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European Constitutional Imagination

A Whig Interpretation of the Process of European Integration?

*Marco Dani and Agustín José Menéndez**

> What is discussed is the tendency in many historians to write on the side of Protestants and Whigs, to praise revolutions provided they have been successful, to emphasize certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present.
>
> Herbert Butterfield, *The Whig Interpretation of History*, 1931

I. Introduction

In this chapter, the characterization of European law[1] as a constitutional order is challenged from two related standpoints, namely, the ambiguity of the qualification of European law as constitutional, and the lack of a well-argued narrative explaining how European law became constitutional and what type of constitutionalism it has developed. We start by clarifying the concept and conceptions of constitution, emphasizing the centrality of the structural and normative conceptions of constitution. This preliminary conceptual work facilitates the task of elucidating what exactly is being argued when it is claimed that European law is constitutional, and what implications are consequently justified. We then note that while the process of constitutionalizing plays a key role in structuring European law as a discipline, normative reasons underlying such characterization remain, if anything, more assumed than explicit and fully demonstrated. This leads us to conclude by arguing that it may be preferable not to imagine contemporary European law in constitutional terms. At the same time, however, we note that the power effectively held by the European Union reaches so many corners of national legal and socio-economic structures as to render it insufficient to merely reject any claim to its constitutionality. The predicament of European law is that of a legal order that de facto discharges the

* This chapter is dedicated to Mark Gilbert.

[1] We use the term 'European law' to refer to supranational law, both of the Community and of the European Union law. This avoids the confusion resulting from the use of those two terms, although it is unsatisfactory to the extent that it appropriates the adjective European to speak of what is actually only one part of it.

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functional tasks proper of constitutional orders, while lacking the requisite democratic and social credentials.

The leitmotiv of this book, the 'European constitutional imagination', is part of the progeny of what may be referred as the 'constitutional turn' in European studies, most especially European legal studies. Once regarded as odd,[2] characterization of the European Union as a 'constitutional' entity became very frequent in the 1990s[3] and ubiquitous in the early 2000s, to the point that different forms of 'Euro-constitutionalism' have become influential theories among not only jurists[4] but also political philosophers,[5] political scientists,[6] and historians.[7] These 'constitutional' theories are deployed as reconstructive tools to account for the development of European law, which became a constitutional legal order on a par with national democratic legal orders. The attribution of a constitutional nature to European law comes to bear when settling concrete legal questions—notably, but not exclusively, conflicts between supranational and national norms regarding the competence of institutions or the substantive content of norms, entailing the supremacy of European law and its prevalence over any conflicting national norms, even those included in the national, and democratically legitimated, constitution.[8]

In this chapter we challenge the constitutional renderings of European law from two related standpoints—the ambiguity of what is meant when characterizing European law as constitutional, and the lack of a well-argued narrative explaining how European law became constitutional and what type of constitutionalism it has developed—which propel, in our view, confused thinking on the relationship between European and national law.

Firstly, theories that characterize European law as constitutional tend to assume that the meaning of constitutional and, consequently, the implications of characterizing a

[2] See Eric Stein, Gerhard Casper, John W Bridge, Stefan A Riesenfeld, Pieter van Themaat, and Ami Barav, 'The Emerging European Constitution' (1978) 72 *Proceedings of the American Society of International Law* 166, 166 in which Stein apologizes for the title of the panel: 'Professor Stein stated that he must accept blame for the ringing title for the panel. It might strike one as unrealistic and Pollyannaish, if not outright propagandistic in more than one sense.'

[3] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; Giuseppe F Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595.

[4] See for example Joseph HH Weiler, *The Constitution of Europe, 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999); Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2009); Robert Schütze, *European Constitutional Law* (CUP 2015).

[5] Jürgen Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?" ' (1995) 1 *European Law Journal* 303; Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 *New Left Review* 5; Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible' (2015) 21 *European Law Journal* 546.

[6] Simon Hix and Bjørn Høyland, *The Political System of the European Union* (Palgrave 2011); Andrew Moravcsik, 'The European Constitutional Settlement' (2008) 31 *The World Economy* 158.

[7] Bill Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in Its Intellectual Context' (2015) 21 *European Law Journal* 434; Morten Rasmussen and Dorte S Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies' (2019) 25 *European Law Journal* 1.

[8] See, eg, the ruling in Case C-416/10 *Križan and Others* [2013] ECLI:EU:C:2013:8.

legal order as constitutional are (or should be) univocal.[9] This is hardly the case and tends to give rise to very confused debates, in which implications are drawn from the constitutionality of European law (paradigmatically, its supremacy over any other conflicting norm, including national constitutional norms) which would be fully justified only if European law was constitutional in a strong normative sense, but not necessarily in most others. This invites a more articulate analysis of the concept and conceptions of constitution, which we undertake in section II, so as to be in a position to clarify what exactly is being argued when it is claimed that European law is constitutional, what implications are consequently justified, and which of them are not.

Second, and quite relatedly, it is clear that whatever the sense in which European law is regarded as constitutional, it must be claimed that this results from the transformation of an international legal order established through three international treaties into a constitutional order which may define the canonical form of constitutionality in Europe. In other words, given that European law was not created as a constitutional order but rather drafted in the grammar of public international law, anybody claiming that European law is now a constitutional order must specify not only in what sense this is so, but also how European law became constitutional. Again, whether such transformation has been completed depends on what conception of constitution, and what consequent claims, are at stake. A number of European legal scholars, however, assume that European law has become constitutional in a strong normative sense. By doing so, they endorse a Whig legal history of European integration. Accordingly, the constitutionality of European law is the result of an evolutionary process coherent with the spirit if not the letter of its founding Treaties, in which the consequent transformation of the supranational and the national politics and law were already encoded.[10] Consequently, the history of European integration would amount to the unavoidable march forward of a specific way of understanding European law and society.[11] We note that while this process of constitutionalization plays a key role in structuring European law as a discipline, normative reasons underlying such characterization remain, if anything, more assumed than explicit and fully demonstrated. In fact, the Whig narrative not only obfuscates the political, social, and economic conflicts that come a long way to explain the evolution of European law since its inception, but also distracts our attention from the recent pattern of evolution of European law—what could be referred to as its neoliberal torsion. This is why in Section III we revisit a number of key watersheds in the evolution of European law, and consider how and whether the shifts in the characterization of European law as a constitutional order could be justified on the basis of a strong normative conception of constitutionalism. As a result, a less triumphalist and reassuring picture emerges—one in which the legitimacy of European law cannot be taken for granted, in particular if a strong normative conception of constitutionalism is embraced.

[9] This *reductio ad unum* is evident even in the most theoretical analyses; see, eg, Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called' (2006) 54 *American Journal of Comparative Law* 505.

[10] Stein (n 2 and 3); Weiler (n 4).

[11] Alec Stone Sweet, 'The Juridical Coup d'État and the Problem of Authority' (2007) 8 *German Law Journal* 915.

This leads us to conclude the chapter by putting forward two arguments against the European constitutional imagination. Firstly, we find that Euro-constitutionalism is at best anchored to a type of liberal constitutionalism that may well end up divorcing constitutional law from democratic and social legitimacy, to the extent that it may lead to an authoritarian organization of power. Second, we argue that the European Union lacks the political and social legitimacy necessary to sustain any normative claim to constitutionality, not least because of the growing distance it entertains with constitutionalism in a strong normative sense, at least if the latter is conceived in accordance with the democratic and social constitutionalism at the core of European national post-war constitutions. In that sense, the question is not only whether European law should aim to be constitutional, but whether it can be so. At the same time, however, we note that the power effectively held by the European Union reaches so many corners of national legal and socio-economic structures as to render it insufficient to merely reject any claim to its constitutionality. The complexity of the predicament of European law[12] is that of a legal order that de facto discharges functional tasks proper of constitutional orders while lacking the democratic and social credentials to do so.

II. Which Constitution, Whose Constitution?

Many different meanings may be presupposed or attributed to the terms 'constitution' or 'constitutional' when used in a legal or political debate. It is indeed accurate to say that 'constitution' and 'constitutional' are essentially contested concepts,[13] or—which is the same—that how we define them depends on which normative positions we stand for (and vice versa).[14]

Debates about European law are not an exception, as they also reflect the extent to which 'constitution', 'constitutional', and 'constitutionalism' are normatively, culturally, and politically loaded.

To put order into the discussion, it seem to us necessary to:

- distinguish, for analytical purposes, five main conceptions of constitution, while stressing that not all of them are placed at the same level of generality, so there are substantive connections between them (subsection A);
- add that each conception of constitution raises specific claims to constitutionality, which become extremely relevant in pragmatic legal discourses (subsection B);
- conclude that the frequently used (not least in European law debates) concept of 'constitutionalism' refers to a specific conception of constitution hearkening back to 'liberal constitutionalism', to be distinguished from 'democratic and social constitutionalism' (subsection C).

[12] Capturing insights from Kaarlo Tuori, *European Constitutionalism* (CUP 2015), but at the same time not disregarding the warnings of Peter L Lindseth, 'The Perils of "As If" European Constitutionalism' (2017) 22 *European Law Journal* 696.

[13] Walter B Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.

[14] See Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 98.

A. Five conceptions of the constitution

Five main conceptions of the constitution are relevant in debates on European law and, in particular, in its relationship with national constitutional norms:[15]

(1) The *formal* conception of constitution refers to a document or set of documents that *are proclaimed to* contain the fundamental norms governing social interaction and cooperation in a given society.[16] Quite typically, modern legal systems are crowned by one single legal document or a clearly delineated set of documents[17] approved through a special formal procedure established exclusively for that purpose, and which contains quite typically a series of norms establishing and regulating the institutional structure of the polity and substantive provisions defining the fundamental rules and principles of the legal order (not least fundamental rights).

(2) The *functional* conception of constitution refers to the set of norms of social interaction that, regardless of what is formally proclaimed as the constitution, actually *regulate* the fundamental social institutions and practices.[18] It is the sheer centrality of the said norms in the life of the polity that requires us to regard them as constitutional, independently of whether they are written or merely implicit (for example, as 'constitutional conventions'), and of the processes through they were elaborated.

(3) The *structural* constitution refers to the norms that determine whether other norms are or are not part of a given legal order, and what force and effects they have.[19] The structural constitution plays a fundamental role in founding and sustaining the legal domain. It is not only the *gatekeeper* of legal validity, but a necessary condition of the functionality of law; in other words, it plays a fundamental role in creating the conditions under which legal norms can be applied by their addressees and by institutions in a more or less coherent fashion.[20]

[15] Other conceptions could be distinguished. Our point is not to be exhaustive, but to pinpoint the distinctions pertinent in the debate on European law.

[16] It goes without saying that the standard formal constitution is the *written constitution*. The proclamation of the formal constitution has to be done by institutions (eg a constituent assembly) raising and redeeming a claim to political authority; typically, such political authority is reinforced and higher than that vested in 'ordinary' political institutions.

[17] Eric Barendt, *Introduction to Constitutional Law* (OUP 1998) 26ff, distinguishes *written* and *codified* constitutions, the latter being those in which constitutional norms are included in a single document. See also Grimm (n 14) 106.

[18] Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016).

[19] Hans Kelsen, 'The Function of a Constitution' in Richard Tur and William L Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 109; part of the characterization of secondary norms in HLA Hart, *The Concept of Law* (OUP 1961). Kelsen's argument makes the validity of the first historical constitution rest on a hypothetical norm ('the grundnorm') that has to be presumed if we want to make legal arguments. Implicitly, this seems to us to imply grounding the validity of the constitution on a societal practice, perhaps wider than that hinted at by Hart (who makes judges and lawyers the key and almost exclusive players), as argued by Neil MacCormick, *Institutions of Law* (OUP 2007).

[20] Quite famously, Kelsen spoke of the 'first historic constitution' as containing the structural constitution. Kelsen (n 19) 114 ('historically first constitution').

(a) It is important to notice that we may speak of the structural constitution in two different senses: a *weak* and a *strong* one.
(b) When we refer to the constitution of a given legal order in a *weak* sense, we are claiming that we are dealing with a legal order and not merely with a congeries of norms, because from the *standpoint of such legal order itself* (but only from such a standpoint, and not necessarily from others), the validity of its norms is determined by a norm or norms belonging to that very same order.
(c) But we may also speak of the structural constitution in a *strong* sense. Then, we assume that the norms of that legal order govern the validity of *all* legal norms applicable at the given time and in the given space in which such legal order claims validity, whether or not those norms are generated by that legal order. In this latter sense, the pretence of structural constitutionality goes beyond the legal order itself, and applies to all legal orders and suborders applicable within the space and time in which the legal order is valid. In other words, the strong conception presupposes not only that we are dealing not only with a legal order, but with one which claims the last word on the definition of law and legality within a given territory. There are thus close connections between the strong conception of structural constitution and the concept of sovereignty (mediated by concepts such as that of *kompetenz-kompetenz*, not by chance invoked by—some—national constitutional courts when setting limits to the implicit claims to strong structural constitutionality[21] allegedly raised by the European Court of Justice (ECJ)).[22]

(4) The *normative* conception of the constitution points to a set of precepts characterized by very intense legitimacy credentials. From a democratic perspective, constitutional norms are those claiming the broadest popular consensus in a particular political community. By contrast, from a strong cognitivist perspective, constitutional norms are those which reflect the *fundamental* moral values, that is, those values the *correctness* of which can be established independently, also from procedures of collective decision-making.[23] In both cases, it is the *normative legitimacy* of the norms that justifies their radiating force over the whole legal order, and indeed their capacity to prevail over any other conflicting norm.
(5) The *material* conception of the constitution refers to the non-formalized or not fully formalized factors that not only allow the establishment of the *constitutional normative order*, but also sustain it over time. Quite typically, the

[21] Dieter Grimm, 'Sovereignty in the European Union' in Johan van der Walt and Jeffrey Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos 2015) 39

[22] The European Court of Justice was later redenominated the Court of Justice of the European Union (CJEU). We hesitated between sticking to one single way of referring to the Court or using one or the other denomination depending on the date of the ruling. We opted for the latter option because, contrary to what is the case with European law, there is no obvious more encompassing term that can be used.

[23] Which normative conception of the constitution is upheld is something that is closely related to the conception of law which one holds. The closer one is to cognitivist conceptions, the more likely it is that one supports a non-positivistic conception of law.

> *material conception* assigns a central role to specific constellations of institutional actors (such as political parties).[24]

The description of these five conceptions of the constitution illuminates the very different senses in which one can make use of the word constitution. However, the mere definition of these different conceptions of the constitution does not clarify in what senses European law can be regarded as a constitutional legal order.

Let us consider this briefly.

Perhaps the only statement that can be made in a rather unqualified manner is that the European Union has a *functional constitution*. It suffices to consider that the basic norms regulating the socio-economic structure and activity, from corporate law to competition law, including decisive elements of labour law and money, are now mostly (but not exclusively) enshrined in supranational law. This can be expressed in a more succinct manner by saying that the legal norms 'encoding capital'[25] in Europe are mostly part of European Union law.

However, it is far from clear whether the European Union could be said to have a formal constitution. Even if it has become not infrequent to refer to the Treaties (the Treaty on European Union and the Treaty on the Functioning of the European Union) as *the constitution of the European Union* (at least in the sense that they are regarded as the documents that most closely resemble a written constitution in the supranational legal order), it remains the case that the Treaties are both over and under-inclusive: not all fundamental norms are part of them, and at the same time they contain far too many *non-fundamental* legal norms.[26]

By the same token, it is clear that the European Union has a structural constitution in a *weak sense*. Regulations, directives, the rulings of the Court of Justice, and a considerable number of other European norms can be and indeed are regularly *reduced* to a system by reference to a fundamental secondary norm that is part of European Union law itself (much as that is the case not only with national constitutional law, but also with public international law). It is, however, intensely debated whether the European Union has a structural constitution also in a *strong sense.* That would imply that European law, not national law, is the ultimate gatekeeper of legal validity in Europe. That is implicit in the understanding of the structural principles of European Union law (direct effect, supremacy) but has been constantly rejected by national constitutional courts.[27] The *contested character* of the claim that European Union law has a strong structural constitution bears relation to the question whether the European Union has a *normative constitution*. It seems to us fair to say that while national

[24] Costantino Mortati, *La Costituzione in Senso Materiale* (Giuffrè 1940); Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Review* 567.

[25] Cf Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[26] It is true that, not infrequently, the written constitution does not include all documents of constitutional relevance or salience. This tends to result from the progressive accretion through history to the constitutional canon. In the case of the European Union, however, it is revealing of the fact that the Treaties remain the product of intergovernmental Treaty-making. Dieter Grimm, 'The Democratic Cost of Constitutionalization: The European Case' (2015) 21 *European Law Journal* 460.

[27] Cf Alessandro Mangia, 'L'interruzione della Grande Opera. Brevi note sul dialogo tra le corti' (2019) *Diritto pubblico comparato ed europeo* 859.

constitutional actors (notably constitutional courts) assume that national constitutions remain the normative anchor of law in the European Union due to their democratic and social pedigree, those sustaining the *constitutional character* of European law tend to rely more on *cognitive claims*, based on a certain understanding of the foundational role of *the rule of law* or of the *freedom-enhancing aspect* of subjective economic freedoms. This may reflect different understandings of the *normative constitution* itself, in the terms already pointed out above.[28]

We should add that the distinction of five conceptions of the constitution makes full sense from an analytical perspective. Indeed, the fact that a given set of norms is constitutional in one *sense* does not entail by itself that they are to be regarded as constitutional in any other relevant sense. Viz: That a given social order is stable, because it has long been tolerated by the population to which it is addressed, does not entail that it is to be regarded as legitimate in a normative sense. By the same token, we should carefully distinguish the claims to weak and strong structural constitutionality: there is a world of difference between the claim that we can identify a fundamental norm around which a legal order is built, and the very different claim that such fundamental norm governs the validity of all legal norms applicable in a given territory at a given time.

However, the different conceptions of the constitution are not situated on the same plane of generality but neither do they stand in splendid isolation from each other, as has emerged in their illustration. In that regard, it is important to stress that different claims to constitutionality may enter into conflict. For example, legal and political analysis may lead to the conclusion that the *formal* constitution does not contain the fundamental norms that de facto govern social life.[29] This urges us to consider what the *functional* and the *material* constitutions reveal about the actual organization of power in a given society, precisely because the norms that really matter are not enshrined in the formal constitution. This was, for example, the purpose of Ferdinand Lassalle in his essay on the Bismarckian constitution.[30] In a similar fashion, we could consider the gap between the formal proclamation of equality and solidarity in contemporary constitutions, and the growing social, economic, and existential inequalities which lead to a social practice in which the common action norms being applied are different from formal legal norms—a conflict which can indeed be detected in European Union law too, with perhaps paradigmatic clarity.

Finally, it must be said that how we characterize a given legal order in some dimensions of constitutionality may predetermine our judgement in other dimensions. In that regard, the strong structural and, above all, the normative conceptions of constitutions turn out to be decisive ones, both in themselves and in their relationships with other conceptions of constitution.

To summarize: there is a plurality of *conceptions* of the constitution, and it matters deeply *which specific conception of the constitution* we have in mind when we engage in

[28] The two alternative perspectives are visible respectively in Rainer Wahl, 'In Defence of "Constitution"' and Mattias Kumm, 'The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia' in Martin Loughlin and Petra Dobner (eds), *The Twilight of Constitutionalism?* (OUP 2010).

[29] Cf Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press 1957).

[30] Ferdinand Lassalle, *Was nun? Zweiter Vortrag über Verfassungswesen* (Meyer und Zeller 1863).

'constitutional talk'. There are critical differences between affirming that the European Union has a constitution in a normative sense or in a purely functional sense. To put it differently, the polysemic ambivalence characteristic of the use of the word 'constitution' can only be avoided if we clarify *in which sense* we are using the term in each specific case.

B. Claims to constitutionality in pragmatic legal discourses

We have already hinted at the fact that each conception of the constitution entails a series of claims regarding the structure and content of the legal order, or, in brief, a series of claims to constitutionality. Such claims are relevant in political discourses, but become particularly consequential in legal debates aimed at settling in an authoritative manner disputes about *how* specific cases should be decided, or indeed *who* should adjudicate upon them. In the latter cases, some of the claims to constitutionality (especially when implying a strong structural conception and the normative conception) may well work as an argumentative trump card.

Take for example the recent *Weiss* saga, in which the German Federal Constitutional Court (GFCC)[31] and the Court of Justice of the European Union (CJEU)[32] entered into a rather spectacular conflict. On the one hand, the CJEU found that the quantitative easing programme of the European Central Bank complied with the competence and proportionality requirements of European law, and could thus proceed unimpeded. On the other hand, the final ruling by the judges sitting in Karlsruhe not only cast serious doubt on its compatibility with German constitutional law, but also concluded that such a programme should be invalidated as unconstitutional, and therefore void, if the strong doubts it expressed were to be confirmed. As a result, the *pragmatic* conflict between the two courts (each arguing for a different outcome to the case) is open to reconstruction as a *conflict between the claims to constitutionality that they make*, which results in a conflict concerning the rules to be applied to the concrete case. The ruling of the CJEU implied a claim to the strong structural constitutionality of European law, which excluded a parallel one made on behalf of German constitutional law, and upheld the validity of the decisions taken by the European Central Bank (ECB).[33] In its turn, the ruling of the GFCC advanced a claim to the strong structural constitutionality of German constitutional law, which excluded the one made by the CJEU on behalf of European law,[34] and opened the door to the invalidation of the decisions taken by the ECB. The solution to these conflict between two *incompatible*

[31] German Federal Constitutional Court, Judgment of the Second Senate, 5 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[32] Case C-493/17 *Weiss and Others* [2017] EU:C:2018:1000.

[33] A point proven by the press release issued by the CJEU after the *Weiss* ruling of the German Federal Constitutional Court. Cf Press release following the judgment of the German Constitutional Court of 5 May 2020, 8 May 2020, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf> accessed 12 May 2021.

[34] The GFCC seemed to somehow dissolve the conflict between European and national law by also claiming that the CJEU was constructing European law wrongly.

constitutional claims hinges, at the end of the day, upon the normative credentials of the conflicting legal orders, as we will see.[35]

With this example we have already hinted at the fact that claims to constitutionality can be raised either implicitly or explicitly. It is quite interesting to notice that the German Constitutional Court made its claims to strong structural and normative constitutionality rather explicit while the CJEU remains quite implicit in its claims, refraining from raising the constitutional card.[36] As we will see, the difference between explicit and implicit claims to constitutionality will be highly relevant when reconstructing the legal history of European Community law.

C. Which constitutionalism?

Constitutionalism is a term as ambiguous as constitution. There is a great variety of constitutionalisms, reflecting different political conceptions of the relationship between individual and community, and further complicated by the way in which the relationship between different conceptions of the constitution is understood.[37] However, the term tends to be identified (not least in debates on the law of the European Union) with *liberal constitutionalism*, according to which the fundamental function of constitutional law is to constrain state power, so as to guarantee private autonomy against encroachments by public actors and institutions.[38] It is thus a form of *normative constitutionalism*, which holds that the realization of the said underlying values is what sustains the legitimacy of the fundamental law.

It is important to keep in mind that *liberal constitutionalism* is an important conception of constitutionalism in historical terms, to the extent that it dominates the history of constitutionalism in Europe in the nineteenth century, in which the constitution is associated with the *limitation* of public power. Things look different, though, from a historical, comparative, or, for that matter, normative perspective. There are good reasons to affirm that the paradigmatic conception of constitution in Europe is the one proper of the democratic and social constitutional state, which makes very different assumptions regarding the relationship between individual, society, and state

[35] Cf on the issue Ulrich Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship between the Court of Justice of the European Union and the German Federal Constitutional Court' [2021] *International Journal of Constitutional Law* 208.

[36] When claims to constitutionality are explicit, there is always resort to constitutional language. That is not the case when the claims are merely implicit, in which case there is no need to use the 'c' word; it suffices to affirm (or presuppose) that the legal order has the features that correspond to a specific conception of the constitution.

[37] See Grimm (n 21). See also Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 *Modern Law Review* 477.

[38] A modern rendering in András Sajó, *Limiting Government: Introduction to Constitutionalism* (Central European University Press 1999). An explicit endorsement of negative constitutionalism in Joseph HH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 7, 15: '[Our constitutions] are about restricting power, not enlarging it; they protect fundamental rights of the individual.' In its turn, the positive dimension is highlighted by Manuel García Pelayo, *Las transformaciones del Estado contemporáneo* (Alianza 1977); Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press 1997) and Martin Loughlin, *Political Jurisprudence* (OUP 1997).

than its liberal counterpart, and emphasizes that the constitution constitutes public power, which it both limits and enables, not least with a view to ensuring a fundamental degree of *equality* within society.[39] This vision, even if only fully realized in Europe in the post-war period, was inspired by interwar constitutional developments, both in Europe and in the US (the New Deal constitutionalism), which pointed to an activist government capable of contributing to the stabilization of the economy, industrial policy, and redistribution.[40]

It seems to us that it is of essence to keep in mind that *liberal constitutionalism* is far from the only possible form of constitutionalism, and that indeed the post-war European 'constitutional tradition' endorses *democratic and social*, not *liberal* constitutionalism. To opt for liberal constitutionalism is not only a *normative choice*,[41] but one that contradicts the identity of contemporary post-war constitutions.

III. The Claims to Constitutionality of European Law: Notes for a Counter-Narrative

The previous section spelled out five different conceptions of the constitution, giving rise in turn to distinct claims to the constitutionality of a given legal order. Equipped with these conceptual tools, we revisit briefly the legal history of the European Union. We aim to explore and assess the genesis of its claims to constitutionality, and in the process to sketch the main lines of what could be characterized as a non-Whig constitutional history, one that avoids taking for granted the constitutional character of European law.[42] Instead of a linear unfolding in which the *constitutionality* of European law comes slowly but steadily to the fore, the history of European law is better reconstructed by distinguishing several relevant *turning points* in the evolution of European law, not by chance closely connected to wider social, economic, cultural, and political transformations, in which the constitutional pretence of the Union becomes increasingly problematic.

We focus on five snapshots capturing the same number of stages of its evolution by reference to the *specific* claims to constitutionality raised by European institutional actors, most notably the legal services of the European Commission and the judges of the ECJ/CJEU. We start by analysing the *ambivalence* of the founding Treaties of the European Communities (subsection A). Then we consider how European institutional

[39] Cf Maurizio Fioravanti, *Costituzionalismo. Percorsi della storia e tendenze attuali* (Laterza 2009).

[40] See, e.g., Hermann Heller, '*Rechtstaat* or Dictatorship?' (1987) 16 *Economy and Society* 127; Giuseppe Dossetti, 'Funzioni e ordinamento dello stato moderno' (1953) 2 *Quaderni di Iustitia* 16, and García Pelayo (n 37). On the New Deal constitutionalism, see Bruce Ackerman, *We the People, vol. II: Transformations* (Harvard University Press 1998) 256.

[41] Which, it may be said *en passant*, is coherent with the historicist 'end of history' and 'end of ideology' ideologies.

[42] We present the turning points in a stylized and sequential fashion. This, by itself, may create the (wrong) impression that there is something *pre-ordained* in the way in which events unfold, that each of them *somehow* naturally leads to the following. This is especially the case when, as here, the dominant narrative intentionally presents facts in such a fashion. Not only is there no such continuity, however, but it is important to keep in mind that events might have unfolded differently. To make sense of *how European law has evolved*, it is of essence to consider how *it might have evolved.*

actors fashioned European law in distinctive terms from standard international law by presenting it as a new type of legal order characterized by its *autonomy*. This entailed raising a two-fold claim to *structural constitutionality*, in the sense that the claim was *implicitly* to *strong* structural constitutionality (extending to both supranational *and* national law), while *explicitly* it pointed to *weak* structural constitutionality (limited to the sphere of supranational law). Moreover, political and social circumstances (not least the reinforcement of intergovernmentalism in the wake of the 'empty chair' crisis) ensured that the *implicit claim to strong structural constitutionality* remained merely latent. In the meantime, however, the reach of supranational law expanded, laying the basis for a *claim to functional constitutionality*, which led to an initial series of conflicts with national constitutional courts (subsection B). In the early 1970s the circumstances in which European integration evolved changed quite radically. This unleashed functional pressures that encouraged European institutional actors not only to scale up their *implicit and explicit claims to (strong) structural constitutionality*, but also to imbue them with *substantive normative content*. This resulted in a remarkable expansion of the scope of European law and its recalibration in the light of constitutional principles borrowed from national constitutional traditions (subsection C). At this point, a range of national institutional actors headed by national constitutional courts engaged into new waves of *resistance* against the pretence of *strong structural* constitutionality of European law. National actors, however, failed to realize the full constitutional implications of the Europeanization of the *functional constitution* of the socio-economic structure, with obvious repercussions for the actual capacity of national legal orders to claim *strong structural constitutionality* also beyond the policy areas transferred to the European Communities. As a result, the supremacy of national constitutions became divorced from their actual capacity to shape the substantive content of the legal order, at the very same time that the constitutional equivalence between the supranational and national legal orders was implicitly affirmed and accepted, while leaving open what that entailed in concrete terms (that is, functional, structural or normative equivalence; subsection D). The financial, economic, and fiscal crises that have hit the European Union since 2007 have led to European institutions abandoning most of their self-imposed limits on the claims they made to the constitutionality of the European legal order. This reveals the normative and functional limits that European constitutional theories face (subsection E).

A. Foundational ambivalences

The establishment of the European Communities in 1951 and 1958 was undertaken through the writing of a new set of legal norms (the Treaties establishing the said Communities),[43] which in their turn foresaw the production of a whole raft of additional norms through which the objectives set in the Treaties were to be spelled out (in particular, decisions in the case of the European Coal and Steel Community,

[43] The three founding Treaties (of the Coal and Steel Community of 1951, of the European Economic Community of 1957, of EUROATOM of 1957) together with the Merger Treaty of 1965, through which the three independent communities (and legal orders) were fused into one.

or ECSC,[44] and regulations and directives in the case of the European Economic Community, or EEC, and Euratom[45]).

As a result, there were good reasons to assume that a new legal order had been created, an order which would soon be referred as 'Community law'. This implied, by itself, a claim to the *weak structural constitutionality* of this new legal order (alongside a modest claim to *functional constitutionality*, if only because key elements of the economic order were regulated or affected by Community norms).

But whether there were other constitutional claims to be made remained unclear because of the ambivalence of the founding documents of this new legal order, an ambivalence which was not least the result of the failure to ratify the closely interrelated Defence and Political Treaties in 1954. The failure of these initiatives, which aimed at establishing an autonomous supranational political level of government and pointed to modelling European law in the semblance of federal constitutional law, was however followed by the negotiation and ratification of the Treaty Establishing the European Economic Community and that establishing the European Atomic Energy Community (Euratom), which could be seen as pointing to a radically alternative way of creating a framework for cross-border relations and interactions, or as an indirect and oblique way of realizing the goals enshrined in the unratified Treaties.

As a result, the trio of European Treaties was open to be interpreted in at least two different ways:

- The *form* of the legal documents in which the key set of new norms were contained and regulated seemed to point to Community norms being part of a (sub) system of international law. After all, the Communities were established through (three) documents negotiated in diplomatic conferences and written with the grammar and syntax of international Treaties. This would have entailed that each national legal order would determine the actual force of Community norms according to its own constitutional norms, as was the case with 'classical' international norms.[46] Consequently, the only claim to constitutionality inherent in the Treaties was one to *weak* structural constitutionality.
- At the same time, however, not only the goals set in the Treaties, but also the *institutional structure*, were infrequent in *classical* international Treaties.[47] This emerged in the range of powers and competences assigned to the European Communities. In particular, it was slightly idiosyncratic that the Treaties delineated procedures through which Community institutions could produce new norms (what would come to be known as secondary norms), not least with a view to harmonize national legal norms (ex article 3h TEC).

There were thus some reasons which supported characterizing European law as a form of international law adventuring in governance and policy-making, and for

[44] Cf Article 14 of the ECSC Treaty.

[45] Cf Article 189 of the EEC Treaty; Article 161 of the Euratom Treaty.

[46] As indeed argued by AG Roemer in his conclusions in Case 26/62 *Van Gend en Loos* [1962] ECLI:EU:C:1962:42.

[47] Bruno de Witte, 'The European Union as an International Legal Experiment' in Grainne De Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 25.

this purpose aspiring to something more than a claim to *weak structural constitutionality.*[48] A similar ambition would have been supported by a *cognitivist normative* claim to constitutionality (perhaps based on the degree to which European integration contributed to peace and prosperity),[49] and would have entailed claims to formal and, in due course, functional constitutionality.

This tension between form and substance (but also between political intentions and functional needs) reflected the underlying disagreements between the very actors that played a key role in the drafting and implementation of the Treaties. In particular, the same individuals[50] that favoured deeper integration (not least the Political Treaty of 1952),[51] and who had contributed to formulating the norms which seemed to differentiate Community law from international law into the three founding Treaties, were to a large extent to be the same ones who promoted at a later stage the interpretation of Community law as if it was something other than a 'classical' international legal order, on the basis of which several additional claims to constitutionality could be raised (and indeed, as we will see, were raised).

B. An autonomous legal order: A claim to strong structural constitutionality on hold

The foundational ambivalence of the founding Treaties morphed into constitutional ambiguity in the first two decades of European integration. What was at stake at the time was whether European law was to be construed as an international legal order or not. To break from the mould of international law in which the Treaties had been framed, it was argued that European law constituted a radically new type of legal order, and that it was characterized by its autonomy (subsection 1). This theoretical formulation was given canonical form in several rulings of the ECJ, albeit that it must be stressed that the latter reflected the debates of a broader set of actors. The result was the creation of the theoretical space in which it was possible to raise a dual claim to constitutionality. Explicitly, the Luxembourg judges were very careful, and limited themselves to raising *claims* to weak structural constitutionality, fully confined to the European legal order. Yet lurking behind the affirmation of the direct effect and the primacy of European law over conflicting national norms in *Van Gend* and *Costa* was a more radical claim to constitutionality, to *strong structural constitutionality* (subsection 2). At any rate, Community law developed for years as a complement, not

[48] Joseph HH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 *German Yearbook of International Law* 559.

[49] As later hinted at by the ECJ in *Van Gend* and as summarized by Pierre Pescatore, 'La constitution, son contenu, son utilité. La constitution nationale et les exigences découlant du droit international et du droit de l'intégration européenne: Essai sur la légitimité des structures supra-étatiques' (1992) 111 *Zeitschrift für Schweizerisches Recht* 41.

[50] Paradigmatic in this regard are the figures of Michel Gaudet and Pierre Pescatore. See Anne Boerger and Morten Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet' (2017) 57 *American Journal of Legal History* 51. Pierre Pescatore, 'Les travaux du "groupe juridique" dans la négociation des traités de Rome' (1981) *Studia diplomatica* 159.

[51] Richard T Griffiths, *Europe's First Constitution: The European Political Community, 1952–1954* (Kogan Page 2000).

an alternative, to national constitutional orders (themselves in the process of being reshaped by reference to democratic and social constitutionalism), acquiring a consistency and relevance that supported claims to *functional* constitutionality, owing to the increasing importance of cross-border economic activities (subsection 3). The growing salience of Community law, alongside the tensions at the core of the *dual claim to constitutionality* raised by European institutional actors, paved the way for the first wave of resistance of national institutional actors (subsection 4).

1. An autonomous legal order?

Once the Treaties were in force, and even more so once they started to be implemented, it was just a matter of time before conflicts would arise between supranational law and national law. This prompted the question of how such conflicts were to be solved, and consequently how the relationship between European law and national law was to be structured.

The first thing to be observed is that at this stage references to the *constitutionality* of European law were marginal. With very few exceptions, neither institutional actors nor scholars dared to raise explicit claims to the constitutionality of European law when discussing how to decide the first conflicts between national and supranational law.[52] This is in itself telling, given the present tendency to see the history of European integration as the realization of the constitutional nature of Community law, without problematizing the ubiquity of constitutional language and rhetoric. When no justification is offered as to how an international order was transformed into a constitutional order, it might be concluded that it is assumed that the said order was, in one sense or the other, constitutional since its inception—a claim that is not only wrong in substantive terms, but also contradicted by the fact that 'constitutional talk' about European Community law would only emerge in the late 1970s and early 1980s, as will be shown below.

Indeed, it seems to us that it would be clarifying to reflect on why barely any legal scholar sustained the constitutional nature of European Community law in the 1950s and 1960s. Considering that several of the actors who played a key role in the relevant debates had entertained the idea that some form of European law could play a central role in the building of some kind of 'United States of Europe', certainly the cause was not lack of political commitment or insufficient legal imagination. It seems to us that two factors were decisive.

Firstly, the establishment of the European Communities as a polity with a full-blown democratic normative constitution had been attempted—and had failed. The rejection of the Defence Treaty by the French Parliament on August 1954 entailed the demise of the European Political Community Treaty, which was a blend of international Treaty and embryonic democratic normative constitution.[53] As a result, the failure of this Treaty precluded the usage of constitutional lexicon.

[52] The exception was constituted by Eric Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case' (1965) 63 *Michigan Law Review* 491; see also the allegations of the Italian barrister that represented Mr Costa before the ECJ: Amedeo Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL' (2019) 30 *European Journal of International Law* 1017.

[53] Griffiths (n 51).

Second, and most decisively, the reconstruction of Western European nation-states after the Second World War revolved around a strong *normative* conception of democratic and social constitutionalism, which came to define constitution and constitutionalism *tout court*. This was most obviously the case in France and Italy, where two 'revolutionary' democratic constitutions were written.[54] But the close association between constitutional law and the highest democratic legitimacy permeated the conception of the constitution even in countries where there was no *new* constitutional beginning after the war (such as Belgium, the Netherlands, or Luxembourg).[55] Or, what is the same, the social and economic transformations of the 1940s, 1950s, and 1960s left their mark on the conception of the constitution to such an extent that it would have been inaccurate to characterize as constitutional the legal order of the European Communities, which had been established through a *diplomatic*, *intergovernmental* agreement, and which did not correspond to the *characteristic template* of the constitutions of mass-democratic polities.[56] Indeed, the democratic legitimacy of the European Communities was *entirely* derivative, more akin to that of a supranational administrative structure than that of a full-blown political system.[57] Consequently, talk about 'constitution' and 'constitutional' applied to Community law seemed at best premature.[58]

Under such circumstances, even supporters of a federal Europe in which federal law would make a claim to structural and normative constitutionality in a strong sense had to accept that the only realistic goal was a much more modest one, namely, to succeed in establishing that Community law was not 'mere' international law, if possible in such a way as to prepare the ground for later claims to be made to constitutionality other than in a weak structural sense. This is what was achieved through the depiction of European law as a *new* and *autonomous* legal order, which stood *separate and equal* in its relation to national legal orders, and *distinct* from public international law.

The originality of Community law created the theoretical and practical space in which it was possible to deny the international character of Community law, at the very least according to the more 'traditional' paradigm of international law, while preparing the ground for later bolder claims to constitutionality. In particular, the 'newness' of Community law came hand in hand with the characterization of the relationship between European law and national law in terms of 'autonomy'. In negative terms this implied a rejection of the outright subordination of Community law to national law, as would have been the case if Community law would qualify as standard public international law. In positive terms, the two orders were identified as separate but equal. In such a way, a claim was made to something more than a weak structural constitutionality which was at the same time tamed by the profession of 'separation'

[54] See Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press 2019) chapters 4, 5, 7 and 8.

[55] Cf Tony Judt, *Postwar: A History of Europe since 1945* (Allen Lane 2005); Martin Conway, *Western Europe's Democratic Age* (Princeton University Press 2020).

[56] Indeed, not by chance, the German 1949 Fundamental Law, which was the result of a process in which US occupying authorities played a fundamental role, was not labelled as a constitution but as a fundamental law.

[57] Ernst Forsthoff, *Der Staat der Industriegesellschaft: dargestellt am Beispiel der Bundesrepublik Deutschland* (CH Beck 1971).

[58] Peter Lindseth, *Power and Legitimacy* (OUP 2010).

between the two legal orders, not least reflecting acceptance of the attributed character of the powers of the Communities, limited to cross-border trade, plus a limited set of flanking policies, crucially agricultural policy and transport.[59] The autonomy of European law was thus the product of calculated ambivalence.

2. The canonical formulation of autonomy: A dual claim to structural constitutionality

As legal historians have clearly shown, the characterization of Community law as a new and autonomous legal order was the product of a collective work undertaken by institutional actors, scholars, and practitioners.[60] However, 'autonomy' was given canonical form in the foundational rulings of the ECJ, particularly in the *Van Gend en Loos* and *Costa* cases.[61]

It is to be noticed that the ECJ settled the cases by reference to categories central to international law. Thus, direct effect was but an alternative way of referring to the self-executing character of a Treaty provision.[62] At the same time, however, the Court shaped these categories in a way that enabled their strategic reconceptualization, by affirming that Community law governed the question of what force was to be acknowledged to Community norms not only by Community institutions (as would have been the case if applying the template of international law with its companion weak claim to structural constitutionality), but also by national institutions (something which pointed to something more than a weak claim to structural constitutionality).[63]

Still, as has already been advanced, the success of the autonomy narrative is closely related to its (calculated) ambiguity, stemming from the tension (if not contradiction) between what was implicitly argued and what was explicitly said, resulting in an ambiguous claim to constitutionality, or rather, in the introduction of two different claims to constitutionality at one and at the same time.

On the one hand, *Van Gend* and *Costa* pointed to a very innovative characterization of the terms of relationship between Community law and national legal orders. In particular, direct effect and primacy were capable of becoming the bridges through which Community norms could penetrate into each and every legal national order, if only because the norm establishing the effect of Community precepts was to be regarded as part and parcel of both Community law and each and every national legal order.

[59] See below III.B.2.

[60] Cf Morten Rasmussen, 'The Legal History of the European Union: Building a European Constitution' in *Oxford Research Encyclopedia: Politics*, 29 July 2019, <https://oxfordre.com/politics/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1064> accessed 12 May 2021.

[61] While there is a clear tendency to regard the two cases as instances through which the ECJ applied a single coherent vision of Community law, a close reading of the judgments reveals the extent to which 'Euro-constitutionalism' was work in progress. Consider the following. In *Van Gend*, the Court characterizes Community law as a 'new order of international law', while in *Costa* the reference to the international law is dropped, Community law being now characterized as a 'new legal order' without any further qualification.

[62] Cf Bruno de Witte, 'Retour à "Costa"—La primauté du droit communautaire à la lumière du droit international' (1984) *Revue trimestrielle de droit européen* 425; Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Gráinne de Búrca and Paul Craig (eds), *The Evolution of EU Law* (OUP 2011) 323. See also Ole Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 763.

[63] See the literature referred in the previous footnote.

This entailed the beginning of a process of *fusion* of the two legal orders, and implied a claim to structural constitutionality other than a weak one.

On the other hand, the explicit constitutional claim being raised by the ECJ remained rather self-restrained.[64]

Firstly, both rulings were drafted in an ambivalent language, which combined symbolic rupture (reflected in the reference to 'a new legal order', or in the affirmation that individuals had a key role in the process of integration) and marked orthodoxy (very clear in the resort to the categories of international law, not least direct effect), which seemed to reassure national higher courts that not much had actually changed.

Second, the actual consequences of the rulings were very limited. The revenue at stake in *Van Gend* was negligible because the decision only affected the interpretation of transitory norms, while the Italian government won the day in *Costa* as the Luxembourg judges recognized the European validity of the (politically decisive) nationalization of electricity in Italy.

Third, and critically, the ambivalent claim to structural constitutionality came hand in hand with the assumption that there was a clear division of labour and competences between supranational and national law.[65] Community law was defined as a legal order having an impact on the way in which states treated (mainly) goods and workers in cross-border movement, and which reinforced the overall design of each national socio-economic structure (as was the case with coal and steel restructurings and common agricultural policy).[66] Not by chance, the fundamental substantive provisions defining the core objective of the Treaty establishing the European Community, the internal market, imposed formal rather than substantive obligations on member states, through the prohibition of discrimination on the basis of nationality.[67] In other words, member states were precluded from closing their economic borders and from treating goods and workers from other member states in ways dissimilar to those they applied to their own goods and workers. But member states remained free not only to determine the substantive content of their regulations, but also to make substantive choices concerning their socio-economic policy. Consequently, building an internal market did not entail eliminating economic borders, but rather rendering them predictably porous, sufficiently open so as to allow goods and workers to flow across them. But if that was so, then the direct effect and supremacy of Community law could be regarded as entailing constraints concerning cross-border movement, not affecting the core of the legal order of each member state. Consequently, the *separateness* of the two legal orders was basically intended as meaning that European law was the legal order of cross-border trade, which further complemented national legal orders by

[64] Mauro Cappelletti, 'Is the European Court of Justice "Running Wild"?' (1987) 12 *European Law Review* 3.

[65] See for example the main lines of 'The Brussels Report on the General Common Market', Luxembourg: Information Service of the High Authority of the European Coal and Steel Community, 1956, <http://aei.pitt.edu/995/1/Spaak_report.pdf> accessed 12 May 2021. See also Alan Milward, *The European Rescue of the Nation-State* (London: Routledge 1994).

[66] Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (CUP 2009).

[67] Compare with Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Hart Publishers 2004).

means of creating the conditions for their further realization.[68] The implicit premise underpinning such characterization was that it was possible to draw clear jurisdictional lines between the sphere of Community law and that in which national legal orders were applicable.

It should also be kept in mind that the transformative capacity of European law was still very limited in 1964. Community norms were not only limited in number, but any additional norm added to what would soon start to be called the *acquis communitaire* had to be unanimously agreed within the Council of Ministers. Moreover, the political environment in the mid and late 1960s further contributed to reinforcing the national control of European integration.[69] As is well known, these were the years in which the Communities took a clearly intergovernmental direction, not least, albeit not exclusively, because of the way in which the 'empty chair' conflict was solved in 1966 through the so-called Luxembourg compromise.[70] For all these reasons, the member states retained the power to contain the growth of the supranational legal order.

The gift of autonomy was its *duplicity*. At the very same time that the claim to strong structural constitutionality was ventilated, it was tamed and put on hold by means of (re)separating the two legal orders. As a result, Community law was made into a legal cloth sufficiently dissimilar to international law and sufficiently similar to national law as to affirm a basic degree of functional, even if not normative, equivalence between the two legal orders. In such a way the subordination of Community law to national law, implicit in any theory that grants ultimate primacy to national law—whether labelled dualistic or monistic—could be de facto transcended.

3. Community law as complement to democratic and social constitutionalism

As the programme of the creation of an 'embedded' internal market[71] was progressively realized under the conditions described in the previous subsection, the substantive affinities between Community law and national democratic and social states seemed to become more marked.

Firstly, supranational law complemented national democratic and social states. As noted, Community norms were mainly applied to cross-border relationships which national legal orders could not effectively regulate. Not by chance, a key holder of Community rights in the period was the cross-border worker, who became entitled to the same socio-economic rights as national workers, thus contributing to the definition of communities of social insurance on the basis of residence and not nationality. [72]

[68] That was the way, we would insist, in which common policies such as agricultural policy were conceived. That is the view underpinning Milward (n 65).

[69] The combination of legal supranationalism and political intergovernmentalism was theorized in Joseph HH Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law*, 267.

[70] On the empty chair crisis, Mark Gilbert, *European Integration* (Rowman and Littlefield 2012) 77ff.

[71] John G Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379.

[72] The emergence of a community of social insurance on the basis of residence was articulated in Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257, 19.10.1968, 2–12.

Second, Community law was largely respectful of the substantive choices enshrined in national constitutions. As was pointed out in the previous subsection, most of the obligations imposed by Community law were formal in nature, leaving substantive choices in the hands of each member state. At the same time, European integration contributed to economic growth by stabilizing the conditions under which cross-border trade in goods proceeded, something that enabled the creation of economies of scale which, in turn, contributed to the consolidation of social states.[73]

Third, European law was substantially defined by reference to national legal orders, and, at the end of the day, by the *collective of national constitutions*. This is paradigmatically reflected in the way in which the ECJ defined in 1970 the unwritten principle of protection of fundamental rights by reference to the constitutional traditions common to the member states.[74] In less grandiose terms, the derivative character of European law was reflected in the use of comparative arguments when interpreting and applying European law, not least by the legal services of the different European institutions.[75] This was so even if the degree of substantive convergence between national legal orders was strong only at the level of abstract principles, while there were major differences in terms of how such principles were institutionalized and operationalized. That rendered it unavoidable that the number and intensity of conflicts would grow as integration became closer and the concrete divergence between national legal systems increased in successive waves of enlargement of the Communities.

What should be stressed now is that the primacy stemming from *Costa* was a muted one because Community law developed as a complement to national constitutional orders; a complement which was, moreover, largely homogeneous with them in substantive terms. By the same token, at this stage of the evolution of European law the production of secondary law was quite limited and remained the product of unanimous decision-making within the Council, something which also favoured complementarity.

The more that supranational law thickened through the adoption of regulations and directives realizing the programme of economic integration, the more there was a case to raise a claim to functional constitutionality of Community law. That may come some way to explain why the German Constitutional Court used the 'c' word to refer to Community law already in 1967,[76] admittedly limiting itself to conceding what was uncontroversial once it was recognized that Community norms formed a distinctive

[73] Something that led to a faster growth of intra-Community trade than international trade of the Member States of the Communities. Cf Milward (n 65) 167ff.

[74] Case 29/69 *Stauder* [1969] ECLI:EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.

[75] See, for example, Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *International and Comparative Law Quarterly* 873.

[76] German Federal Constitutional Court, First Senate, 18 October 1967, 22 BVerfGE 293, summarized in (1968) 5 *Common Market Law Review* 483: 'The EEC Treaty is in a sense the constitution of this Community. The legal provisions enacted by the Community organs within their Treaty powers, the "secondary Community law", constitute a separate legal order, the norms of which are neither international law nor national law of the Member States. Community law and the domestic law of Member States are "two autonomous legal orders, different from each other"; the law created by the EEC Treaty derives from an "autonomous source of law".'

legal order—or, which is the same, once the soundness of a weak claim to structural constitutionality on behalf of supranational law was accepted.

4. The first wave of national constitutional resistance

Even if ambivalent and muted, the claim to structural constitutionality was bound to result in theoretical (constitutional) unrest as European law expanded, that is, as the number of regulations and directives increased and their remit widened. The substantive intertwinement of the national and supranational legal orders, reflected in the synthetic conception of 'constitutional traditions common to Member States' put forward in *Internationale*[77] and *Stauder*,[78] was aimed at quelling such unrest. In particular, some national constitutional courts (chief among them the German and the Italian ones) took seriously the doubts which were emerging in lower courts regarding the mismatch between the ambiguous claims to structural constitutionality made by supranational actors and the lack, on the part of Community law, of the procedural and substantive features proper of a democratic and social constitutional order. By placing the unwritten principle of fundamental rights protection (and consequently the collective of national constitutions) at the very basis of Community law, the Court of Justice was seen (and rightly so) as pre-empting attacks on the *primacy* of European law.[79] Still, what started as a revolt of guardians of constitutionality would then spread to other jurisdictions and to other kinds of courts.[80] The tension would only ease after a peculiar reformulation, on the side of national courts, of what the autonomy of European law entailed—something which was only possible by neglecting the extent to which what was labelled as 'economic law' had massive constitutional implications, as we will see in subsection C.1.[81]

C. From an autonomous to a constitutional-like legal order

In the late 1970s and early 1980s we can observe three decisive transformations that represent a clear break in the evolution of Community law, and that by themselves prove the wrongness of reconstructing its history in a Whig key. Firstly, national constitutional actors came to accept the claim to autonomy of Community law raised by supranational actors, trying in the process to give it a peculiar twist (subsection 1). At the same time, second, changes in supranational policy led to a decisive transformation of the substantive content of Community law, which implicitly entailed a redefinition of its substantive scope; this set Community law on a potential collision course with national legal orders (subsection 2). Third, European institutional actors strengthened the explicit claims to structural constitutionality, in the process reinforcing the claims to functional and normative constitutionality. In particular, the CJEU

[77] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.

[78] Case 29/69 *Erich Stauder v City of Ulm—Sozialamt* [1969] ECLI:EU:C:1969:57.

[79] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

[80] Such as the decision of the French Conseil d'Ètat in *Cohn-Bendit*, 22 December 1978, [1980] 1 CMLR 543. A general panorama in A Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) 14 *International Journal of Law in Context* 258.

[81] Italian Constitutional Court, *Frontini*, ruling 183/1973, of 18 December 1973, ECLI:IT:COST:1973:183.

started to use constitutional language and reshaped the scope of the claim to primacy over conflicting national laws, making it explicit that it could extend to national constitutional norms (subsection 3).

1. National acceptance of the claim to autonomy of European law

As was pointed out in section 2.D, national courts, and very especially national constitutional courts, had resisted, both on democratic procedural[82] and on substantive[83] grounds, the claim to *autonomy* of Community law put forward by European institutional actors.

This backlash resulted in inter-institutional declarations and new lines of case law through which the explicit features of Community law were restyled, coming to resemble more closely the characteristics of a constitutional order.[84] In 1976, the Act establishing the direct election of the Members of the European Parliament was finally agreed, putting an end to the secondment of national parliamentarians. The political core of a new supranational citizenship seemed to be emerging, further developing the 'proto-citizenship' latent in the personal status as developed by the European legislator (and fine-tuned by the ECJ in the 1960s and 1970s).[85] Moreover, a series of supranational fundamental rights emerged, one case at a time, from new lines of case law of the Luxembourg Court, inspired by the collective of national constitutions and by the European Convention of Human Rights (which was coming of age at precisely the same time as the Strasbourg Court).[86]

As a result of the above-mentioned transformations, the stance of some of the key guardians of national constitutionality became more nuanced. On the one hand, both the Italian and the German Constitutional Courts subscribed to the 'separate but equal' doctrine on the basis of the axiological equivalence between supranational and national law. As long as European law continued to develop its original project (the legal order of cross-border activities, to which human rights were being progressively uploaded), the said courts would not engage in any form of review of the contents of European norms, and could indeed accept both their direct effect and the primacy.[87] On the other hand, however, national constitutional courts maintained unaltered their claims to the *supremacy* of national constitutions. This entailed that the *primacy* of Community law was not self-standing, but rested upon the national constitutional decision to open itself to supranational law. This was reinforced by the role which national constitutional courts assumed as guardians of the core of the fundamental values of national constitutions in the process of European integration.

The result was a counterclaim to the implicit supranational claim to strong structural constitutionality on the side of the CJEU. Indeed, the *controlimiti* doctrine[88] served

[82] Italian Constitutional Court, *Costa* ruling 14/1964, of 7 March 1964, ECLI:IT:COST:1964:14.

[83] See *Frontini* (n 78) and German Federal Constitutional Court, *Solange I*, 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.

[84] E.g. Bill Davies, *Resisting the European Court of Justice* (CUP 2012) chapter 5.

[85] Agustín J Menéndez and Espen DH Olsen, *Challenging European Citizenship* (Palgrave 2020).

[86] Gráinne de Búrca, 'The Evolution of EU Human Rights Law' in de Búrca and Craig (n 62) 465–97.

[87] Italian Constitutional Court, ruling 170/84, *Granital*, 5 June 1984, ECLI:IT:COST:1984:170; German Federal Constitutional Court, *Solange II*, 22 October 1986 BVerfGE 73, 339, [1987] 3 CMLR 225.

[88] On the 'contro-limiti' doctrine, see for example Pietro Faraguna, *Ai confini della costituzione: Principi supremi e identità costituzionale* (Franco Angeli 2015) 74–75, 84–88. A useful contribution is Riccardo Nevola, 'Le limitazioni della sovranità statale in favore dell'Unione europea nella giurisprudenza

first and foremost to prevent any claim to *sovereignty* of the European Communities, that is, to rule out any capacity of the European Communities to set their own competence basis and, consequently, impose their normative claims.

It was not by chance that the shift operated by national constitutional courts was contemporary to the diffusion of legal theories that constructed Community law in a constitutional key. The 1980s were the years in which Eric Stein ceased to be the odd man out in labelling Community law as a constitutional order and became the scholar that opened a new path in the analysis of European law,[89] not least explored by the 'integration through law' project led by Mauro Cappelletti.[90] The paradox, as we will see, is that both constitutional courts and scholars were proceeding on the assumption (or faith) that the substantive content of European law was becoming akin to that of national constitutions, precisely at the time at which European law was in flux, being radically transformed by what we have suggested labelling as its *neoliberal torsion*.[91]

2. The substantive transformation of European law

The demise of the international monetary order in 1971 (the so-called Bretton Woods system) and the economic crisis triggered in 1973 by a rapid rise in the price of oil unleashed a period of financial and economic turbulence, during which the socio-economic consensus which had slowly emerged during the post-war years was put on trial and found inadequate. Despite the extent to which states (some with more conviction than others) tried to make use of the monetary and fiscal levers to reflate economies, both stagnation and inflation set in.[92] This created the conditions under which neoliberal socio-economic views, which had been marginal throughout the post-war period, could be imposed with full force.[93]

The substantive consistency and breadth of Community law was radically reshaped in this new socio-economic context. Two developments were crucial.

Firstly, a European monetary infrastructure (the European Monetary System, or EMS) was (re)created by the end of 1978. This intergovernmental arrangement not only prioritized the fight against inflation over other socio-economic goals, such as full employment or distributive justice, but consolidated the hegemonic role played by the only independent European central bank, the Bundesbank, which de facto was granted the power to set the monetary policy of the EMS as a whole.[94] As a result, the political space for autonomous national monetary (and even fiscal) policies was

costituzionale', Corte Costituzionale Servizio Studi STU 262, maggio 2014, available at <https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_262.pdf.>, accessed 10 June 2021.

[89] Stein (n 3).

[90] Mauro Cappelletti, Monica Seccombe, and Joseph HH Weiler, *Integration through Law* (De Gruyter 1985–88).

[91] Edmondo Mostacci, 'La sindrome di Francoforte: crisi del debito, costituzione finanziaria europea e torsioni del costituzionalismo democratico' (2013) 44 *Politica del diritto* 481.

[92] Overviews in Andrew Glyn, Philip Armstrong, and John Harrison, *Capitalism since World War II: The Making and Breakup of the Great Boom* (Fontana 1984); B Eichengreen, *The European Economy since 1945: Coordinated Capitalism and Beyond* (Princeton University Press 2007).

[93] Andrew Glyn, *Capitalism Unleashed: Finance, Globalization, and Welfare* (OUP 2007); Philipp Ther, *Europe since 1989: A History* (Princeton University Press 2016).

[94] Jeremy Leaman, *The Bundesbank Myth: Towards a Critique of Central Bank Independence* (Palgrave 2001) 181ff, 193ff.

drastically reduced, contrary to what had been the case in the precedent monetary infrastructures of the European Payments Union and Bretton Woods.

Second, almost at the same time, the legal services of the Commission and the Court of Justice favoured a new interpretation of free movement of goods, to be understood no longer as an operationalization of the principle of non-discrimination on the basis of nationality, but as a concretization of the right to private property and of entrepreneurial freedom, which required eliminating (in principle) all obstacles to its exercise.[95]

In both cases we observe a shift not only in substantive content, but also in the very scope of Community law. For the EMS, the fight against inflation required turning such goal into a pre-condition for all socio-economic policies. In other words, monetary stability was to be not only the objective of monetary policy, but an overriding goal to be achieved before other goals could be pursued through fiscal or social policies. Meanwhile, free movement of goods (and later all other economic freedoms) became a yardstick to gauge the validity of all national regulatory measures, and not only those affecting cross-border trade.[96]

Consequently, Community law ceased to be a neutral constraint on domestic policy choices and instead became loaded in favour of a neoliberal socio-economic model with private property and entrepreneurial freedom at its centre, aspiring to exert their substantive influence over the entire breadth and scope of national legal orders.

This was immediately constructed by the Commission as entailing the emancipation of economic integration from intergovernmental political consensus, in the process rendering corporate actors into its main drivers through the judicial vindication of their economic freedoms.[97]

Again, however, the full potential of these trailblazing changes would not yet be fully drawn on. The EMS was a powerful *vincolo esterno*, but it was still possible to introduce negotiated changes in the parities of the currencies.[98] By the same token, the new understanding of Community rights was for the time being limited to free movement of goods, while *de jure*, even if increasingly less de facto, remnants of the embeddedness of capital remained in place. Things started to change in 1987 with the entry into force of the Single European Act, and even more with its natural corollary, Directive 88/361 on free movement of capital,[99] which confirmed and radicalized the shift implicit in *Cassis de Dijon*. Still, as was pointed out, the Court trod a cautious path (as reflected, for example, in its nuancing of its case law on goods in *Keck*),[100] and was rather restrained in its case law until the signature of the Maastricht Treaty.

[95] Case 120/78 *Cassis de Dijon* [1979] ECLI:EU:C:1979:42.

[96] Cf, for example, joined cases C-321/94, C-332/94. C-323/94 and C-324/94, [1997] *Pistre*, ECLI:EU:C:1997:229.

[97] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon') [1980] OJ C 256, 3.10.1980, 2–3.

[98] Several devaluations were agreed between 1979 and 1987; however, the amount by which the D-Mark was revalued did not compensate the full amount of 'real' depreciation of such currency. See Augusto Graziani, *Lo sviluppo dell'economia italiana* (Bollati Boringhieri 2001) 133.137. The rigidification of changes after 1987 played a key role in the collapse of the EMS in 1992.

[99] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178, 08.07.1988, 5–18.

[100] Case C-267/91, *Keck* [1993] ECLI:EU:C:1993:905.

What we find important to stress at this juncture is that the EMS and the case law following *Cassis de Dijon* pointed to a radically transformed relationship between European law and national law. Before 1979, the claim to strong structural constitutionality implicit in primacy was somehow softened by the purely formal and thus relative character of the obligations stemming from Community law (non-discrimination on the basis of nationality). After 1979, the actual implications of the claim to primacy were critically changed by the new substantive characterization of the obligations stemming from the European monetary infrastructure, the new conception of free movement of goods, and the implicit claim to full-range scope of Community law.

One of the reasons why this was not fully realized at the time (and, to a large extent, continues not to be realized) was that the European Communities occupied the European imaginary by borrowing the language of democratic and social constitutionalism at the same time that the institutions embarked on a policy agenda that would undermine the very constitutional commitments it pretended to emulate at the supranational level.

3. From implicit to explicit constitutional language

Not by chance, the transformations in the substantive content and scope described in the previous subsection came hand in hand with a change in the way in which European institutional actors raised claims to the constitutionality of European law. Firstly, the implicit claim to strong structural constitutionality was emboldened. In particular, from *Simmenthal II* onwards the language of *primacy* was replaced by that of *supremacy*, with a quite unequivocal reference to European law prevailing over national constitutional norms.[101] Secondly, explicit reference to the constitutional character of Community law was made in *Les Verts*.[102] The 'c' word was finally pronounced, scaling up the muted claim in *Costa*, namely that European law was not only 'separate and equal' vis-á-vis national law but was also of the same normative fabric as national law, that is, a 'constitutional' legal order. This partially reflected the rise of the constitutional narrative in legal scholarship, and at the same time nourished it in terms of what concerned European law.

4. European law unleashed: One money in one market

European law was in a process of radical and rapid mutation since the late seventies (in the terms that we described in subsection B). The Treaty of Maastricht would consolidate the neoliberal socio-economic turn (confirmed by a deeply asymmetric economic and monetary union), while fostering the further wrapping of the constitutional restyling (reflected for example in the relabelling of the European personal status increasingly focused on mobility as 'European citizenship'). This determined that supranational constitutionalism came even more to resemble liberal constitutionalism, while diverging from democratic and social constitutionalism.[103]

[101] Case C-106/77 *Amministrazione delle finanze dello Stato v SpA Simmenthal* [1978] ECLI:EU:C:1978:49.
[102] Case C-294/83 *Les Verts* [1986] ECLI:EU:C:1986:166.
[103] Dieter Grimm, *The Constitution of European Democracy* (OUP 2017) highlights the (excessive) robustness of the discipline of economic freedoms on European law, which contrasts with the weak democratic legitimacy credentials of European law.

In the fateful wake of the collapse of the Berlin Wall, which was followed by German (first monetary, then political) reunification, European leaders agreed on an unprecedented form of monetary union, which would result in the creation of a new and peculiar common currency.

On the one hand, the monetary side of Economic and Monetary Union (EMU) certified that the German government held the stronger hand. Monetary policy was federalized and its implementation entrusted to a radically independent system of central banks, helmed by the ECB, which was left to define the monetary rules concretizing its originally narrow mandate.[104]

On the other hand, political consensus on the introduction of a common currency did not extend to an agreement on how to reconcile the two (uneasily fitting) planks of the agreed monetary union; or, which is the same, how to make an effective whole out of the combination of a single monetary policy and a plurality of national fiscal policies. The euro was planned to be a currency without a supporting state. Coordination of national fiscal policies was not to be entrusted with a political centre, the assumption being instead that a sufficient degree of direction would largely result from the enforcement of fiscal rules erecting walls of separation among national exchequers[105] and setting ceilings on both the levels of annual deficits and the total stock of public debt.[106] Finally, the freedom of capital owners was dramatically enlarged by means of extending its sphere of application to flows originating or ending in third countries,[107] in a move that was deliberately intended to empower financial markets to act as forces disciplining national fiscal choices.

In the wake of the ratification of the Maastricht Treaty, the ECJ extended to all economic freedoms the characterization of free movement of goods that it had put forward in *Cassis de Dijon*.[108] At the very same time, the Luxembourg judges developed a case law which increased the bite of the principle of non-distorted competition as a yardstick of review for the validity of large swathes of national norms.[109] By 1995, the ECJ, in tandem with the Commission, had de facto become a peculiar form of constitutional court, reviewing national norms in the light of constitutional standards that, despite the abundant constitutional rhetoric, continued to diverge from those employed in national constitutional quarters.

[104] Governing Council of the ECB, *A Stability-Oriented Monetary Policy Strategy for the ESCB*, 13 October 1998, available at <https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html>; Governing Council of the ECB, *The ECB's Monetary Policy Strategy*, 8 May 2003, available at <https://www.ecb.europa.eu/press/pr/date/2003/html/pr030508_2.en.html> accessed 31 March 2021.

[105] As results from Articles 101 TEC (now Article 123 TFEU) and 103 TEC (now Article 125 TFEU), as amended by the Maastricht Treaty.

[106] Article 1 of the Protocol to the Maastricht Treaty on the Excessive Deficit Procedure.

[107] By virtue of Article 56 TEC, as amended by the Maastricht Treaty (now Article 63 TFEU).

[108] Cf Case C-55/94 *Gebhard* [1995] ECLI:EU:C:1995:411; Case C-415/93 *Bosman* [1995] ECLI:EU:C:1995:463; Joint Cases C-163/94, C-165/94, and C-250/94 *Sanz de Lera* [1995] ECLI:EU:C:1995:451.

[109] From the mid-1980s, the ECJ started to make use of competition provisions to engage into a strict scrutiny of state actions shaping the socio-economic structure. Cf Case C-18/88 *Régie des telegraphes* [1991] ECLI:EU:C:1991:474; Case C-41/90 *Höfner and Elser* [1991] ECLI:EU:C:1991:161; Case C-387/92 *Banco Exterior de España* [1994] ECLI:EU:C:1994:100; Case C-206/06 *Essent* [2008] ECLI:EU:C:2008:413; Joined Cases C-399 and 401/10 *Bouygues* [2013] ECLI:EU:C:2013:175. Cf the prescient Francis Snyder, 'Ideologies of Competition in European Community Law' (1989) 52 *The Modern Law Review* 149.

This changed the pace of the transformation of the substantive content of European law which had started in 1979. If in *Costa* the collective good had justified the expropriation of electricity, and in *Internationale* the establishment and running of a common agricultural policy had been found to uphold conspicuous constraints on the right to private property, by 2007 the Court would find that the right to strike was to be trumped by freedom of establishment. Or, to be more precise, the right to strike had to be exercised in such a way as not to undermine the right to freedom of establishment—another way of taking the democratic 'risk' out of the right to strike.[110]

It is important to stress, indeed, that the exterior form and the interpretative techniques of democratic and social constitutionalism were placed at the service of a modified form of supranational liberal constitutionalism, in which the trio of private property, entrepreneurial freedom, and monetary stability came to define the substantive bases of the legal order. In other words, behind provisions with a similar wording to those enshrined in national democratic constitutions laid a radical substantive break resulting from the prioritization of private property and entrepreneurial freedom and the corresponding downgrading of other socio-economic objectives.

The salience of these transformations accounts for a second but very ambiguous wave of resistance on the side of national constitutional courts, to which we turn in the next section. The tensions, however, will only come fully to the surface in the aftermath of the European crises. From 2008 onwards, functional pressures (not least to avoid the uncontrolled unravelling of the eurozone) led to the radicalization of the claims to constitutionality made by supranational institutions, a development that would push the legitimacy and stability of European law on to ever more precarious terrain.

D. A second wave of national constitutional resistance: Failing to take seriously the constitutional nature of economic law

The ratification of the Maastricht Treaty paved the way to a second wave of resistance to the constitutional claims made by European institutional actors, following the steps taken in the 1970s first wave (section 2.D). If objections were raised at the time of the ratification of the Treaty on European Union in the first half of the 1990s, they became even more acute after the codification in the treaties of the principle of respect of the national identities of member states.[111]

National constitutional courts, led by the German Constitutional Court, seemed to render more robust the *controlimiti* by means of developing new grounds on which they would be inclined to review the constitutionality of European norms. In its *Maastricht* ruling,[112] the guardian of German constitutionality strengthened the principle of attribution as a yardstick to measure the domestic constitutionality of European norms

[110] Even more invasive and abrasive was the ruling in Case C-314/08 *Filipiak* [2009] ECLI:EU:C:2009:719, in which the CJEU found that the decision of the Polish Constitutional Court to limit the temporal effects on one of its own rulings undermined the effectiveness of the primacy of Union law, and was, consequently, to be declared in breach of European law itself.

[111] Cf Article F of the Maastricht Treaty, now Article 4(2) TEU.

[112] BverfG, Judgment of 12 October 1993–2 BvR 2134/92, 2 BvR 2159/92, [1994] 1 CMLR 57.

and decisions. In 2009, in its *Lisbon* ruling,[113] the judges sitting at Karlsruhe added a new head of review, (national) constitutional identity, and beefed up the competence review, by drawing more stringent limits regarding the Europeanization of a number of competences. However, it must be added that the new review powers were later gummed, as the Court ruled out intervening unless breaches were not egregious (in more technical terms, 'structural').[114]

What national courts seemed keen on preserving was not so much the supremacy of the Constitution in procedural and/or substantive terms, but the very kernel of sovereignty, the competence over the delimitation of competences (or *kompetenz-kompetenz*) and, as a reflection, their own power as guardians of that sovereignty. All attempts at making that slightly more substantial (as through the drawing of 'red lines' to the powers to be held by the European Union) failed to take into account the necessary consequences of their previous jurisprudence, which had enabled the Union's neoliberal drive. Suffice in that regard to remind the reader of how the ratification of the Maastricht Treaty led to a dramatic change in the German Basic Law, namely, the constitutionalizing of the independence of the central bank, which had previously been guaranteed only by an act of Parliament.[115] On the basis of such an amendment the Federal Constitutional Court carved out a sphere of public power (monetary policy, defined in opposition to economic policy), no longer subject to parliamentary democratic control. In the process the functional constitution of the European Union was also radically changed, making monetary stability a sort of overriding meta-principle steering the direction of other EU policies. [116]

E. The ultimate gambit: Redefining national constitutionalism in the image of European law

From 2007 the European Union, and very especially the eurozone, was hit by overlapping yet distinctive financial, economic, and fiscal crises, triggering scores of punctual decisions and structural reforms aimed at overcoming and containing them.[117]

Functional reasons (summarized in the ambivalent rallying call to 'save the euro') led to remarkable changes in the organization of power in Europe, deeply affecting the terms of the relationship between supranational law and national law. In particular, the supranational level of government was assigned more powers to discipline and control

[113] German Federal Constitutional Court, Second Senate, 30 June 2009, 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208.

[114] German Federal Constitutional Court, Order of the Second Senate, 6 July 2010, 2 BvR 2661/06, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106.

[115] Article 88 of the German Fundamental Law. See Christian Joerges, 'What Is Left of the European Economic Constitution?' EUI *Working Paper, LAW No. 2004/13*, available at <https://cadmus.eui.eu/bitstream/handle/1814/2828/law04-13.pdf?sequence=1&isAllowed=y> accessed 31 March 2021; now in Christian Joerges, 'What Is Left of the European Economic Constitution?' (2005) 30 *European Law Review* 461.

[116] As reflected for example in Article 119.3 TFEU.

[117] Agustín J Menéndez, 'A European Union in Constitutional Mutation?' (2014) 20 *European Law Journal* 127.

the ways in which member states defined their fiscal, labour, tax, and social policies. Social expenditure and social rights became the only macroeconomic adjustment variables left in the hands of member states,[118] forced to undertake painful internal devaluations given the sheer impossibility of resorting to an external devaluation. In such a context, freedom of movement ended up becoming a peculiar functional substitute of social policy, given that migration to the eurozone core emerged as the only alternative to destitution for a good number of the young in the eurozone periphery. The result was a regression towards a form of liberal constitutionalism, fragmenting and pulverizing public power in the name of preserving the rights of individuals and, notably, private property and entrepreneurial freedom.

The implicit and explicit claims to strong structural constitutionality of European law were further strengthened, to the point that the relationship between European law and national law was reversed to a considerable extent, with European law posing as the template which national legal orders should follow.[119] This can be chiefly appreciated in the field of fiscal rules. The legally and constitutionally peculiar Fiscal Compact requires the member states to patriate into their constitutional system the fiscal rule limiting the volume of annual deficits.[120] At the same time, the CJEU has been empowered to control the extent to which national reforms to that effect comply with this obligation.[121] An equally remarkable development concerns the procedures of surveillance of national compliance with fiscal rules. In the name of reducing political discretion, the power to impose sanctions is now assigned jointly to the Commission and a *minority* of member states; that is to say, sanctions could be applied despite a majority (below a qualified one) objecting to them.

The crises have also revealed the normative and functional limits of the claims to structural and normative constitutionality of European law on the part of European institutions. The European Union has been proven unable to redeem such claims because it lacks the necessary preconditions for doing so. Not even at the height of the crisis was the European Union capable of exercising sovereign public power in an explicit fashion. The European Union can act as a *vincolo esterno* (exerting *negative powers*), but not as an autonomous political actor (making use of *positive powers*). It lacks the institutional, the material, and, above all, the legitimacy resources to do so, to a considerable extent because its functional and material constitutions are far from those presupposed by democratic and social constitutionalism.[122] This is true of all European institutions, including those, such as the ECB, which have not only have seen their powers expanded during the crises, but have played a central role in its governing. It is true that the so-called unconventional monetary policies of the ECB were decisive in the denouement of the crises, whatever assessment we make of their

[118] Francesco Costamagna, 'National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal' (2018) 24 *European Law Journal* 163.

[119] Alexander Somek, 'Delegation and Authority: Authoritarian Liberalism Today' (2015) 21 *European Law Journal* 340.

[120] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Article 3(2).

[121] Ibid Article 8(1).

[122] Grimm (n 103) makes the argument focusing on the European Parliament, but it can be projected to the European Union as a whole. The same line of reasoning was already present in Fritz Scharpf, *Governing in Europe: Effective and Democratic*? (OUP 2000).

opportunity and effectiveness. But it is telling that the ECB could only act in a decisive manner by pretending that it was merely discharging its modest role of implementing monetary policy in a fully rule-based manner.[123] Only by means of cloaking its political role as purely technical could the ECB take the decisions it took. Had the ECB fully disclosed the nature of what it was doing, its authority would have been immediately depleted.[124]

IV. Conclusions

The combination of the analytical tools put forward in section I and the historical reconstruction contained in section II reveals that 'Euro-constitutionalism' makes two central claims to the constitutionality of European law: a claim to strong structural constitutionality, which is hard to disentangle from a claim to sovereignty on behalf of the European Union; and a claim to normative constitutionality, which is grounded on liberal constitutionalism, in particular, on private property, entrepreneurial freedom, and monetary and financial stability as overriding principles of European law.[125]

The claim to strong structural constitutionality cannot be fully redeemed by the European Union, both for normative and functional reasons. As we saw in section II.5, contradictions at the core of the asymmetric economic and monetary union have put European institutions under strong functional pressure to come very close to claiming that European law is the constitutional order of a fully sovereign polity. This neglects that the EU does not have, and is unlikely to acquire any time soon, the capacity to act as a constitutional sovereign.[126] The constitutional umbilical cord with national constitutions and national institutional structures cannot be severed.

However, it would be too rash by half to conclude that the strong claim to structural constitutionality is as a result simply irrelevant. A claim to strong structural constitutionality on behalf of European law, even if incapable of being legally and politically redeemed, does contribute to the enervation of national public power. This is indeed the path that the European Union has trodden in the past three decades. Power, very especially in terms of what concerns socio-economic issues, has shifted away from national parliaments and governments, but it has not been recreated in an equivalent form at the European level, with the result that it has been dispersed to the benefit of some private actors and technocratic (or pseudotechnocratic[127]) bodies. In other words, the power of European institutions is not so much positive—to

[123] As argued repeatedly by the ECB, not least in the judicial sagas of *Gauweiler* and *Weiss*.

[124] It suffices to consider what the outcome of the *Weiss* saga would have been had the ECB explicitly admitted to the exercise of fiscal powers.

[125] Agustín J Menéndez, 'A European Union Founded on Capital? The Fundamental Norms Organising Public Power in the European Union' in Céline Jouin (ed), *La Constitution Matérielle de l'Europe* (Pedone 2019) and 'The "Terrible" Functional Constitution of the European Union: "Sound" Money, Economic Freedom(s) and "Free" Competition' in Marco Goldoni and Michael A Wilkinson (eds) *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023).

[126] Damian Chalmers, 'European Restatements of Sovereignty' in Richard Rawling, Peter Leyland, and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perpsectives* (OUP 2013).

[127] Paul Krugman, 'Crisis of the Eurocrats' *New York Times,* 22 May 2014.

shape policy—as negative—to constrain and discipline the policy choices taken by its member states.

The second claim—that to normative constitutionality—implies a frontal attack on democratic and social constitutionalism. The fact of the matter is that the force characteristic of democratic constitution-making and/or democratic constitutionalizing has not manifested itself at the supranational level. There has not been a European constitutional moment; nor have the fundamental norms organizing power in the EU been appropriated by political actors with a view to develop a constitutional ethos, or, for that matter, evolved into a democratically supported constitution. In such circumstances, imagining European law *as if* it were constitutional entails the risk of divorcing constitutional law from its democratic and social basis—something that unavoidably paves the way for authoritarian regression.[128]

On such a basis, it is simply impossible to claim that acknowledging to European law the condition of a 'constitutional order' is either a neutral way of referring to the object of study of a legal-dogmatic discipline or a means of promoting the transformation of European law in the semblance of democratic and social constitutionalism.

The perverse way in which European lawyers 'imagined' European constitutionalism has resulted in an updated version of liberal constitutionalism, only wrapped up in the rhetoric of its historical opponent and replacement. The result is not so much legal dogmatics as dangerous legal mythology.

What is needed, however, is not a mere rejection of the constitutional character of European law, because European integration has proceeded in such a way that a good deal of the powers transferred to the supranational level have major constitutional implications. The constitutional implications of European integration and of Europeanization have to be fully taken into account without devaluing the currency of the democratic and social constitution. Therefore, the European constitutional imagination has to rely, first and foremost, on the collective of national democratic and social constitutions.

[128] Hermann Heller, 'Authoritarian Liberalism?' (2015) 21 *European Law Journal*, 295; Michael A Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 *European Law Journal* 313; Wolfgang Streeck, 'Heller, Schmitt and the Euro' (2015) 21 *European Law Journal* 361.