ARTICLES

Questioning EU Constitutionalisms

By Matej Avbelj[*]

A. What Kind of Constitutionalism are We Actually Talking About?

Since the very conception of the European integration, there has been one core question that has attracted much attention and yet it remains contested and in a way unanswered till present. What is the legal nature of the European integration - a query about what integration stands for (the descriptive dimension), how it is to be explained and construed (the explanatory dimension) and eventually what it should stand for (the normative dimension). With the lapse of time, and as integration has evolved, various legal, political, economical and even broader intellectual streams of mutually shared beliefs, we should call them narratives, have emerged all offering their own and separate visions of what constitutes the most appropriate answer. Among them, however, the constitutional narrative has come out as a sort of master or dominant narrative whose answers have reached and persuaded the widest circle of influential stakeholders with the greatest impact on the social construction of the European integration.

Indeed, since the early 1980s the constitutional narrative has slowly paved its way towards the practical realization, i.e. institutionalization, of its vision of the European integration. In that it has openly competed with the other narratives (*inter alia* international law, statist, autonomous *sui-generis* narratives). These narratives have, in return, selected it as their main target and thus implicitly recognized its leading role. However, at a certain stage, which can be more or less safely located in the early 1990s, the constitutional narrative apparently felt it had won the social constructionist race and it therefore turned its attention away from competing with the other narratives to focus exclusively on the perfection of its almost taken-for-granted EU constitutional matrix. Hence, it did not take long for the proponents of the constitutional narrative to declare that EU constitutionalism

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had won broad acceptance across the ideological spectrum[1] and had consequently become the integration's dominant currency.[2] Thereafter the constitutional narrative about European integration proliferated immensely. It has been widespread, especially in scholarship, but also to a growing extent, approvingly or critically, in every day EU parlance and practice. The constitutional language has been used widely and fairly indiscriminately. Its tag has been attached to numerous elements of the European integration, ranging from the Treaty as a constitutional charter to the constitution of external relations[3] and even to the constitutionalism of comitology.[4] It has become almost *en vogue* to use constitutional terms.

However, at the same time and while this EU constitutional ado lasted, that is in the very heyday of the EU constitutional narrative, the practices of integration, just recall the failed documentary constitutionalization episode, refused to follow the dominant constitutional suite. If one, as we do, subscribes to the laws of social constructionism, following which social practices should mirror the dominant narrative, this certainly is an utterly paradoxical result which, *volens nolens,* urges one to take a more cautious attitude towards the dominant mantra of constitutionalism. For if the practices do not work or are self-defeating, something has apparently gone wrong with the narrative that was supposed to inform and guide them.[5] It is for this reason that we feel compelled to take a step back and ask a question that a great majority of proponents of EU constitutionalism in their sometimes overly enthusiastic constitutional enterprise surprisingly failed to address.[6] Beyond constitutional nominalism, that is, beyond the pervasive constitutional labeling, what kind of constitutionalism are we actually talking about?

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[1] Deirdre Curtin, *The Shaping of a European Constitution and the 1996 IGC: Flexibility as a Key Paradigm?*, 50 AUSSENWIRTSCHAFT 237, 251 (1995).

[2] Miguel Poiares Maduro, *How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union*, *in* ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE (Jospeh Weiler and Christopher Eisgruber eds., 2005), Jean Monnet Working Paper 5/04, available at http://www.jeanmonnetprogram.org/papers/04/040501-18.html.

[3] Marise Cremona, *The Union's External Action : Constitutional Perspectives, in* GENÈSE ET DESTINÉE DE LA CONSTITUTION EUROPÉENNE: COMMENTAIRE DU TRAITÉ ÉTABLISSANT UNE CONSTITUTION POUR L'EUROPE À LA LUMIÈRE DES TRAVAUX PRÉPARATOIRES ET PERSPECTIVES D' AVENIR (Giuliano Amato, et al. eds., 2007).

[4] Christian Joerges, *Deliberative Supranationalism – a Defence*, 5 EUROPEAN INTEGRATION ON-LINE PAPERS (EIoP) 1 (2001).

[5] CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCE, PHILOSOPHICAL PAPERS II 109 (1985).

[6] There have been, as always, some exceptions: *see*, for example, Maduro, *supra* note 2, at 1, who asks, "Do we really know what we mean by constitutionalism in the European Union?"

B. EU Constitutionalisms Across the Time

I. The Stage of Constitutional Terminology

If we approach the EU constitutional narrative from a historical perspective across a time span of more than 40 years, three evolutionary stages can be identified. The first is the stage of constitutional terminology and covers the period between the early 1960s and early 1980s. As it is implied in its name, at this stage a coherent constitutional self-awareness and collective inter-subjective perception[7] of the integration as a constitutional entity did not emerge yet. All that was reminiscent of constitutionalism was a periodical attribution of the constitutional adjective to some elements of the integration both by scholars as well as by Community and national officials.[8] The prevailing conception of the constitution was thus a functional or organizational conception following which a constitution is understood in a very general way as a legal act constituting a new entity, providing it with a necessary framework for its efficient operation. In those terms every legal entity from the obscurest private association to the international organization has a constitution. Thus, in this period the notion of the EC constitution was not yet invested with a deeper normative meaning as a mechanism that not only provides for a functional framework indispensable for the entity's operation, but one that also ensures its legitimate functioning by constraining power and which, moreover, endows it with a whole new normative, even deeply symbolical quality of a legally and politically autonomous entity.[9] This period of time namely still belonged to the supranational narrative which emerged from the competition with the international law narrative as the leading paradigm.

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[7] Taylor emphasizes that social practices cannot exist absent of participants' self-understanding or self-awareness of these very practices. *See* Charles Taylor, *Political Theory and Practice*, SOCIAL THEORY AND POLITICAL PRACTICE, 61, 62 (Christopher Lloyd ed., 1983).

[8] Walter Hallstein, First General Report, point 28, quoted in COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW, (Luxembourg 1983) called the EC Treaty a constitutional instrument. Italian Constitutional Court in case No. 183/73 *Frontini v. Ministero delle Finanze*, December 1973 spoke of *lo Statuto Fondamentale*; *See also*, Carl Friedrich Ophüls, *Die Europäischen Gemeinschaftsverträge als Planungsverfassungen*, *in* PLANNUNG I, 299 (Joseph H. Kaiser ed., 1965); H.J. HAHN, FUNKTIONENTEILUNG IM VERFASSUNGSRECHT EUROPÄISCHER ORGANISATIONEN (1977); PIERRE PESCATORE, THE LAW OF INTEGRATION (1974).

[9] *See* Maduro, *supra* note 2, 2; also Mattias Kumm, *Beyond Golf Clubs and Judicialization of Politics: Why Europe has a Constitution properly so called?*, 54 AMERICAN JOURNAL OF COMPARATIVE LAW, 504, 508 (2006). Kumm, for example, distinguishes between three meanings of a constitution: formal, material and deeply normative.

However, the beginning of the 1980s witnessed a profound change of the paradigm. The supranational narrative relatively quickly passed over to the constitutional narrative. The novel legal practices of the integration - the principles of primacy, direct effect, human rights protection, implied powers and others that supranational narrative still defended as *sui generis*, supranational in nature and held them as profoundly different from international law were now simply baptized as fully constitutional. It was argued that the European Court of Justice (hereinafter the Court or ECJ) had constitutionalized the founding Treaties by construing them in a constitutional mode rather than employing the traditional international law methodology.[10] In doing that it asserted its position as an ultimate umpire for drawing the line between Community and national law and it achieved a broad integration of Community law into national legal orders, the former having supremacy over any conflicting national law within its scope of competence.

The grounds for making a transnational or supranational constitution were thereby laid.[11] The attention turned away from showing how different Community law was from international law, to emphasize how constitutional in nature it was and would still become. All this was taking place long before the European Court of Justice had ever used the word constitution that would anyhow be sought in vain in the text of the founding Treaties. It was only in 1986, followed by the decision in 1991, that the Court explicitly proclaimed the Treaty the basic Constitutional charter of the Community.[12] These two decisions combined with the pre-existing scholarly constitutional enthusiasm then marked the heyday of the classical constitutional narrative.

[10] Joseph Weiler, *The Transformation of Europe*, 100 YALE LAW JOURNAL 2403, 2407 (1991).

[11] Eric Stein, *Lawyers, Judges and the Making of Transnational Constitution*, 75 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 1, 1 (1981).

[12] Case C-294/83, *Les Verts*, par. 23 and Opinion 1/91 [1991] E.C.R. I-6079; 1 COMMON MARKET LAW REVIEW 245 (1992).

II. The Classical Constitutional Narrative

The essence of the classical constitutional narrative[13] is the constitutionalization thesis following which the European Court of Justice in a series of landmark decisions established a set of doctrines that fixed the relationship between Community law and Member States law and rendered it indistinguishable from analogous legal relationships in constitutional federal states:[14]

> There is an allocation of powers, which as has been the experience in most federal states has often not been respected; there is the principle of the law of the land, in the EU called direct effect; and there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself.[15]

These doctrines were proclaimed a formal constitution of the integration[16] and were said to have transformed[17] the nature of the integration from an entity constituted under international law to an entity whose constitutional character stands beyond doubt.[18] Consequently, or better in the same vein, the ECJ's jurisprudence, whereby the Court itself was discovered as a constitutional court,[19] was regarded as a jurisprudence in constitutional law. Its teleological interpretation was said to be

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[13] Joseph Weiler, *European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order*, POLITICAL STUDIES XLIV, 517, 533 (1996) uses the same term.

[14] Joseph Weiler, *Federalism without Constitutionalism: Europe's Sonderweg*, *in* THE FEDERAL VISION, LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION, 56 (Kalypso Nicolaidis ed., 2001).

[15] *Id*.

[16] Weiler, *supra* note 13, at 517.

[17] Weiler, *supra* note 10, at 2405.

[18] Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AMERICAN JOURNAL OF COMPARATIVE LAW 205, 210 (1990).

[19] Andreas M. Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, 11 COMMON MARKET LAW REVIEW 127 (1974); Rolv Ryssdal, *On the Road to a European Constitutional Court*, *in* COLLECTED COURSE OF THE ACADEMY OF EUROPEAN LAW: THE PROTECTION OF HUMAN RIGHTS IN EUROPE 7 (Frank Emmert ed., 1991); Ole Due, *A Constitutional Court for the European Communities*, *in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW: ESSAYS FOR THE HON. MR. JUSTICE T. F. O'HIGGINS (1992); Francis G. Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court?*, *in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW: ESSAYS FOR THE HON. MR. JUSTICE T. F. O'HIGGINS (1992); Jens Rinze, *The Role of the European Court of Justice as a Federal Constitutional Court*, PUBLIC LAW 426 (1993).

characteristic of constitutional regimes rather than of international organizations;[20] and the direct link with the individuals that it had established was treated as yet another piece in the mosaic reinforcing the cause of the classical constitutional narrative.[21]

The latter was, however, not limited only to the issues of the EU constitutional structure, i.e. to the so called formal constitution,[22] it also discerned the foundations of the EU's substantive double-layered constitution. The first and more developed layer is the economic constitution,[23] a type of European *Wirthschaftsverfassungsrecht*,[24] which encompasses European common market with four fundamental freedoms based on the constitutional principles of prohibition of discrimination and distortion of competition. It is here that the classical constitutional narrative, above all, emphasizes the role of the ECJ's constitutional doctrines in safeguarding the uniformity and efficiency of Community law conceived as an indispensable means for preserving the viability of a truly common market. Without supremacy, denoting a hierarchy of norms whereby Community law, as the law of the land, trumps conflicting national norms,[25] direct effect and the doctrine of pre-emption, the common market would inevitably result in an uncontrolled fragmentation and the economic constitution would be lost.[26]

The second layer is the EU's political constitution in the making. European Union is more than a mere economic integration, more than an international agreement on free trade, it is a constitutional polity which is not structured just around economic

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[20] PESCATORE, *supra* note 8; Joseph Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37 HARVARD INTERNATIONAL LAW JOURNAL 411 (1996).

[21] *Id*.

[22] Weiler, *supra* note 13, at 517.

[23] MIGUEL POIARES MADURO, WE THE COURT, THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION, A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY (1998); JULIO BAQUERO CRUZ, BETWEEN COMPETITION AND FREE MOVEMENT, THE ECONOMIC CONSTITUTIONAL LAW OF THE EUROPEAN COMMUNITY (2002).

[24] Kamiel Mortelmans, *Community Law: More than a Functional Area of Law, Less than a Legal System*, LEGAL ISSUES OF EUROPEAN INTEGRATION 23, 35 (1996).

[25] Weiler, *supra* note 14, at 57; Christiaan Timmermans, *The Constitutionalization of the European Union*, 21 YEARBOOK OF EUROPEAN LAW 1, 3 (2002).

[26] Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces,* 30 COMMON MARKET LAW REVIEW 17, 46 (1993); Carol Lyons, *Flexibility and the European Court of Justice*, *in* CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY 95, 109 (Grainne de Burca, Joanne Scott eds., 2000): "[…]uniform law[…]constitutes the uniqueness of the supranational system[…]".

imperatives of a common marketplace, but possesses its own political identity and values. The political constitution thus addresses the democratic credentials of the integration at whose core are the individuals as citizens of the European Union, rather than mere economic operators or the factors of production which would be instrumentally related to objectives of the common market.[27] From the perspective of the political constitution, it is stressed that integration suffers from a democratic deficit, which is especially acute in its social, rather than formal, component.[28] This is mirrored in the alienation of individuals from the decision-making processes and in the lack of their identification with the project of integration. In turn, the institutions of the Union are expected to be designed in a manner in which a full representation of the interests of its citizens and transparent governance, based on the separation of powers between the legislative, executive and judicial branch, would be ensured. The absence of demos in terms of shared ethnicity will not prevent the integration to be democratic and legitimated in civil terms by the multiple demoi.[29] To the contrary, provided that there is an appropriate policy of fundamental rights in place, the European Union's legitimacy as a polity could be gradually effectively achieved and its political constitution completed.[30]

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[27] This is the idea of 'Civis Europeus sum' espoused by Advocate General Jacobs in Case C-168/91 *Christos Konstantinidis*, 1993 E.C.R. I-1191, paras. 45-46 of AG's opinion, which has subsequently won a broad endorsement in the EU scholarly literature as well as in, by today well advanced, judicial practice of the ECJ concerning citizenship.

[28] Matej Avbelj, *Can the New European Constitution Remedy the EU "Democratic Deficit"?*, EUMAP ON-LINE JOURNAL (2005), at http://www.eumap.org/journal/features/2005/demodef/avbelj.

[29] For a discussion on the European citizenship and European demos, *see*, Joseph Weiler, *To be a European Citizen – Eros and Civilization*, WORKING PAPER SERIES, IN EUROPEAN STUDIES, SPECIAL EDITION, 31, 37 (1998). Weiler proposes supranational normative concept of the European citizenship (as opposed to a statal concept of nationality), relying on the concept of "multiple *demoi*", which is enabled by decoupling of nationality and citizenship. Citizens of the EU by definition do not share the same nationality, but they (have to) constitute a *demos* – an origin of all legitimacy for the Community action. European citizens should be regarded as members of the European demos in civic and *political* terms, rather than in ethno-cultural terms characteristic of a statal concept of nationality and citizenship. *See also*, Kalypso Nicolaidis, *The New Constitution as European Demoi-cracy?*, THE FEDERAL TRUST ONLINE PAPER, 38/03 (2003). For the opposite view, which perceives the debate on demos and *demoi* as nationalistic, *see,* Nick W. Barber, *Citizenship, Nationalism and the European Union*, 27 EUROPEAN LAW REVIEW 241 (2002).

[30] Philip Alston and Joseph Weiler, *An 'ever closer union in need of a human rights policy: The European Union and Human Rights*, HARVARD JEAN MONNET WORKING PAPER 1/99, at http://www.jeanmonnetprogram.org/papers/99/990101.html.

1. Disintegration of the Master Constitutional Narrative

The early years of the 1990s were thus overwhelmed by the classical constitutional narrative. Its *telos* was an ever closer union between the peoples of Europe which required, what was deemed to be essentially inbuilt in the integration itself, that the latter should proceed just one way.[31] Harmonization, if not unification, was the main paradigm and all the differences and diversity existing in the integration were perceived as obstacles, originally to free trade and then to integration as such. They were expected to give way, albeit incrementally, to the supreme Community law requiring uncompromised uniformity of its application across all the Member States. The employment of the constitutional narrative was expected to serve exactly this integrationist cause.[32] On the basis of the statist constitutional federal experiences, on which classical constitutionalism is heavily dependent and in fact owes its origins to, it was presumed that as constitution confers unity and order in the statist environment the same virtuous effects should occur in the supranational environment. The statist origins of classical constitutionalism, if considered and recognized at all, were accordingly not at all perceived as something contentious. To the contrary, the formal constitution of the integration was explicitly declared to be of a hierarchical nature and literally indistinguishable from that of a federal state. As we have seen, also in substantive terms where the economic constitution was to be complemented by a complete political constitution the latter was supposed to mirror, especially in pursuit of an appropriate model of democracy and human rights policy, a federal state.

However political and legal, especially judicial, developments surrounding the adoption of the Treaty of Maastricht (ToM), caused a significant blow to the vision of integration espoused by the classical constitutional narrative. In 1993 the Treaty of Maastrich introduced the (in)famous three-pillared temple structure of the European Union, consisting of the pre-existing Community pillar and of two, so called, intergovernmental pillars of the EU, namely the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs (JHA). Moreover, it introduced a set of protocols and declarations that granted some Member States exemption from the *acquis communautaire* of the Community pillar.[33] Additionally, national constitutional courts, during and after the Treaty's ratification, unanimously and unambiguously refused to subject national legal orders to what

[31] Curtin, *supra* note 26, at 67.

[32] Maduro, *supra* note 2, at 6.

[33] These were the so called Danish second-home protocol, the "Barber" protocol, the Irish abortion protocol, the non-accession of UK to the Social Policy Agreement, UK's right to opt-out from the European Monetary Union, etc. *See*, Curtin, *supra* note 26, at 46.

classical constitutionalism regarded as hierarchically supreme Community law, and stressed that future development of the integration can not bypass and even less trump the essential requirements of national constitutions.[34] Suddenly all the key elements of the classical constitutional narrative appeared to be at stake. Its telos was defeated, the political aura of inevitable integration was tarnished,[35] uniformity of Community law was broken for the holiest cow of integration,[36] the *acquis communautaire*, was hijacked.[37] National courts did not acquiesce to the hierarchical nature of the relationship between national and Community legal order, and in the eyes of classical constitutionalism they resorted almost to nationalistic-speak, putting huge obstacles in the way of the emerging supranational civic democracy.[38]

Indeed, what classical constitutionalism considered to be the real world, post-Maastricht developments revealed to be just a fable.[39] The metaphysics of classical constitutional narrative was gradually, but irreversibly falling apart. The master narrative of classical constitutionalism, which for more than a decade existed, at least ostensibly, as a homogeneous force of mutually shared beliefs, disintegrated first into two and subsequently into a whole array of different constitutional narratives. The era of EU constitutionalisms replacing a single EU constitutional narrative thus began.

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[34] For a review of the applicable case law *see*, ANDREW OPPENHEIMER, THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES, VOL. 1 AND 2 (2003); MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2006).

[35] DAMIEN CHALMERS, EUROPEAN UNION LAW 30 (2006).

[36] Joseph Weiler, *The Reformation of European Constitutionalism*, 35 JOURNAL OF COMMON MARKET STUDIES 97, 98 (1997).

[37] Curtin, *supra* note 26, at 44.

[38] Federico Mancini, *Europe: The Case for Statehood*, 4 EUROPEAN LAW JOURNAL 29, 35 (1998); Joseph Weiler, *The State 'über alles': Demos, Telos and the German Maastricht Decision*, JEAN MONNET WORKING PAPER 6/95, at http://www.jeanmonnetprogram.org/papers/95/9506ind.html: »How sad, then, to observe the Bundesverfassungsgericht, faced with the need, and historical opportunity, to rethink these issue in the context of Community and Member State, looking backwards, like Lot's Wife, to a polity based on the tired old ideas of an ethno-culturally homogeneous Volk and the unholy Trinity of Volk-Staat-Staatsangehöriger as the exclusive basis for democratic authority and legitimate rule-making.«

[39] To paraphrase Julio Baquero, who actually claims exactly the opposite, *see* Julio Baquero Cruz, *The Legacy of Maastricht-Urteil and the Pluralist Movement*, RSC WORKING PAPER 2007.

2. Revindicated Classical Constitutionalism

Reactions to the epistemic rupture caused by ToM were initially of two kinds. One strand of constitutionalists refused to come to terms with the new reality and while it seemed that classical constitutionalism had reached the point of no return, they resisted and called for its revival. A new narrative of revindicated classical constitutionalism was emerging which was determined to continue with the vision of an ever-more constitutional, uniform and integrated Europe. It considered the post-Maastricht developments as mere aberrations, like temporary short circuits in the system that would be overcome once the European Union moved to a more constitutional form of organization.[40]

The identified remedy was a process of documentary constitutionalization. The Union was said to be in need of a genuine constitutional blueprint – of a veritable Constitution which would cure all its pathologies, all this constitutional chaos and fragmentation, once and for all.[41] As it is well known, after a complicated sequence of events, whereby the Amsterdam and the Nice Treaty further entrenched the 'constitutional chaos' of Maastricht with a bing bang enlargement that endowed the integration with unprecedented diversity, the Laeken declaration convened a constitutional convention. The latter, sometimes openly flirting with its Philadelphian counterpart,[42] produced a single document which unified all the preexisting Treaties and carried an indicative name: a Constitutional Treaty, or shortly a Constitution. Documentary constitutionalism was thus indeed initiated, but, as we all know, it has never been successfully carried to an end. Despite of shooting with all the constitutional cannons, or maybe precisely because of it, and a sometimes overt, but always covert, reliance on the statist constitutional paradigm, it failed to pass the threshold referenda in France and in The Netherlands and was finally abandoned in favor of the Reform Treaty. Once again, the classical constitutional narrative, albeit in a revindicated version, suffered from defeat, and reached a point of no return – this time maybe even for good.

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[40] JEAN-VICTOR LOUIS, THE COMMUNITY LEGAL ORDER 196 (1993).

[41] Curtin, *supra* note 26, at 69; Walter van Gerven, *Toward a Coherent Constitutional System within the European Union*, 2 EUROPEAN PUBLIC LAW (1996); Philip Allot, *Epilogue: Europe and the dream of reason*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (Joseph Weiler & Marlene Wind 2003).

[42] Giscard d'Estaing, the Chairman of the Convention, was a pioneer of this analogy, *see* his 'Henry Kissinger Lecture', at http://european-convention.eu.int/docs/speeches/7072.pdf.

III. The Revised EU Constitutionalisms

However, there was another constitutional reaction to Maastricht and post-Maastricht events that opted for a different approach. Instead of boldly refusing and downplaying the new situation and insisting on even more constitutionalism to strengthen the would-be ever more uniform integration, this branch of constitutionalists decided to take the new developments seriously and to adjust their constitutional positions if necessary. Perhaps, the new reasoning went, after all it is indeed not realistic, or it might be even utopian, to argue for a simple, unified, integrated and comprehensive constitutional structure to govern all aspects of the integration in the same way.[43] As a result of this open-minded, reflexive and even slightly internally skeptical attitude towards constitutionalism, a new perspective, or better perspectives, on the constitutional nature of the integration was gradually being taken: the revised EU constitutionalisms.

1. Socio-teleological Constitutionalism

One of the most influential among them has been socio-teleological constitutionalism whose representative is Joseph Weiler. His reformed EU constitutional narrative[44] is a sum of three components. The first is the formal constitution, indistinguishable from a constitution of a federal state, standing for the key doctrines developed by the European Court of Justice defining the relationship between the EC and national law. This Weiler not just uncritically borrows from the classical constitutionalism, but on its basis even concludes that Europe already has a constitution which does not need to be changed or replaced by a whole new written constitution, because it works well as it presently stands.[45] What European integration, already existing as a constitutional entity, really requires is not another constitution, rather it is constitutionalism:[46] a normative justification of the European polity endowing it with a necessary legitimacy and with indispensable ideals which should direct its course in the future.[47]

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[43] Grainne de Burca, *The Institutional Development of the EU: A Constitutional Analysis, Evolution of EU Law*, in THE EVOLUTION OF EU LAW 80 (Paul Craig & Grainne de Burca eds., 1999).

[44] Weiler, *supra* note 36.

[45] Joseph Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 23 (Joseph Weiler & Marlene Wind eds., 2003).

[46] Weiler, *supra* note 13.

[47] Joseph Weiler, *Fin-de-Siecle Europe*, in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION? 208 (Renaud Dehousse ed., 1994). The three core ideals are: peace, prosperity as dignity and supranationalism.

Accordingly, integration is legitimated by simultaneously contributing to and being a result of the constitutional tolerance.[48] The latter sends a deeply normative message of necessity and desirability of mutual recognition between the self-reflexive individuals and Member States in their eternal pursuit of a decent life in honor of the creation in the image of God, or the secular equivalent.[49] This *telos* of constitutional tolerance should be continuously implemented in the every day life of integration, in its quotidian, the most commonplace practices between the public officials of whatever rank, EU citizens and aliens. For it will be this ordinary sociological day to day exchange which will result in the positive spill-overs that will, as they have done so far, make integration viable and stronger in a longer run.[50]

It has been precisely this dimension, socio-teleological constitutionalism claims, that classical constitutionalism has overlooked. The latter had focused on the exceptional, on the questions of sovereignty, *Grundnorm* and ultimate legal authority, locking itself in a vicious dialectic of constitutional extremes between Kelsen and Schmitt.[51] Moreover, in doing that, it has been persistently driven to increasingly statist solutions which Weiler, including the attempt of documentary constitutionalization, strongly refutes as a threat to the very ideal of constitutional tolerance that integration embodies.[52] Socio-teleological constitutionalism is thus a deeply normative constitutionalism, based on constitutional modesty as opposed to constitutional fetishism,[53] allegedly present in classical EU and national constitutional thoughts. It is a constitutionalism with an already existing formal constitution which, however, should not be formalized and documented in a traditional constitutional way lest its essence disappears.

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[48] The idea of constitutional tolerance has won a broad support among scholars, *see*, for example, Stefan Oeter, *Federalism and Democracy,* in PRINCIPLES OF EUROPEAN CONSTITUTINAL LAW 95 (Armin von Bogdandy&Jurgen Bas eds., 2006); Pavlos Eleftheriadis, *The Idea of a European Constitution*, 1 OXFORD JOURNAL OF LEGAL STUDIES 1, 16 (2007); Claus Offe and Ulrich K. Preuss, T*he Problem of Legitimacy in the European Union. Is Democratization the Answer?*, CONSTITUTIONAL WEBPAPERS, ConWEB No 6/2006, at http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/Filetoupload,52216,en.pdf

[49] Joseph Weiler, *On the Power of the Word: Europe's constitutional iconography*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 173, 186 (2005).

[50] Weiler, *supra* note 45, at 23.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 21.

2. Epistemic Meta-constitutionalism

Another version of revised constitutional narratives, the epistemic meta-constitutionalism defended by Neil Walker, distances itself much more from the classical constitutionalism than socio-teleological constitutionalism does. Working within a broader context and with a deeper insight it argues that constitutional discontinuities and frictions in the European integration should be understood as part of a wider process initiated by the demise of the centuries old Westphalian paradigm.[54] The traditional one-dimensional socio-legal-political world of sovereign states has been increasingly faced with the emergence of new sectorial and functionally-oriented entities, both infra- and supra-national, which assert within their own scope of competences equally plausible claims towards ultimate legal authority and thus challenge the traditional unitary nature of sovereignty as an exclusive property of states.[55] In contrast to socio-teleological constitutionalism, epistemic meta-constitutionalism therefore takes the question of sovereignty seriously, not due to any potential obsession with the exceptional, but because it holds that disregarding a social concept which is so deeply embedded in social practices could lead to a loss of something important in the understanding of that practice itself.[56]

Starting from the premise of a declining Westphalian paradigm, epistemic meta-constitutionalism casts the constitutional nature of the European integration in a very different light. As sovereignty in legal terms is no longer an exclusive characteristic of territorial entities, i.e. states, but belongs to the functional entities as well, it is possible to conceive of the existence of multiple claims towards ultimate legal authority within a particular territory.[57] And this is what the European integration, in the eyes of epistemic meta-constitutionalism, actually is an embodiment of. It is characterized by a plurality of legal orders – of different epistemic sites, albeit within a single political space,[58] with each possessing its own epistemic starting point, its own way of knowing and understanding, resulting in a

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[54] Neil Walker, *The Idea of Constitutional Pluralism,* 65 THE MODERN LAW REVIEW 317, 320 (2002).

[55] Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION 17 (Neil Walker ed., 2003); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 4 (1999); Marlene Wind, *The European Union as a polycentric polity: returning to a neo-medieval Europe?* in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (Joseph Weiler & Marlene Wind eds., 2003).

[56] Walker, *supra* note 55, at 17.

[57] *Id*.

[58] Walker, *supra* note 54, at 361.

plurality of intersecting claims towards ultimate legal authority with an increased possibility of "conflicts" at their boundaries.[59] Conflicts are, again, not avoided by this narrative, but it follows from its epistemic dimension that when they do in fact occur between the competing national and supranational levels, there is no plausible perspective, no sure basis of historical knowledge, no Archimedean point, from which their claims could be reconciled as long as EU legal order and legal orders of the Member States are to be treated as different unities.[60]

However, this does not mean that law and constitutionalism at that stage simply run out.[61] To the contrary, it is here where constitutionalism could prove most beneficial for the continuous viability of integration as an economical and political project. Provided that it escapes the overly narrow statist bonds and the ensuing drawbacks, so that its spatial, temporal and normative criteria are redefined in pluralist terms, it could as a constitutive discourse of imagination and conceptualization fit the epistemically pluralist European construction.[62] As such it could furnish a meta-constitutional framework above and beyond singular epistemic units, which would encourage them to continuously reflect on the legitimacy of their authoritative decision-making and on the proper allocation of authority. It would, again and in a way similar to the socio-teleological constitutionalism, contribute to a dialog, mutual learning and cross-fertilization between the epistemic units. [63]

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[59] *Id*. at 346.

[60] *Id*. at 338. Hans Lindahl and Bert van Roermund seem to endorse similar, but less elaborated approaches when they argue that "Recognizing that the EC is already a political unity does not mean, however, that the Member States have ceased to be political community, nor that sovereignty is 'divided' between the EC and its Member States ('divided sovereignty' is a contradiction in terms). It means that the Member States and the EC are sovereign from different points of view." *see* Hans Lindahl and Bert van Roermund, *Law Without a State? On Representing the Common Market* in THE EUROPEAN UNION AND ITS ORDER 13 (Zenon Bankowski & Andrew Scott eds., 2000).

[61] MACCORMICK, *supra* note 55, at 118. While he had initially endorsed the same pluralist view as epistemic meta-constitutional narrative, he subsequently changed his mind because, in his opinion, radical pluralism too quickly runs out of legal solutions and leaves legal actors and their addressees with a superfluity of legal answers that imperils the value of predictability and legal certainty. The resolution of constitutional conflicts under the model of radical pluralism, following MacCormick, is eventually a matter for circumspection and for political as much as legal judgment and is as such less attractive as the solutions offered by 'pluralism under international law' to which he subscribes now.

[62] Walker, *supra* note 54, at 334.

[63] *Id*. *See also* Neil Walker, *Flexibility within a Meta-constitutional frame: Reflections on the future of legal authority in Europe*, JEAN MONET WORKING PAPER 12/99, at http://www.jeanmonnetprogram.org/papers/99/991202.html.

Eventually socio-teleological and epistemic meta-constitutionalism come out with essentially the same and indistinguishable normative tenor of mutual recognition, reflexivity and cognitive-openness instead of closure. They are both also inherently supportive of integration and believe that constitutionalism is the best, or perhaps even the only,[64] guarantee of its viability and strength.[65] Similarly they share the aversion for the statist vision of the integration, but epistemic meta-constitutionalism does not exclude a possibility, and it is therefore not categorically against the EU being endowed with a written constitution.[66] On the other hand, they have chosen very different constitutional means to attain their desired and largely shared normative ends. While socio-teleological constitutionalism comes with a hierarchical framework of classical constitutionalism and thus avoids and simultaneously pre-empts the hard questions, epistemic meta-constitutionalism endorses a heterarchical, even radically pluralist approach whereby conflicts are fully exposed along with, for many a troubling realization of their ultimate insolubility.[67] Hence, whilst for the epistemic meta-constitutionalism there exists, or at least it sends such an impression, a limit, a constitutional ceiling of the integration, socio-teleological constitutionalism draws no such a boundary to its quotidian pro-integrationist spill-overs as long as they are conducted in the spirit of constitutional tolerance.

3. Best Fit Universal Constitutionalism

Somewhere between socio-teleological constitutionalism and epistemic meta-constitutionalism two other revised constitutional narratives are found. The first is a best fit universal constitutionalism whose most pronounced proponent is Mattias Kumm. His account shares features which are common to both of the already presented constitutional narratives, especially the vision of strong integration of a constitutional nature, and yet not of a statist quality.[68] With its normative ideal of

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[64] JOSEPH WEILER, CONSTITUTION OF EUROPE 223 (1999).

[65] Walker, *supra* note 54, at 343. *See* also Neil Walker, *'After finalité' The Future of the European Constitutional Idea*, in GENÈSE ET DESTINÉE DE LA CONSTITUTION EUROPÉENNE: COMMENTAIRE DU TRAITÉ ÉTABLISSANT UNE CONSTITUTION POUR L'EUROPE À LA LUMIÈRE DES TRAVAUX PRÉPARATOIRES ET PERSPECTIVES D' AVENIR, (Giuliano Amato, et al. eds., 2007).

[66] Neil Walker, *Europe's Constitutional Engagement*, 18 RATIO JURIS, 387, 398 (2005). Walker locates the added value of documentary constitutionalism in the launching of a self-consciously constitutional process, with a wide-scale debate and emerging collective author attempting to identify common European predicates. The result is not sure, but the opening of the full, self-aware and wide-scale debate is the right way of addressing concerns of integration, community, documentary constitutionalism and their implications for capacity (effectiveness), influence (democracy), identity (being).

[67] Walker, *supra* note 54.

[68] Kumm calls his version of constitutionalism a constitutionalism beyond the state.

mutually deliberate engagement between the actors in the integration it also subscribes to a very similar normative tenor as they do. Nevertheless, it is ultimately much closer to socio-teleological constitutionalism for it adopts the formal constitution of classical constitutionalism, though in a manner analogous to epistemic meta-constitutionalism recognizes that it needs to be cast and executed in a more pluralist way.[69] However, its pluralist solution is very different from the latter's and its focus is, in comparison with that of socio-teleological constitutionalism, elsewhere as well.

The best fit universal constitutionalism is concerned exactly with what socio-teleological constitutionalism considers exceptional: it aims at providing a normative jurisprudential account of constitutional conflicts,[70] which should contribute to the coherence of the European legal order as a whole. Its constitutional perspective, from which these conflicts should be assessed and resolved, is universal in a double sense. In terms of scope where the focus should be always on all the layers of the integration that are holistically treated as one common whole,[71] as well as in terms of substantive quality where this common whole is believed to be based on values that are not just nominally universal, but whose content is essentially homogeneous as well.[72] It is this presumption of one European legal practice and of universality and homogeneity of values across the European integration that sets the best fit universal constitutionalism apparently worlds apart from the epistemic meta-constitutionalism.

This becomes quickly apparent once both approaches are applied to the constitutional conflicts. While epistemic meta-constitutionalism excludes any possibility of balancing and reconciling the competing claims to ultimate legal authority for they come from different epistemic sites whose claims by default can not be reconciled, it is essential to the best fit universal constitutionalism that the actors engage in balancing to find the equilibrium that fits best the integration as a whole. The national and EU courts are not prevented by their own legal practices, allegedly grounded in the respective Grundnorms or rules of recognition, to engage in such a balancing enterprise, for this would be a purely unjustified positivist excuse, instead they are always obliged to find in a mutually deliberative

[69] Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUROPEAN LAW JOURNAL 262, 292 (2005).

[70] *Id*. at 268.

[71] *Id*. at 288.

[72] *Id*. at 292.

engagement the best fit solution all things considered.[73] In their judicial decision-making they should therefore always have the following question in mind:

> what is the interpretation of the relationship between national constitutions and the EU constitution that *best fits and justifies legal practices in the European Union, seen as a whole*? Or alternatively: what makes national and European constitutional practice in Europe appear in its best light?[74]

However, the answer is not necessarily unequivocal. Integration as it currently stands, and this can be seen as a pluralist moment in the best fit universal constitutionalism, does not yet warrant a clear cut and unexceptional compliance with the hierarchical principle of supremacy of EC law and it should remain so until some fundamental conditions are fulfilled.[75] The determination of these conditions, and this might be considered as the second pluralist moment, does not depend on one absolute principle, rather there is a set of competing principles in the European legal order[76] whose realization is a question of degree that must, in a contextually sensitive way, be balanced against one another. By relying on them, no legal order, neither of the Member States nor of the EU, hegemonizes the other, since they provide a sufficient guarantee that European practice will remain coherent even without clear cut hierarchical rules governing the relationships between the two.[77] Nevertheless and simultaneously, in the balancing of national and EC claims the latter should enjoy a great deal of presumptive weight against the former.[78] This requirement stems logically from a decision of treating integration as one legal practice whose overall coherence depends on the search for the best fit balance of shared normative commitments that, in a vein very similar to

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[73] *Id*. at 286.

[74] *Id*.

[75] Id. at 297: "[As] long as (a) the national community has not explicitly committed itself to EU law as the supreme law of the land and (b) European institutions have not established a political process with elections and directly representative institutions at its heart and remain dependant on national democratic processes for its legitimation and (c) a European public sphere, European civil society and a European identity as the sociological prerequisites of a meaningful democratic process have not yet developed to a sufficient degree, a blanket rule requiring national courts to set aside national constitutional provisions is incompatible with respect to democratic legitimacy and the institutional role of constitutional courts in constitutional democracies."

[76] *Id*. at 299. These principles are: the formal principle of legality, jurisdictional principle of subsidiarity, the procedural principle of democracy and substantive principle of protection of basic rights or reasonableness.

[77] *Id*. at 301.

[78] *Id*. at 302.

socio-teleological constitutionalism, is nothing but destined, which is also at least implicitly desired, to lead the integration to an ever more integrated, unified and hence non-conflicting entity.

4. Harmonious Discursive Constitutionalism

Harmonious discursive constitutionalism has much in common with best fit universal constitutionalism, but it is also very different from it. It first of all does not shake off the question of sovereignty so easily from its shoulders,[79] and it moreover shares with the epistemic meta-constitutionalism an *ex-ante* full recognition of the pluralist reality of integration and even finds it appealing and justified.[80] However, only to the extent that it does not become a threat for the viability of integration.[81] It is here where the crux of the harmonious discursive constitutionalism is and where its entire concern lies: how to ensure that this admittedly pluralist, heterarchical integration remains in harmony be it in a form of coherence, [82] integrity[83] or contrapunct?[84] The answer is to develop a discursive practice among all the actors involved, not just the courts, whose common basis is ensured by a framework of contrapunctual principles[85] which integrate the claims and regulate the relations among national legal orders *inter se* and between them and the EU legal order.[86]

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[79] It acknowledges the importance of sovereignty that due to its strong impact on the epistemology as well as the legitimacy of the European integration can not be simply dismissed. *See*, Miguel Poiares Maduro, *Contrapuntcual Law: Europe's Constitutional Pluralism in Action*, in SOVEREIGNTY IN TRANSITION 502 (Neil Walker ed., 2003).

[80] *Id*. at 522. "There are powerful pragmatic and normative reasons not to adopt a hierarchical alternative imposing a monist authority of European law and its judicial institutions over national law."

[81] *Id*. at 523. "As long as the possible conflicts of authority do not lead to a disintegration of the European legal order, the pluralist character of European constitutionalism in its relationship with national constitutionalism should be met as a welcome discovery and not as a problem in need of a solution."

[82] AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY (2002).

[83] Samantha Besson, *From European Integration to European Integrity: Should European Law Speak with Just One Voice?*, 10 EUROPEAN LAW JOURNAL (2004).

[84] Maduro, *supra* note 79.

[85] *Id*. at 524. These are the principles of pluralism, consistency, vertical and horizontal coherence, universalizability and institutional choice.

[86] *Id*.

The way this harmonious discursive constitutionalism is expected to operate is by ostensibly marrying the characteristics of epistemic meta-constitutionalism and best fit universal constitutionalism. With the latter it shares, albeit somehow qualified, a presumption that the participants in the integration use similar language and reasoning, which mirrors the claim of values homogeneity, and that they essentially participate in one legal practice of the European legal order,[87] which is the other dimension of Kumm's universal constitutionalism. At the same time, and this is where the account moves closer to the epistemic meta-constitutionalism, national and EU participants are recognized as starting from different perspectives and are therefore legitimated in using different arguments and underlying theories to justify their positions. But, and here we are back in the embrace of best fit universal constitutionalism, these arguments and theories on which they are based have to be universalizable to all the participants and must be conducive and should ultimately lead to an agreement on the specific outcomes.[88] Ultimately, the competing claims must be reconciled to make the integrated European legal order possible.[89]

Again it becomes apparent that harmonious discursive constitutional narrative does not subscribe to the epistemic and genuinely pluralist nature of the European integration, rather it ultimately privileges coherence, admittedly of different intensity,[90] of the integration as a whole. While the European integration is said to best fit a pluralist image of networks of overlapping and interdependent legal systems, each of which has its own criteria of validity, pluralism in order to be workable has to operate within certain limits[91] and its implications can not reach the extreme point of irreconcilability.

5. Multilevel Classical Constitutionalism

No other version of revised constitutionalism makes this clearer than multilevel classical constitutionalism. The latter, defended by Ingolf Pernice, envisages the

[87] Miguel Poiares Maduro, *The Heteronyms of European Law*, 5 EUROPEAN LAW JOURNAL 160, 167 (1999).

[88] Maduro, *supra* note 79, at 525.

[89] *Id*.

[90] Besson, *supra* note 83, at 259., who claims that overall coherence will be satisfied only when all national decisions cohere with all European and *vice versa*.

[91] VERHOEVEN, *supra* note 82, at 300., who proposes an overarching principle of integrity, which should be used as a yardstick assessing the reasonableness of the claims to validity and applicability of the different legal systems. "Such overarching set of rules – guiding, ultimately, the pluralist interface – can not be imposed top-down by the EU legal system, nor bottom-up by the Member States. The rules that guide the pluralist interface must somehow belong to a third 'space', an overarching legal area – to a Gesamtverfassung as proposed by Kelsen, but understood in a radically non-monist way."

integration as one legal system with a single constitution, albeit composed of two complementary constitutional layers, European and national, which co-exist independently but are simultaneously characterized by a high degree of unity and increasing homogeneity of constitutional values.[92] The levels of a multi-level constitutionalism are already so closely interwoven and interdependent that one can not be understood without regard to the other[93] and, moreover, by forming part of a single system they must ultimately produce one legal answer to each case. In other words, while the EU system is, from its origin and construction, necessarily non-hierarchical, it is inherent in it and a condition of its proper functioning that one, i.e. EU, rule prevails.[94]

This entails, in contrast with the epistemic meta-constitutionalism and harmonious discursive constitutionalism, that sovereignty retains its unitary character and it rests with the peoples of Europe.[95] The masters of the Treaties, if any, can only be the citizens, not the Member States, and given the obligations of homogeneity it is even doubtful whether the latter still remain the sovereign masters of their own constitutions.[96] Since the real sovereign is the peoples, they are those who hold the key to *Kompetenz-Kompetenz* and subsequently there is even no room for consideration of the Member States to leave the European Union by unilateral action.[97]

As a result, multilevel classical constitutionalism could be hardly treated any differently as a slightly more sophisticated version of classical constitutionalism. Except for its rhetorical insistence on the multi-levelness and heterarchy, it is literally indistinguishable from a traditional federalist constitutional framework. Pursuant to its constitutional vision, integration is one single holistic whole, governed by one sovereign, values are homogeneous across the entire scale, and in case of constitutional conflicts the supremacy of EU law applies so that one single answer is always assured.

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[92] Armin von Bogdandy, *A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective*, 6 EUROPEAN LAW JOURNAL 208, 227 (2000).

[93] Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUROPEAN LAW REVIEW 511, 514 (2002).

[94] *Id*. at 520.

[95] VERHOEVEN , *supra* note 82, at 300.

[96] Pernice, *supra* note 93, at 518.

[97] *Id*. at 519.

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6. Reductionist Constitutionalism

While the multilevel classical constitutionalism henceforth has not really severed the link with the classical constitutionalism, the last narrative in the group of revised constitutional narratives, the reductionist constitutionalism did just the opposite. It abandoned the classical constitutional paradigm in its entirety, along with its sovereignty conundrum, pursuit of universality, coherence and integrity. It treats the quest for these ideals as simply unnecessary as a classical constitutionalism based on representation, equality of citizens and separation of powers is inherently prone to uniform and generalized results. Moreover, this quest is not just unnecessary, it is even misguided, for the ideals that it is striving for inevitably run short of providing effective solutions to specific problems.[98] The focus should be therefore rather different: it should be switched from the whole to the particular, from the constitutionally holistic to the constitutionally reductionist approach.

The European integration should be, accordingly, completely re-constructed and established as a directly-deliberative polyarchy standing for a de-nationalization, brining the Romantic identity of the people and state to an end.[99] It should consequently move from a two-level: state or EU-centered governance, to a multi-level governance, characterized by multiple-modalities of authorities, variability and complexity of policy-making that involves a broad range of private and public actors entangled into a whole array of policy networks.[100] Instead of traditional state and EU-based institutions, the main players would become the local actors from smaller units who are directly concerned with specific problems in every imaginable policy field. They would arrive at decisions through direct deliberation without any delegation to superior representatives. These smaller units would be the main locus for policy-making and not the courts because they are not well equipped for that. Additionally, the search for integrity and justice that the community personified should endorse would be replaced by a pragmatic, experimentalist approach of radical polyarchical democracy.[101] The latter, despite

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[98] Joshua Cohen and Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUROPEAN LAW JOURNAL 313, 324 (1997).

[99] Oliver Gerstenberg and Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOEVERNANCE IN EUROPE'S INTEGRATED MARKET 291, 292 (Christian Joerges & Renaud Dehousse, 2002).

[100] Gary Marks, Liesbet Hooghe and Kermit Blank, *European Integration from the 1980s: State-Centric v. Multi-Level Governance*, 34 JOURNAL OF COMMON MARKET STUDIES (1996); GARY MARKS, GOVERNANCE IN THE EUROPEAN UNION (2001).

[101] Cohen, *supra* note 98, at 338.

being through and through pluralistic, would be made feasible by the dispersed units' connection through the requirements of reason-giving and in particular by the demand to respect and compare each other's constitutional reasons.[102] The current practices of EU decision-making within the environment of comitology[103] can be seen as the first step towards European integration conceived as a constitutional directly-deliberative polyarchy.

C. Conclusion

Having strolled through the evolution of the EU constitutional narratives, it is now time to draw some, at least preliminary, conclusions. The first which naturally offers itself to the type of question we have asked, namely what kind of constitutionalism are we actually talking about in the European integration, is the realization that, contrary to commonplace and widespread convictions, we certainly do not talk just about one constitutionalism, rather about many.

The ostensibly homogeneous classical constitutional narrative, which preceded the epistemic rupture caused by Maastricht events, has disintegrated into many EU constitutionalisms. The new wave of EU constitutionalism has strived to distinguish itself from the classical constitutionalism due to its too strong reliance on the constitutional framework of a federal state, and due to its excessive and unrealistic insistence on unity, uniformity and overall hierarchical top-down constitutional structure of the Union. As these kind of, more or less, unilaterally imposed constitutional characteristics have never been truly internalized by a national constitutional pole of the integration and as a consequence classical constitutionalism has repeatedly failed to take roots in practice, the revised constitutionalisms recognized the need for more imaginative solutions.

The latter have taken different shapes and forms. We have familiarized ourselves with the sociological, epistemic, discursive, universal, holistic as well as reductionist constitutional visions of the integration. They all share, if anything, positive affiliation with a constitutional idea, as an important means and facilitator of integration, combined with an increased awareness of a mighty, if invisible, touch of stateness in the classical constitutional narrative.[104] All of them have consciously tried to avoid statist implications of constitutionalism, which are in

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[102] *Id*. at 325.

[103] Christian Joerges and Juergen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUROPEAN LAW JOURNAL (1997).

[104] Jo Shaw, Antje Wiener, *The Paradox of the 'European Polity'*, JEAN MONNET WORKING PAPER 10/99, at http://www.jeanmonnetprogram.org/papers/99/991002.html.

structural terms most clearly exhibited in the requirement of hierarchy, whereas in substantive political terms they can be recognized in yearning for one demos, for an increasing homogeneity of values and hence as much as possible uniform order. They have urged for caution when translating constitutional concepts from statist to non-statist environment,[105] and have open-mindedly, though not all to the same extent, recognized that some social concepts, such as sovereignty for example, can undergo significant transformation in time and space.[106] Moreover, these narratives have also started questioning the orthodoxies of hierarchy and uniformity as allegedly existential requirements of integration and have suggested that EU constitutionalism should be reformed through more relaxed, heterarchical and overall pluralist solutions.

Despite many shared features, there exist also many differences between the revised constitutional narratives. For example, there is no agreement among them on what one would expect to be necessarily a shared starting point, whether European Union already has a constitution[107] or not and is therefore in need of a written one.[108] However, no matter how striking this observation might be, this disagreement is not what truly separates different versions of revised constitutionalism. The main difference lies in the extent to which they have in fact split with the tenets of classical constitutionalism. While we could observe a general trend of devising pluralist solutions, many revised constitutionalisms have been, admittedly, pluralist only in their name. Their endorsement of pluralism has been in many instances much more, if not exclusively, rhetorical rather than genuine.

With the sole exception of reductionist constitutionalism, which works within a completely polyarchical paradigm, and, as it seems, of epistemic meta-constitutionalism, all the other revised constitutionalisms have inherited the formal

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[105] Neil Walker, *Postnational Constitutionalism and the Problem of Translation,* in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (Joseph Weiler & Marlene Wind eds., 2003); Jo Shaw, *Postnational Constitutionalism in the European Union*, in THE SOCIAL CONSTRUCTION OF EUROPE (Antje Wiener et al eds., 2001).

[106] Walker, *supra* note 55.; Samantha Besson, *Sovereignty in Conflict*, 8 EUROPEAN INTEGRATION ONLINE PAPERS (2004), Bruno De Witte, *Sovereignty and European Integration: the Weight of Legal Tradition*, in EUROPEAN COURT OF JUSTICE AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE, (Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler eds., 2000); MARLENE WIND, SOVEREIGNTY AND EUROPEAN INTEGRATION (2001); Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN LAW REVIEW (1993).

[107] Weiler, *supra* note 45.

[108] Among the revised constitutional narratives only socio-teleological constitutionalism is expressly against documentary constitutionalization (and probably, reductionist constitutionalism *per se*). The other approaches, in principle, remain open to it but caution against potential 'statist collateral damage.'

constitution from the classical constitutional narrative. The doctrines of supremacy, direct effect, pre-emption and human rights protection, establishing a hierarchical structural framework of the integration have, despite the widespread commitments to constitutional pluralism, largely remained the unquestioned Articles of Faith.[109] This is apparent from the kind of language these narratives use[110] from the conclusions they draw;[111] and from the internal irreducible tensions they face due to their rhetorical adherence to pluralism and simultaneous practical, deep down, reliance on hierarchical constitutional monism.[112] Despite the explicit commitment to a revised and thus a new kind of constitutionalism, the old, classical one has endured and continuous to underlie the EU constitutional thought, but under a different guise.

However, if we know what practice has also demonstrated repeatedly, that classical constitutionalism with its monist pedigree has never truly worked in the European Union, for it has simply failed to persuade national constitutional actors, and moreover if we believe that it should never really be allowed to work, because it comes with a whole range of negative normative consequences, the news of its persistent endurance could not come but as a disappointment. But, what does it actually mean? Is its persistence merely a result of insufficient intellectual efforts on the side of revised constitutionalists or does it send the gloomier message that constitutionalism is due to its inherent reliance on the presupposition of uniformity

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[109] Weiler, *supra* note 13, at 517.

[110] The principle of primacy or supremacy can serve as the best example. While the ECJ has almost unexceptionally used the term primacy standing for a relational, non-hierarchical principle, the majority of constitutional narratives have consistently employed the term supremacy denoting a hierarchical legal structure of integration.

[111] For example, even though the integration is internally pluralist, consisting of multiple levels, the competitive claims to ultimate legal authority have to be reconciled so that there is eventually just one answer to each case. And even if they appear to be many at this point they will gradually through every day "tolerant" practice (have to) be reduced to one.

[112] Socio-teleological constitutionalism might serve as the best example. While it takes over the formal hierarchical constitution from the classical constitutionalism in its entirety, it fails to explain how its constitutional vision of the integration can be then genuinely tolerant and thus truly legitimate if a normative ideal of constitutional tolerance is introduced only when the constitutional framework of a clearly hierarchical nature is already in place. In other words, socio-teleological constitutionalism first hierarchically subordinates national legal orders to a hierarchically supreme EU legal order and then requires them to be tolerant. This is, of course, a prescription bound to get very few on board, for it seems to be imposing tolerance at a stage when the equilibrium has already been lost, when the structural issues have already been decided and when tolerance consequently could work just one way. As a consequence and simultaneously, it is then also difficult to see how this constitutional narrative could fulfill its aspirations to bring about a more horizontal and conversational constitutionalism when its genetic code is its exact counterpart.

of a nation state with a centralized and unitary system of legal and political institutions[113] conceptually precluded from being translated into a non-statist environment?

If anything, the latter is certainly not the case. Constitutionalism is a social concept, which means that it does not have any essence of its own which is immutable and independent from the social constructionist forces in the society. Social concepts, constitutionalism included, are after all nothing more and nothing less than institutionalized mutually shared beliefs. Consequently, there can be simply no justification for a claim that constitutionalism can not be severed from its statist pedigree.[114] Such a claim would clearly violate the non-essentialist character of social concepts, i.e. the very fact that they are social and not natural concepts.[115] Once we are aware of this, the gate is wide open to think of a constitutionalism that could fit a kind of non-statist, supranational and deeply pluralist environment of the European integration. There is therefore no reason why the latter should not develop as an expression of special pluralist constitutionalism. We would only need to persuade as many stakeholders as possible, in all the constituent entities of the integration, in order to turn it into an institutionalized mutually shared belief. But we could only do that if we ourselves first truly believed in our chosen constitutional account, in its viability and desirability.

The main reason that EU constitutionalism(s) is presently stuck and why despite its domination it has not translated itself in EU practices is precisely the lack of a sincere belief in constitutionalism as a viable narrative for integration. The revelation of this paper that there are in fact many constitutional narratives in the European integration has not solely proven wrong the mainstream convictions about just one dominant constitutional narrative, but it has, moreover and more importantly, exposed the fact that EU constitutionalists very often speak very different languages, largely, without even being aware of it, which might also show, and this is of far greater concern, that many EU constitutionalists might not even know – beyond the constitutional label that they attach everywhere - why they are using constitutional language in the first place. [116]

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[113] JAMES TULLY, STRANGE MUTLIPLICITY 9 (1995).

[114] *Id*. at 37-38. Tully stresses that constitutional language is neither monolithic nor immutable. It is flexible and adjustable. Hence there is no need to discard constitutionalism as such.

[115] Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD JOURNAL OF LEGAL STUDIES 1, 11 (2004); Brian Z. Tamanaha, A *Non-Essentialist Version of Legal Pluralism*, 27 JOURNAL OF LAW AND SOCIETY 296, 313 (2000).

[116] This, presumably at least, should not apply to the main advocates of the constitutional theories presented in this article.

Indeed, if there is one dominant narrative in the European integration, this is the narrative of constitutional labeling. What is truly dominating integration is a constitutional label, more often than not filled with statist constitutional content, which can be removed from the façade of integration at least as quickly as it has been, with an enormous ease and little reflection, stuck on it. Just recall the latest genuine *salto mortale*, called the Reform Treaty. In a manner close to lustration of EU constitutionalism the European stakeholders uprooted from the text of a Constitutional Treaty, that they had only a while ago still so vigorously defended as the Constitution, everything that might be in any way reminiscent of the C-word. Those who genuinely believe in constitutionalism and in its appropriateness for the European integration simply do not act like that. And those who do not believe in it can not plausibly expect it to be ever turned into reality.