SPEECH

Change and continuity in law

Keynote speech by Christine Lagarde, President of the ECB, at the ECB Legal Conference 2021

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Introduction

Ladies and gentlemen,

The first President of the European Commission, Walter Hallstein, famously said that the European Union is a "community of law"[1] – an expression which was then picked up by the European Court of Justice in its judgments. The rule of law is one of the basic principles of our Union, and one we have to defend – especially at times when it is put at risk of being attacked.[2]

This principle means that EU law is the cement that keeps the European construction together. It is the precondition for the very existence of the EU institutions, including the ECB, and for the policies that they are mandated to carry out. But there is an ever-present tension between the role of law as an immutable anchor of society and its need to adapt as the world changes.

Europe's reaction to the coronavirus (COVID-19) crisis has led to a number of institutional innovations, leading some to deem it a "Hamiltonian moment for Europe". This epithet primarily reflects Alexander Hamilton's guiding role in creating the US fiscal and monetary institutional set-up. But there is also a second reason why the description fits. Hamilton – a lawyer – was one of the first to introduce the question of the relationship between change and law, and of the role that interpretation – in particular the authoritative interpretation by judges – can have in this context.

This issue has developed into a decades-long debate between "originalism" and "realism" in US scholarship. The same question has also shaped the way in which the notion of an ever-closer Union, the foundation of the EU Treaties, has been developed by the jurisprudence of the Court of Justice. And it continues to shape Europe's future direction today.

In my remarks this morning, I would like to review the evolution of this debate in US law, starting with Hamilton himself. I will then turn to EU law and ask whether the lessons we can draw from legal history can help give us a sense of direction for the challenges of today and tomorrow.

Hamilton and the Constitution

Hamilton is nowadays credited for having been the father of the US fiscal union, and – as further proof of how these two things go hand in hand – he was also the father of the first central bank of the United States. The US legislature then abolished and re-established a nationwide central bank twice before finally settling on the Federal Reserve System in 1913.

Change is the result of a process of trial and error, and one which can easily end up back at square one – as happened with the repeated attempts to do away with the institution of a central bank altogether to create a new monetary system. To cater for the right balance between the aspiration to experiment and the need to limit errors, legal frameworks include provisions of constitutional rank. These rules[3] provide an element of continuity which anchors the whole system and to which "regular" laws are hierarchically subordinated: laws can be passed by the majorities of the time, but the Constitution is typically very difficult to amend.

However, change in law is pursued not only through the enactment of new laws, but also in the way law is interpreted and applied. And, because they are difficult to amend, this is particularly important for legal provisions having a constitutional rank. Factual contexts can change, and the question then

arises whether there is scope for the interpretation of such provisions to change as well, which may be better suited to new social or economic circumstances.

This question is primarily for courts to decide, which have been tasked with interpreting provisions with a constitutional rank. But it also applies to other institutions which have to apply those provisions.

Hamilton famously wrote that judges, in order to preserve the people's rights and privileges, must have authority to check legislation and acts of the executive for constitutionality. But at the same time, the judiciary, by the very nature of its functions, will always be "the least dangerous" branch of government, for judges hold neither the sword nor the purse of the community; ultimately, they must depend upon the political branches to effectuate their judgments[4].

Hamilton was pointing to the very delicate balance which must be struck between the political legitimation of democratic bodies, which relies on the people, and the authority of independent institutions such as the judiciary – or even central banks – which relies on the law. Since the law is the only source of legitimation of these institutions, the exact meaning and scope of the law – in other words, its *interpretation* – becomes an issue of crucial importance.

The original meaning of the law in US legal scholarship: continuity and change

If the authority of courts – and the powers of other independent institutions – indeed relies on the law, a question that may be asked is "which law"?

Nobody would disagree with the law narrowly defined, i.e. the provisions under a certain legal framework, having been approved by a certain authority which is entrusted with this power, and following a certain procedure. But the answer becomes more complicated if one considers a broader interpretation, such as the adjudication of the law by the courts.

According to a traditional view, judges are just "the living voice of the Law"[5], while others deem that the idea of law should be stretched to include judicial adjudication[6]. This fascinating debate has been at the centre of legal scholarship for most of the last century, and in the United States it has become the cleavage in the US Supreme Court across which contentious wedge issues have spanned.

The more traditional, "formalist" approach posits that the legal system is composed of a hierarchical system of norms where each level is validated by a superior one. The prevalent view in US legal scholarship in the first part of the last century, which is still represented in the Supreme Court today, is that the aim of interpretation should be to find out the original meaning of the law as drafted by the legislators – or alternatively, the original intention of these drafters. The Constitution should not only be lex legum, a law of laws, but also lex immutabilis, unalterable law, unless explicitly changed via the amendment process. This school of thought is known as "originalism".

In the 1930s, an opposing movement – the "realist movement" – arose in US legal scholarship. This movement challenged the understanding and very meaning of the concept of law, which in its view should have a much broader scope than legislation alone. That concept should include, inter alia, decision-making by judicial authorities, since "judges do and must legislate" – although only to the extent of filling gaps between positive norms by way of interpretation[7].

This debate between the originalist and realist schools of thought has animated US legal doctrine during the last century, and in more recent times has been personified in the amicable dissent between Supreme Court Justices Scalia and Ginsburg[8]. According to the realists, the very high bar to amend the US Constitution means that the originalist approach introduces an element of rigidity into the legal framework. And this becomes increasingly burdensome as time goes by and the world changes more and more from that which existed when the US Constitution was originally drafted. This is why the realist school has advocated using interpretation to make the legal framework more dynamic, allowing society to adapt to evolving circumstances.

The 14th Amendment, one of the amendments adopted after the War of Secession extending citizenship and civil rights, has been the battlefield *par excellence* for this debate. And it has been an extremely concrete debate for those people who did not originally benefit from constitutional rights and

protections. Indeed, the first part of US constitutional history was defined by the extension of these rights and safeguards to once-excluded groups, such as people from ethnic minorities (including those who were formerly enslaved), men without property, and women[9].

Yet these important changes – which sound obvious to us today – happened to a large extent without changes to the text of the Constitution, so much so that originalist scholars rebelled against what they saw as an abusive use of powers by the Court[10]. In her Madison Lecture, Justice Ginsburg recalled that many of the framers of the Constitution spoke publicly against extending even voting rights to women or black people, who they explicitly saw as a danger.[11]

However, the US Constitution, which does not speak about "equality" with regard to individual rights, had within it the potential to become the foundation on which the rights of women and minorities could be grounded. Remarkably, Justice Ginsburg herself mentioned in the same Madison Lecture that "with prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not "a bevy of Platonic Guardians," the Justices generally follow, they do not lead, changes taking place elsewhere in society".[12]

The Treaty as a new step in the process of creating an ever-closer Union

This debate has shown that there is an inherent tension in law, between change on the one hand and the preservation of the legacy of the past on the other. Cutting across the ideals of change and continuity are the roles of legislation and interpretation in law. It should be no surprise that this tension also exists in EU law.

On the one hand, several elements can be used to argue in favour of the immutable nature of the Treaties as drafted by the *Herren der Verträge*: above all, the principle of conferral and, to a lesser extent, the principle of subsidiarity and the reference to constitutional identities. The burdensome process for introducing amendments also points in this direction.

On the other hand, the very wording of the Treaties lends itself to a dynamic interpretation, most tellingly when they refer to a "process of creating an ever-closer Union", of which the Treaties themselves are only "a new step". Indeed, there are several Treaty provisions that explicitly cater for the need to adapt to changes.

First, there is the general enabling clause, which foresees that the EU Council can unanimously adopt the measures necessary to attain one of the objectives of the Treaties when the Treaties themselves have not provided the necessary powers.[13] Second, there are other more specific provisions which allow the expansion of the tasks and powers assigned to the EU and its institutions. These include the provision on the basis of which the prudential supervision of banks was assigned to the ECB in 2014, without a Treaty change.[14]

There are also several provisions which, in a changing world, can be interpreted to cover new developments. Consider the digital euro or climate change: in both cases the provisions are already there but need to be interpreted to apply to new phenomena. To be the source of authoritative interpretation of EU law, including its founding Treaties, this role is assigned by the Treaties specifically to the European Court of Justice.

The discussions in the EU today on upholding the rule of law are a clear example of how a legal basis in the Treaties has been reinterpreted as the foundation of a whole new framework – a framework which had not been expressly provided for by the drafters of the Treaties, but which the Treaties had the potential to express, and which is in itself providing the basis for the independence of the judiciary in the national context. Even concepts such as the direct effect and primacy of EU law do not stem from the Treaties directly, but from their interpretation in early ground-breaking judgments such as *Van Gend en Loos*[15] and *Costa Enel*[16], respectively.

The jurisprudential origin of these concepts has been used by some Member States to challenge the legitimacy of the Court's role and of the primacy of EU law itself. These challenges have taken place in the alleged defence of the real intentions of the *Herren der Verträge* when they signed the Treaties.

Proponents of change often call for new legislation to make change happen – most of the time because it is thought that only legislation can provide the necessary degree of clarity and certainty. However, pursuing the route of legislative change can serve as a way to resist reforms which would otherwise be possible in a context of the continuity of existing rules and their adapted interpretation. This is particularly true in a multilateral context like that of the EU, where a double majority in the European Parliament and EU Council is required to adopt legislation. The bar becomes even higher in the case of changes to the Treaties themselves, where the unanimity of Member States is required, including national ratification procedures which sometimes require referendums.

Member States provide important – although often silent – testimonials to the possibility of using the flexibility in the Treaties to adapt to change without amending the text itself. If Member States do not oppose an interpretation of the law which is developed in view of changed circumstances, it can be seen as a validation mechanism for the interpretative change. Indeed, since the Treaty of Lisbon entered into force, there have been almost no changes to the text of the Treaties[17], yet in this period the EU went through the global financial crisis, the migration crisis and more recently the COVID-19 crisis. The evolutive nature of EU law has allowed it to expand and refine the profile and type of intervention that the EU can propose in reaction to a crisis. Today, many measures are possible which 15 years ago would not have even seemed plausible.

Proponents of a careful scrutiny of the action of EU institutions to avoid them overstepping their mandates stress that an evolutive interpretation is not the law that was written in the Treaties, and that this represents undue interference by the Court of Justice in the sovereign decisions of Member States. At the same time, one has to observe that Treaty amendments are nowadays invoked as being required for changes which are often of a technical nature and relatively narrow in scope. This stands in contrast to the incremental evolution which took place in EU law during the first decades and in the absence of any change to the founding Treaties.

In a complex, multi-layered institutional framework such as the EU, one should not see this issue as being limited to a looming conflict between independent courts and Member States. Courts can rightly argue among themselves about different interpretations of the law, and even about the extent to which another court has been given a mandate by the law to give a binding interpretation.

Yet we have challenges that our US friends do not, because within a single system with a single ultimate jurisdictional authority, reconciliation is possible at the top. The language of legal pluralism has been useful to keep everything together, but there is a limit at which the presence of multiple voices, which claim for themselves the role of ultimate deciders, turns from being a resource into a risk – that is, the risk of perennial standstill, where no move is possible without Treaty change.

While this may be seen as a virtue by some – the EU version of the originalists – it is a risk insofar as such a system is inflexible and the idea that change is possible in continuity is denied. It is therefore increasingly becoming apparent that only discontinuity can deliver change. As institutions devoted to continuity, central banks should question if this is what we want.

Conclusion

Let me conclude.

Change can be pursued in many ways, and it is not necessarily true that those which are more eye-catching are also the most effective. Particularly effective are those changes which take place in continuity. One particular case is that of the law, which can be interpreted in a way that makes sense and adapts to societal changes, while remaining coherent with the fundamental principles of the legal system. This ensures continuity in the meaning of the law, in the sense that the text of the law has not changed at all.

Against this background, events like this conference are extremely important, because they offer an occasion to foster discussions, new ways of thinking and possible new ways of interpreting the law, without changing it, in a way that better suits the needs of today.

Following the lesson of Justice Ginsburg, independent institutions which ground their legitimation in the law should stand ready to adapt to the changes which happen in society. And they should interpret

and apply the law consequentially, in the way that best serves the needs of the societies and polities which these institutions are meant to serve.

1. Hallstein, W. (1962), “Die EWG—Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion”, University of Padua, 12 March, in Hallstein, W., Europäische Reden, pp. 343-44.
2. The programme of the ECB Legal Conference is available on the ECB’s website.
3. Which may or may not be referred to as a constitution, like in the case of the Treaties in the EU legal framework.
4. Hamilton, A., *The Federalist Papers*, No 78.
5. “Les juges … ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n’en peuvent modérer ni la force ni la rigueur.” See Montesquieu (1748), *De l’esprit des lois*.
6. For some, even interpretation as such, and the factual context insofar as it influences such interpretation (and thereby judicial adjudication).
7. *Southern Pac. Co. v Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Even the father of the *Reine Rechtslehre,* Hans Kelsen*,* admitted that in applying the law to an individual case some margins for interpretation by judicial authorities are inevitable. See von Bernstorff, J., “Hans Kelsen’s Judicial Decisionism versus Carl Schmitt’s Concept of the One ‘Right’ Judicial Decision: Comments on Stanley L Paulson, ‘Metamorphosis in Hans Kelsen’s Legal Philosophy’ (2017) 80(5) MLR 860-894”, *Modern Law Review*.
8. Monaghan, H.P. (2004), “Doing Originalism”, *Scholarship Archive*, Columbia Law School.
9. Morris, R.B. (1987), *The Forging of the Union, 1781-1789*, Harper & Row, New York, pp. 162-163.
10. Berger, R. (1977), *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Harvard University Press.
11. Ginsburg, R. (1992), “Speaking in a judicial voice”, *New York University Law Review*, Vol. 67, No 6, pp. 1185-1209.
12. In doing so, Justice Ginsburg referred to a piece of scholarship by Archibald Cox, tellingly entitled “The Role of the Supreme Court: Judicial Activism or Self-Restraint?” (Cox, A. (1987), “The Role of the Supreme Court: Judicial Activism or Self-Restraint?”, *Maryland Law Review*, Vol. 47, No 1, pp. 118-138).
13. Article 352 TFEU.
14. Article 127(6) TFEU.
15. Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, ECLI:EU:C:1963:1.
16. Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66.
17. With the important exception of the addition of a new paragraph to Article 136 TFEU.

CONTACT
European Central Bank
Directorate General Communications

- Sonnemannstrasse 20
- 60314 Frankfurt am Main, Germany
- +49 69 1344 7455
- media@ecb.europa.eu

Media contacts