means are also employed to propagate falsehoods and to spread the most uncivilised, toxic, divisive and conflictual

outpourings of the human mind. The cultivation of the best is fiercely defied by an amplification of the worst.

For a Union set up to uphold shared values and to act together constructively to deal with common issues, there might be special dangers involved if a culture of discourse were to succumb to the noises of tribal shouting. As we witness the perils arising when democratic principles and the rule of law become undermined by those who rose to power by virtue of those principles, it becomes clear that struggles are not over, whether inside or outside Europe. A couple of decades ago we were more hopeful than today that—given all the lessons of the past—less difficult times might finally lie ahead and that the most crucial fundamentals would no longer be questioned.

## **Best Wishes**

I would of course have preferred to avoid any sombre reflections on this occasion. But we cannot ignore the present realities, and I have ventilated the above worries here in the knowledge that they are shared ones.

While we cannot say that all is well in Europe, we can nonetheless unreservedly congratulate and thank Wolfgang for his long dedication and successful work in the service of ERA, and thus for the promotion of the ideas, values and goals on which the EU itself is based. We persist in the hope that they shall not be defeated.

Many will join me in a figurative toast to honour Wolfgang's fine career and to express our warmest thanks and best farewell wishes. SKÅL to a true European soul and a very dear friend!

Judge, European Court of Human  
Rights, Strasbourg, France

Pauliine Koskelo

## Preface by the Co-Editors

It was never going to be possible to let Wolfgang Heusel retire without his friends and former colleagues paying a fitting tribute to him and to his achievements in leading and guiding for so many years the Academy of European Law (ERA) in Trier.

Wolfgang Heusel was born in Darmstadt in 1955 and took his *Abitur* in Wiesbaden in 1974. Given his passion for European history and politics, he initially thought of studying journalism to become a reporter. Instead, he chose—to some extent as a default option—to study law at the University of Mainz after completing his military service, making ends meet by working nights as a taxi driver. At a time when studying abroad was not as common as it has now become, Wolfgang spent a year at the University of Dijon in France in 1978–1979. He subsequently passed his first and second state law examinations in Mainz in 1981 and 1985, respectively, and became a research assistant to Professor Krümpelmann at the Chair of Criminal Law and Law of Criminal Procedure in Mainz. He also worked part-time for a lawyer between 1985 and 1989. Wolfgang obtained a Ph.D. degree in law with a dissertation on “soft” international law in 1989. Soon after, he joined the judiciary where he successively worked as a public prosecutor in Koblenz, served in the Ministry of Justice of the State of Rhineland-Palatinate, was a judge at the civil division of the Regional Court of Mainz between 1990 and 1992 and was appointed to the Civil Division of the Koblenz Court of Appeal (1995).

His first contact with ERA dates back to 1991. At that time, ERA was still just a concept, an idea supported by the then Minister of Justice of Rhineland-Palatinate Peter Caesar. During his secondment to the Ministry of Justice, Wolfgang was already involved in the project. He started working part-time for ERA in June 1991, was then appointed Deputy Director and Programme Director in January 1993 and became Director in January 2000. He remained in this function until his retirement at the end of 2020. For nearly 30 years, ERA was Wolfgang’s *Zauberberg* (“Magic Mountain”)—to use the title of the famous novel by his favourite writer Thomas Mann.

With hard work, perseverance, charisma, humour—a lot of humour—this excellent jurist who both charmed and impressed those close to him contributed decisively to what ERA has become today: a training institute, the quality and expertise of which are recognised throughout Europe. Furthermore, through learning by doing, the *Volljurist*, initially trained to be a judge, became as well a successful manager, a multilingual promoter of programmes open to all legal professions and a persuasive lobbyist. The fact that all EU Member States joined the ERA Foundation during his tenure is to a large extent his achievement and, dare we say it, a very major success. Another of his major achievements has been the network of ERA supporters and the solid team he has patiently built over the years. Of course, when one talks about Wolfgang, it is impossible to omit his other team at home: Lydia Heusel, his wife, and his four daughters—Barbara, Claudia, Judith and Ursula.

Wolfgang's Liber Amicorum is entitled:

*The Future of Legal Europe: Will We Trust in It?*

Besides the fact that this title conveys a definite sense of provocation, a trait that the recipient of this book has always appreciated, it also reflects our concern for the future of the European Union. When, in 2019 the idea of preparing this Liber Amicorum emerged, it was a very different time. It was a time when Brexit was still potentially reversible and a time when a pandemic on the scale of the COVID-19 outbreak—with its societal, political and economic implications—still seemed unthinkable. It was already a time when the rule of law in the EU was a concern, but probably not (yet) the systemic threat it has become. The year 2020 will have swept away many certainties and shaken the European edifice like no other series of crises in recent times. The question of trust and confidence in European law and the European project will remain of concern for some years to come.

This title is also a tribute—or rather a reference—to John Toulmin QC CMG. When ERA celebrated its 20 years of existence in 2012, John, who was then the Chair of the Board of Trustees, proposed *The Future of Legal Europe* as the overarching topic of the anniversary congress. John would have been an obvious contributor to this Liber Amicorum. He was Wolfgang's unlikely friend, as the two had in fact nothing in common, except the essentials: a passion for ERA, a strong—partly diverging—belief in the European project, a strategic mind, a political instinct, a gift for negotiations and—it should not be forgotten—a love for Burgundy and its vineyards. The affection and mutual respect between the two were for a long time a driving force for the development of ERA.

The other professional colleague of Wolfgang who needs to be mentioned in this preface is of course Pauliine Koskelo, who succeeded John as Chair of the Board of Trustees and remained in this function until 2020. Wolfgang was able to count on Pauline's valuable advice and support for many years. Her values, her analytical mind and her humanity have suffused ERA's work and latest successes. We—the co-editors—are grateful to Pauliine Koskelo for kindly accepting to write the foreword and we know how honoured this will make Wolfgang feel.

All in all, the search for authors was not a difficult one, as most of those we approached were quick to respond and eager to contribute. Their number could have

been much higher if we had not had to take into account some constraints—especially time and editorial ones. We hope that those who have not been included will understand. It was indeed not possible to bring together in one volume all those who have played a role in Wolfgang’s working life. So, we tried to strike a balance between “old” and “recent” players in the development of ERA by bringing together some of Wolfgang’s friends from the legal and judicial professions, from academia, from politics and last but not least from ERA itself.

This *Liber Amicorum* is the product of a collective effort that goes beyond the contributors and co-editors. We would thus like to thank very warmly Fabian Anheier, Elizabeth Greenwood and Tom Vallée, without whose assistance we would not have been able to produce this book on time. We also thank Springer Verlag, in particular for accepting contributions in English, French and German.

We would like to finish by indicating that the four of us at different periods and different positions worked together with Wolfgang. During all these years, it was a privilege and often great fun to fight side-by-side with him for the benefit of ERA—an institution in whose future—in no small part due to the foundational efforts Wolfgang has exerted over many years—we will be happy to trust.

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