STILL TOWARDS 'AN EVER-CLOSER UNION'? RISE, DECLINE AND TRANSFIGURATION OF THE *PLANUNGSVERFASSUNG* ARGUMENT IN THE INTERPRETATION OF UNION LAW

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Abstract

In a decade of multiple crises, the European Union seems uncertain about its own destiny, as the integration through law project exposes multiple fragilities and the integration proceeds fast, yet randomly, due to the several incumbent emergencies. This work aims to uncover the origins of a doctrine – the *Planungsverfassung*, or 'constitution-to-be' – that has given overwhelming force to the 'original intent' argument in the interpretation of Union law to endow the latter with applicative priority *vis-à-vis* national law. The key benefit this concept offers is to elucidate the ties between the political-constitutional settlements reached within the Member States after World War II and the gradual implementation of the European project. This insight may contribute to a better understanding of the increasing constitutional conflicts that perturb the Union, especially as the Court of Justice wishes to severe the link with the national constitutions as both repositories of conceptual tools and sources of authority. In this regard, claims for a value-based primacy are accounted for in light of the *transfiguration* of the *Planungsverfassung* construct, as a result of which textual arguments bringing morally-neutral elements to Union law are being gradually marginalised.

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TABLE OF CONTENTS

1. Introduction & Research Question

The increasing constitutional conflicts between the Union and the States have taken the Union to a dead end[1]. Suitable way-outs are commonly described as two. Either the Union shows 'constitutional maturity'[2] and accepts primacy as unrestrained while subscribing to the 'unconfined power' conferred on the Union institutions,[3] or the whole edifice would crumble away, *Brexit* being but the first of many other painstaking farewells. Yet – the narrative proceeds – in eerie times of military confrontation it is time to stand together in defence of common values[4] and to set aside for good the trivial conflicts characterizing the immature phases of the integration project[5].

However, although wars obviously obliterate moderate political positions, this should not happen for lawyers: they are tightened to the 'ought', rather than to the 'is', and stick to the difficult, yet crucial task of discerning what is legally binding and

[1] M. Dani, J. Mendes, A.J. Menéndez, M.A. Wilkinson, H. Schepel, *At the End of Law. A Moment of Truth for the Eurozone and the EU* (15 May 2020) in *Verfassungsblog.de.*

[2] R.D. Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*' 2 *Maastricht Journal of European & Comparative Law*, (2016) 136-150.

[3] Critically, D. Chalmers, *The Unconfined Power of European Union Law* 1:2, *European Papers* 405-437 (2016).

[4] See P. Mengozzi, *I valori dell'Unione europea ed il controllo della Corte di giustizia sulla legittimità degli atti PESC*, 2 *Il Diritto dell'Unione Europea*, 1-81, 21f. (2024)

[5] *Inter alia*, the Speech delivered by the European Commission's President Ursula von der Leyen at the European Parliament Plenary on 'Strengthening European defence in a volatile geopolitical landscape', 26 February 2024.

what is no more than partisan *wish* backed by rampant, outweighing force. Indeed, should the latter be identified with law *tout court*, the result would steer the Union away from its original blueprint; and this would lead to question what do we as Europeans are to exactly defend under the rather pompous name of 'common values'.

In this light, answers need to be provided to the following, urgent question: if, and how, the Union can survive the ongoing emergencies without losing its distinctive signs, *i.e.*, those special characteristics that have made Europe a place in which peace, equality and liberty have thriven to a quite unprecedented extent in the history of mankind.

The paper presented hereby is part of a more comprehensive work aiming to uncover the transformation of primacy. The answer it tries to give rests on the following assumption: these specialties stem from the *post*-WWII constitutional legacy and find in the European project the solidest bulwark against the rise of authoritarian aggressive regimes. This was, in fact, the idea of the early ages as it results from legal texts and from the arguments deployed to account for primacy, *i.e.*, to back the claim for prior application of the emerging Community law. Should this be the case, to establish a link between primacy and the *post*-WWII constitutional legacy would deliver the desired outcome.

In the general accounts of the integration, it is commonly understood that, as the Community was given birth by States resting on those very constitutions, the link just mentioned exists, and builds on a presumption – that is, whatever the European integration process attains is presumptively held in line with the national constitutional projects. Thus, the question is twofold: first, how and why this presumption has worked; then, if and why it has ceased to work or, anyway, has lowered in effectiveness – which leaves room for the autonomy of Union law to make a step forward[6].

This paper seeks to answer to this twofold question. In this light, the focus shifts to one of the moments of the transformation of primacy: the evolution of the textual argument based on voluntarism. In other words, whereas in the immediate aftermaths of WWII the old riddle still went as 'what the States want, is law;

[6] See J. Lindeboom, R.A. Wessel, *The Autonomy of EU Law, Legal Theory and European Integration*, 8(3) *European Papers* 1247-1254 (2023).

what they do not want, is not law', the landscape changed as the rise of the Communities conveyed the establishment of *supranationalism*. This peculiar concept is based on the idea that 'what the States wanted' was to melt themselves into a new form through a process of 'putting in common' certain sectors of their national economies and legal orders. This idea has eventually materialized into a legal argument paving the way to a smooth evolution from textual voluntarism to moral teleologism in the interpretation of Community law.

In this light, the work aims to tell the story of this argument, and of the ideal and dogmatic construct that has underpinned it. The added value it brings is twofold. First, it highlights the link between primacy and the defence of the national constitutional legacy, understood as the core of liberal social democracy underpinned by popular sovereignty. Second, it highlights how the affirmation of an unrestrained primacy entails the abandonment of textual arguments and the marginalisation of written law, which seriously undermines legal certainty. In this light, the core concept of this work – the *Planungsverfassung* doctrine and the argument it offers – is both the object of a brief historical reconstruction and the instrument to cast new light on the line of reasoning that the Court of Justice has maintained in a conspicuous array of controversial cases. In the first case, the historical account points to the subversion of positivist logics until then dominant in the interpretation of international law, and the replacement thereof with logics based on utmost *preferability* of the presented objective – which has permitted the expansion of the Community law's applicative scope, as it has offered a common ground to the hermeneutical toolkit the Court has deployed. In the second case, the *Planungsverfassung*'s decline and transfiguration are understood as backing arguments against the claims for unrestrained primacy, for the latter is presented as unrelated to written law and disrespectful of the national constitutional legacy.

2. Back to Beginnings: Plan of the Work

'Determined to establish the foundations of an ever-closer union among the peoples of Europe', six States whose constitutions revealed unprecedented signs of pluralist-democratic ambition created a European Economic Community by means of an

international instrument[7]. Such instrument, in the same vein, has revealed unprecedented ambitions, too[8]. In comparison with previous treaties furthering European integration, the new approach signposted a radical turn[9]. Whereas the ECSC simply aims to lay the grounds of 'a *de facto* solidarity' by building up 'shared bases of economic development', the EEC Treaty triggers a seemingly irreversible process towards a federal-like integration[10].

Among the many theoretical constructs aiming to account for this process, the choice here is to look at a corner so far not fully explored by most scholars. While building on the *ever-closer union* clause laid down in the TEEC Preamble[11], the doctrine analysed hereby offers a wide-ranging, prospective view of the integration process by means of a novel concept – *Planungsverfassung* – and of an argument that seems to explain how Community law, as an international law of a new kind, has been able to initiate its relentless expansion *vis-à-vis* national law[12].

According to the former, the Treaties were presented as *constitutions-to-be* that enshrined the seeds of a future unitary polity[13]. In this view, the Treaties offer a structure for the *post*-WWII social, political and economic compromises enshrined in the Member States' constitutions to be developed on a shared plane: they provide a legal-political framework for the *post*-WWII constitutional legacy to be perpetually secured[14]. In this light, links

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[7] European Parliament – I-Pol Directorate – Study: *National Constitutional Law and European Integration* (PE 432.750: 2011) 3-226.

[8] A. Stone Sweet, T.L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92(1) *American Political Science Review* 63-81 (1998).

[9] See A.-T. Norodom, *Entre droit international et droit constitutionnel : le métissage du droit de l'Union européenne*, 2 *Revue des affaires européennes* 229-238 (2016).

[10] W. Phelan, *Goodbye to All That:* Commission *v.* Luxembourg & Belgium *and European Community's Law Break with the Enforcement Mechanisms of General International Law*, in F. Nicola, B. Davies (eds.) *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (2017) 121-133, 129.

[11] R. Bieber, J.-P. Jacqué, J.H.H. Weiler, *An Ever Closer Union. A critical analysis of the draft Treaty establishing a European Union* (Luxembourg-Bruxelles, 1985) 7-18.

[12] L.-J. Constantinesco, *La specificité du droit communautaire*, 1 *Revue Trimestrielle de Droit Européen* (1966) 1-30.

[13] Paul Reuter, 'Juridical and Institutional Aspects of the European Regional Communities' (1961) 26 *Law & Contemporary Problems* 381-399.

[14] Christian Grabenwarter, 'National Constitutional Law Relating to the European Union', in Armin von Bogdandy and Jürgen Bast (eds.) *Principles of European Constitutional Law* (2nd edition, Oxford-Portland: Hart 2009) 83-129.

with national constitutions could not be just fictitious: it was each national constitutional project, endowed with unprecedented ambitions of pluralist democracy, what was to be unfolded on a common path in order to fulfil those ambitions. This correspondence surrounded the European project with an allure of moral *preferability* which was crucial for the pro-Europe narratives to reach national audiences with some impact.

The latter makes Community law's textual-voluntarist reading equivalent to a systematic-teleological one, as any improvement towards the *ever-closer union* goal was allegedly covered by the will of the Founding States. Since the States wrote they wanted an 'ever closer union', then whatever interpretation expanded the 'applicative scope'[15] of Community's measures marked a step ahead towards the much-coveted objective.

The *Planungsverfassung*, in other words, succeeded in a twofold task. First, it linked Community law's superior morality with some national constitutional legacy to be defended, which has made the integration process an end '*per se*'. Second, it applied this superior morality to legal hermeneutics, which has been crucial for the development of the abundant constitutional toolkit that the Court of Justice has deployed to further the integration.

In other terms, the *Plannungsverfassung*, while putting the first brick of the presumption of coherence between national and supranational laws, has caused the first creep in the wall of legal positivism – and the combined action of the two has paved the way to the expansion of Community law's applicative scope to the detriment of national law.

Pursuant to a turbulent decade culminated in the 2008 crisis, fear and distrust have disrupted the political narrative and the legal edifice underpinning the *Planungsverfassung* construct. As for the narrative, the moral preferability of Community law has departed from the *irenic* logics of mutual common benefit through perpetuation of the national constitutional legacy to embrace a model of 'integration through fear'[16] while pointing at the Union as a *catechontic* power[17]. As for the argument, it has been overtly

[15] M.E. Bartoloni, *Ambito di applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018) 54.

[16] J.H.H. Weiler, *Integration Through Fear*, Guest Editorial, *European Journal of International Law* 23:1, 1-5 (2012).

[17] See M. Cacciari, *Il potere che frena* (2013) 44.

reverted and instrumentally recycled. In *Pringle*[18], the Court of Justice held that, for the ESM Treaty to be held in line with Union law, the latter's scope is to shrink following the States' will as it is *today* – not to broaden in light of their special original will: at polar opposites with what the *Planungsverfassung* postulates.

Throughout the recent crises, the decline of the latter has become apparent in many respects; nonetheless, the Court has not ceased to deploy all the concepts tied to the argument concerned, yet in a transfigured guise. Then, such argument has been used in support of pure teleological assertions (as in EMU cases[19]) or genuine value judgements, like in the battle for the alleged protection of the rule of law[20]. This transfiguration infuses Union law with powerful ideological claims yet in the lack of written provisions in their support; and such claims, by virtue of the presumption the *Planungsverfassung* construes, are regarded as virtually undisputable even when contrary to sensitive national constitutional claims.

Thus, unveiling the roots of the *Planungsverfassung* doctrine brings at least two outcomes. First: it casts further light on the special link between Union law and the will of the States as formalized in their constitutions – which sets external *ab initio* limitations to Union law's autonomy and specialty[21]. Second: it accounts for the current unbalance between moral teleologism and voluntarist positivism in interpreting Union law, the latter element being progressively marginalized to the advantage of the former[22].

Pursuant to such an account, the question 'whether the Union can survive the current emergencies without losing its distinctive traits' finds some suitable arguments for an answer. Perhaps frightened by gloomy military confrontations and increasing Euro-criticism, often depicted as 'populism' whatever this label may

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[18] CJEU, C-370/12, *Thomas Pringle* v *Republic of Ireland*, 27 November 2012, ECLI:EU:C:2012:756.

[19] See C. Kaupa, *Has (Downturn-) Austerity Really Been 'Constitutionalized' in Europe? On the Ideological Dimension of Such a Claim*, 44:1 *Journal of Law and Society* 32-55 (2017).

[20] See J.-W. Müller, 'The EU as a militant democracy, or: are there limits to Constitutional mutations within EU member States?' 165 *Revista de Estudios Políticos* 141-162 (2014).

[21] See J.H.H. Weiler, U.R. Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37:2 *Harvard International Law Review*, 411-488 (1996).

[22] G. Campanini, *Ragione e volontà nella legge* (1964) 25, 127.

contain[23]. teleological-systematic arguments have virtually ousted textual-voluntarist ones. The consent of States, and peoples, is increasingly regarded as given *una tantum* at the time of the Treaty's stipulation, and irrelevant from then onwards – whatever legal norm allegedly follows from the stipulation – with decreasing, to say the least, consideration for the textual wording of the legal bases concerned.

This is certainly not in line with national constitutions, which all lay down the principle of people's sovereignty as instrumental to rights been recognized, not *octroyés* in the guise of liberal, single-class constitutions. Today,

Were there binding means to require that, especially in cases of clear sensitivity, such consent be reinforced, so that acts of commensurate political responsibility underpin the additional consequences to be derived from the Treaty, then the ties with national constitutions would be restored in full, both as a political reference and a legal ground – which would enhance both Union law's political support and legal legitimacy. In this light, one may argue that the arguments backing Union law's claim for primacy need to be measured against their initial constitutional background[24] to avoid loopholes in the constitutional continuity from States to the Union[25]. Then, the oft-abused *motto* 'back to beginnings' would point to a refreshed exam of the relation that Union law entertains with the ever-closer union clause – still today, one of the most emblematic, though enigmatic formulas of the European integration[26].

Yet, these last assumptions are a fast-forward of the whole story; as far as this work is concerned, it is only the first chapter of the novel what is going to be presented here.

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[23] See, *ex multis*, C.J. Bickerton, C. Invernizzi Accetti, *Technopopulism: The New Logic of Democratic Politics* (2021) 39, *passim*, and G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective* (2023) 63, *passim*.

[24] *Ex multis*, S. Ramírez Pérez, *European Trade Unions from the Single European Act to Maastricht: 1985-1992*, 62(1) *Studi Storici: Rivista trimestrale della Fondazione Gramsci* 211-245 (2021), and M. Rasmussen, *Towards a Legal History of European Law* 6(2) *European Papers* 923-932(2021).

[25] On the continuity principle, with special regard to the legal order's continuity, M. Ferrara, *Continuità e politica estera. Appunti preliminari*, in *Il Filangieri – Quaderno 2022*, 79-94, 82 (2022).

[26] J.H.H. Weiler, '*Fin-de-siècle* Europe' in R. Dehousse (ed.) *Europe After Maastricht. An Ever-Closer Union?* 203-216 (1994).

The work is structured as follows. Section 3 compares the ECSC and the EEC Treaty as attesting to the supranational turn of the 'ever closer union' project. Section 4 introduces the *Planungsverfassung* doctrine as built on the latter's enhanced teleology; Section 5 describes the argument following thereby as the prime matrix of the 'integration through law' toolkit. Sections 6 and 7 account for the *Planungsverfassung*'s decline and transfiguration; the *Conclusions* aim to contextualize the achievements of the work.

3. The 'Ever Closer Union' Project: Enhanced Teleology

It has been aptly noticed that the peculiar *telos* of the European integration as enshrined in the *ever closer union* clause unleashes a process whose completion may never be achieved, which points to a European *Sonderweg*[27] infusing the Community with an *ethos* of 'constitutional tolerance'.[28] Implications of this *telos* have regarded the emergence of a European *demos* as a necessary *a-priori* for a European constitution to exist[29]. Yet, what may need further account is the link between this *telos* and the legal consequences that consolidate in the passage from the ECSC to the EEC Treaty. A brief recall may give the reader a better picture of the magnitude of such a change.

As for the institutional framework, TECSC (Articles 3-4) gives the institutions the powers to act 'in the common interest' of the Member States. Certain conditions held instrumental to a common market are imposed, while others are forbidden. Institutions are assigned the task of 'carry[ing] out activities' such as those listed by Article 5 in 'close cooperation with the parties concerned', with a 'limited measure of intervention' and 'a minimum of administrative machinery'. A little variety of legal acts is available to the High Authority for the execution of its tasks (Article 14: decisions, recommendations, opinions) whereas the Council ensures 'harmonisation' with national measures. The High

[27] J.H.H. Weiler, 'In defence of the *status quo*: Europe's constitutional *Sonderweg*' in J.H.H. Weiler, M. Wind (eds.) *European Constitutionalism beyond the State* (2003) 7-24.

[28] Joseph H.H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' 3:2-3 *International Journal of Constitutional Law* 173-190 (2005).

[29] D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21:4 *European Law Journal* 460-473 (2015).

Authority deliberates by absolute majority (Article 13); the Council acts according to Article 28, which does not always envisage a vote.

On the other hand, the TEEC confers on the institutions the power to pursue common objectives in broad policy areas under the guide of 'principles' provided for in 'Part One', whereas Member States are bound by a set of obligations in the form of objective Community law ('*Bases of the Community*'). For each area, specific procedures supply the inter-institutional bargaining (see *inter alia* Articles 43, 48, 70, 100) with an enriched normative framework; multiple legal acts are available as far as Article 189 is concerned (Regulations, Directives, Decisions, Recommendations).

As for constitutional ambitions, pursuant to Article 2 TECSC, the core 'task' of the elder Community is 'to contribute to economic expansion, growth of employment and a rising standard of living in the Member States'. This task is conducted 'in harmony with the general economy of the Member States and through the establishment of a common market'. The aim is to 'progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States'. Thus, the ECSC enucleates specific objectives that are part of the overall constitutional arrangements of each Member State, to the completion of which they are instrumental[30].

Conversely, the EEC Treaty does not shy away from reshaping the constitutional settlement of each Member State into a common framework. Though addressed to the States, the *Bases of the Community* are generally phrased in the language of 'liberal' rights and liberties – see Article 48, *Free Movement of Workers*; Article 52, *Right of Establishment*. On the other hand, in light of Article 5, Member States are bound by a twofold general obligation: 'to take all general or particular measures which are appropriate… to facilitate the achievement of the Community's aims' and to 'abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty'. Such an obligation gives the EEC's institutions free room to penetrate the layers of the national societies until the boundaries policed by the highest constitutional

[30] P. de Visscher, *La Communauté Européenne du Carbon et de l'Acier et le États Membres*, in *Actes Officiels*, II (1957) 7.

principles[31]– a supranational, pluralistic *constitutional mosaic* gradually emerging by virtue of that process[32].

Hence, the teleology underpinning the respective political projects reminds that, as far as Article 1 is concerned, the TECSC is 'founded upon a common market, common objectives and common institutions'. The *Preamble* highlights that this commonality derives from the awareness of Europe's most recent past and aims to 'safeguard world peace', to maintain 'peaceful relations' and to substitute for the age-old rivalries the merging of… essential interests' of the Member States concerned. Hence, as far as this declaration of intents goes, Europe is to be construed 'through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'.

The EEC Treaty turns this retrospective approach into a prospective one, the above-said declaration of intents becoming a fully-fledged integration plan[33]. In light of Article 2, the common market is a means to 'promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated rising of the standard of living and closer relations between its Member States'. Overall, the teleology of the integration points at a *prospective* unity: as the *Preamble* openly declares, the Member States are 'determined to establish the foundations of an ever closer union among the European peoples'.

This comparative picture renders the idea of an upgraded integration project whose law-making mechanisms undergo a slight but significant mutation encompassing the scope and density of the law produced. This mutation – in the view presented here – is so peculiar that it amounts to a *qualitative*, rather than *quantitative* one: in fact, different models can be construed to account for either separately.

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[31] A. Tizzano, *Lo sviluppo delle competenze materiali della Comunità europea*, 21:2 *Rivista di Diritto Europeo* 139-210, 154 (1981).

[32] C. Mac Amhlaigh, *The European Union's Constitutional Mosaic: Big 'C or Small 'c', Is that the Question?*, in N. Walker, S. Tierney (eds.) *Europe's Constitutional Mosaic* (2011) 21-48.

[33] M. Udina, 'Articolo 1', in R. Quadri, R. Monaco, A. Trabucchi, B. Conforti (eds.) *Trattato istitutivo della Comunità Economica Europea: commentario*, I (1965) 5.

In the 'task-attribution' template provided in the ECSC Treaty, the institutions act as *multinational* organs[34]: they are set to perform certain activities in the common interest of the States. Thus, they exercise the attributed tasks within the sphere of control of the States, as an implementation of the States' purposes. Consequently, the link between the original consent of the States themselves and the normative measures the ECSC institutions adopt is, in principle, solid enough to ensure that law-making fits the intergovernmental circuit[35].

In the 'power-conferral'[36] model enshrined in the EEC Treaty, institutions are truly *supranational* organs: they are recognised substantive institutional capacity – hence, political autonomy – in view of a fully-fledged common project whose destiny is to create a single entity out of the plurality of States. Rather than fences, the once specific tasks look like open ways toward the attainment of the common objectives listed in the Treaty. Therefore, EEC institutions are set to re-write, in concrete, what the common purposes of the States amount to, and to pursue it via the multiple agreements they reach within and among themselves according to the *règles d'engagement* provided for in the legal bases.

Consequently, the ties with the original consent of the States slightly incline towards a *fictio juris*, as normative measures are taken at the initiative of the institutions and represent *their* positions, rather that the positions of the States. This is certainly the case for the so-called independent institutions – the Commission, the Bank[37] – but can be safely held for the whole EEC law-making inasmuch as the unanimity rule in Council is disregarded.

Conclusively, it seems possible to argue that the EEC Treaty plants the seeds of a political-constitutional project built on enhanced teleology, and sets the scene for a 'new' legal order that

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[34] See G. della Cananea, *Cooperazione e integrazione nel sistema amministrativo delle Comunità europee: la questione della "comitologia"'* 3 *Rivista trimestrale di diritto pubblico* 655-702 (1990).

[35] P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland', in P. Kirchhof, H. Schäfer, H. Tietmeyer J. Isensee (eds). *Europa als politische Idee und als rechtliche Form*, 63-101 (1993).

[36] Confront the account of such norms offered by G. Tusseau, *Theoretical Deflation: The EU Order of Competences and Power-Conferring Norms Theory*, in L. Azoulai (ed.) *The Question of Competence in the European Union* 39-63 (2014).

[37] See A.J. Menéndez, *¿Qué clase de Unión es ésta? A vueltas con la saga* Gauweiler, 116 *Revista Española de Derecho Constitucional* 269-299 (2019).

departs from the national-international law dichotomy in view of accomplishing this project [38].

4. The Legal Concept: A Planned 'Constitution-To-Be'

The match between the enhanced teleology of the ever-closer union project and the demise of the just cited dichotomy points to the core of *supranationality*[39] as the 'new idea' undergirding the European integration[40]. Certainly, this idea did not go unnoticed in the literature: Francis Rosenstiel nicely captured the concept's potential in view of a *neutralisation* of political conflicts[41], something that Carl Schmitt himself grasped[42].

General debates on supranationality have entered two separate channels, both displaying a strong teleological element in the construction of the polity and in the application of the law concerned.

On one hand, the teleological element has emerged as a distinctive feature of the Community in the long-lasting scholarly dispute on the latter's nature, as equally distant from a State but also from average international organisations[43]. In early decades, several works assimilated the Communities to a *Bundesstaat*, or a

[38] P. Pescatore, *International Law and Community Law. A Comparative Analysis*, 7(2) *Common Market Law Review* 167-183 (1970).

[39] V. Constantinesco, *En torno a la supranacionalidad*,) 49 *Teoría y realidad constitucional* 105-120 (2022).

[40] R. Schuman, *Préface* à Paul Reuter, *La Communauté Européenne du Charbon et de l'Acier* (1953) IV. See also J.-M. Dehousse, *Essai sur le concept de supranationalité* 22(2) *Chronique de politique étrangère*, 183-203 (1969), and J.-L. Iglesias Buhigues, *La noción de supranacionalidad en las Comunidades Europeas* (CECA, CEE, CEEA)' (1974) 1(1) *Revista de Instituciones Europeas* 73-120.

[41] F. Rosenstiel, *Le principe de supranationalité. Essai sur les rapports de la politique et du droit* (1962) 1-146.

[42] According to G. Itzcovich, *Teorie e ideologie del diritto comunitario* (2004) 97 (fn 30) and 425 (fn 10) Carl Schmitt looked with great interest at the supranationality idea and personally suggested to Rosenstiel a subtitle for the German edition of his book (*Supranationalität. Eine Politik des Unpolitischen* (translated by F. Becker, 1962).

[43] R. Barents, *The Autonomy of Community Law* (2004) 29, 33.

Staatenbund[44], or, else, to a *quasi*-federal *sui generis* international organisation[45].

On the other hand, the teleological element arises in debates on Community's competences, which are more recent: Armin von Bogdandy and Jürgen Bast recall that, until late '90s – set aside the *implied powers* provided for by Art. 235 TEEC (308 TEC)[46] – there was 'astonishingly little research on the vertical competences'[47]. Discussions have flourished throughout the 2000's and beyond;[48] particularly, experts in comparative law have unveiled the semantic ambiguity of the term *Kompetenz* as a translation for the English 'powers'[49]. Such a translation, indeed, does not help to understand the difference between the two law-making models reported hitherto: 'attribution of tasks' *versus* 'conferral of powers'.

The link between enhanced, supranational teleology and Community law's ever-enlarging applicative scope was obvious in the eyes of Community lawyers during the first decades. However, apart from wishful thinking[50] and political endorsements[51], their arguments in favour of the Community law's applicative priority did not bring much more than teleology itself: they were regularly phrased as the urgency 'to get things done' and to follow 'the teaching of the Court of Justice'[52] while emphasising the need to

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[44] See G. Jaenicke, *Bundesstaat oder Staatenbund* in *Völkerrechtliche und Staatsrechtliche Abhandlungen – Carl Bilfinger zum 75. Geburtstag* (1954) 71-108.

[45] A recall in J. Klabbers, '*Sui Generis*? The European Union as an International Organization' in D. Patterson and A. Södersten (eds.) *A Companion to European Union Law and International Law* (2016) 1-15.

[46] See R. Schütze, *Organised change towards an "ever closer union": Art. 308 EC and the limits to the Community's legislative competence*, 22(1) Yearbook of European Law 79-115 (2003).

[47] A. von Bogdandy, J. Bast, *The Vertical Order of Competences*, in Armin von Bogdandy and Jürgen Bast (eds.) *Principles of European Constitutional Law* – II ed., English, 335-372, 336 (2006).

[48] L. Azoulai, '*Introduction: The Question of Competence*', in L. Azoulai (ed.) *The Question of Competence in the European Union*, cit. (fn 38 *supra*).

[49] O. Beaud, *The Allocation of Competences in a Federation – A General Introduction,* in L. Azoulai (ed.) fn. 38, 19-38.

[50] As an example, see P. Gori, *'A quando anche l'Italia? Per un deciso riconoscimento del diritto comunitario'* 18 *Rivista di diritto civile* 186-204 (1972).

[51] See R. Lecourt, *L'Europe des juges* (1967) 235; A. Segni, *Norme comunitarie*, 1 *Rivista di Diritto Europeo* 363-366 (1961).

[52] N. Catalano, *Portata dei Trattati istitutivi delle Comunità europee e limiti dei poteri sovrani degli Stati membri*, 4 *Il Foro Italiano* 153 (1964).

escape 'the trap of internal-external State law dichotomy'[53]. Beyond the rhetoric of a commonality of intents and destiny[54], such arguments clearly lacked legal bite and could hardly counter the legal positivism that dominated national and international law. In fact, the core of such arguments may be epitomised by the *nobility* of the *European cause*, which was presented as a synonym of general progression, civilisation and well-being. In order to achieve these utterly desirable goals, law was regarded as the main driver of supranationality, so that integration through law could precede, and foster, integration through politics[55].

To be sure, such an argument, yet weaker than positivist-voluntarist positions, was not deprived of legal background. Rooted in the profound, shared awareness of the dramatic World War II events, this argument claimed to bridge the ECSC with the EEC project to stand in defence of the post-war constitutional achievements – universal suffrage, human dignity, rights, liberties – deployed against a comeback of aggressive authoritarian nationalisms. Such a background was common to the *post*-WWII instruments of international law, too: it possibly stems from the narrative of the post-war Trials such as Nuremberg and Tokyo[56], as a new legal era was said to be at dawn whose core – to be defended at all costs – was the dignity of human persons as equals[57] .

Therefore, the 'integration through law' was supported by a claim of moral substance, whose ultimate support was the *new* ethics proclaimed as a source of inspiration for both national and international law in the immediate aftermaths of World War II[58].

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[53] A. Trabucchi, *Un nuovo diritto*, 9 *Rivista di diritto civile* 259 (1963).

[54] J.H.H. Weiler, '*Europe in Crisis – On 'Political Messianism', 'Legitimacy' and 'Rule of Law'* 1 *Singapore Journal of Legal Studies* 248-268 (2012).

[55] J. H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1(1) *Yearbook of European Law*, 267-306 (1981).

[56] B.E. Simma, *The Impact of Nuremberg and Tokyo: Attempts at a Comparison*, in N. Andō (ed.) *Japan and International Law. Past, Present and Future: International Symposium to Mark the Centennial of the Japanese Association of International Law*, Springer, The Hague, 1999, 59-84.

[57] M.R. Saulle, *Il senso della legalità nel processo di Norimberga*, in A. Tarantino, R. Rocco, R. Scorrano (eds.) Il *processo di Norimberga a cinquant'anni dalla sua celebrazione*, Atti del Simposio internazionale (Lecce, 5-7 dicembre 1997) (1998) 35; see also S. Glaser, *The Charter of the Nuremberg Tribunal and New Principles of International Law*, in G. Mettraux (ed.) *Perspectives on the Nuremberg Trial* (2008) 55-70.

[58] See Luigi Ferrajoli, *La democrazia nell'età della globalizzazione*, in Id., Principia juris. *Teoria del diritto e della democrazia* (2007) 487. Yet, this construct did not entail

However, this view had still to confront the well-rooted State-centred scholarship and the unchallenged precedence of positivist-voluntarist arguments over moral-teleological arguments.

This is the context in which *Planungsverfassung* comes in, as said above, without making too much noise in the relevant debates. Two were the main fields that this theory intercepted.

First, *Planungsverfassung* linked the common policy planning provided in the Treaties with the legal, socio-economic and political arrangements enshrined in the constitutions of the Member States: it promised a shared path of enduring consolidation for the achievements that those constitutions aimed to defend.

Second, *Planungsverfassung* generated a legal argument paving the way to Community law's priority-in-application in an ever-expanding array of cases, which unleashed the potential of the Community's 'conferral of powers' law-making model.

The definition of the Founding Treaties as *Planungsverfassungen* – which in German echoes the twofold meaning of 'constitutions engaged in planning' and 'planned constitutions', or 'constitutions-to-be' – was apparently coined by a German scholar, Carl Friedrich Ophüls. He was active in the *Frankfurt School*[59], worked as a professor of international and trademark law and was a key member of the Germany's team that contributed to the drafting of the very Community Treaties.

This definition is spelt out with clarity in a contribution to a volume edited by Joseph Heinrich Kaiser after a *Symposium* on 'Planning', published by *Nomos* in 1965[60].

The background to this collective work deserves attention, too. In the German legal-economic scholarship of that time, whether the State should prepare and implement a 'plan' for any of

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the demise of the State as the key political form for representative democracy, but its maintenance in view of a consistent homogeneity between national and international law. See P. De Sena, *Dignità umana in senso oggettivo e diritto internazionale*, 11 *Diritti umani e diritto internazionale* 573-586 (2017) and Y. Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights* in D. Kretzmer, E. Klein (eds.) *The Concept of Human Dignity in Human Rights Discourse* (2012) 1-18.

[59] S. Kadelbach, *Frankfurt's Contribution to European Law*, in R. Hofmann, S. Kadelbach (eds.) *Law Beyond the State. Pasts and Futures* (2016) 49-70, 51, 54.

[60] C.F. Ophüls, *Die europäischen Gemeinschaftsverträge als Planungsverfassungen*, in J.H. Kaiser (ed.) *Planung I – Recht und Politik der Planung in Wirtschaft und Gesellschaft* (1965) 229-245.

the sectors of national economy was matter for a heated debate;[61] more generally, the point was whether interference between law and economics should ever occur at all[62]. In fact, as much as in other Member States (like Italy) whatever attempt to manipulate the economy by the public side was seen as divisive, and looked at with suspicion by the most fervent liberals[63] – a vast majority of them being fervent advocates of the European project, too[64]. Furthermore, in Germany such debate carried the supplementary weight of the salient influence exercised by 'evil scholars' such as Carl Schmitt[65] – particularly, as regards the still alive-and-well fascination of the Total State[66], which was, to be sure, inherited from legal, socio-political and economic scholars who backed the rise of the *Dritte Reich*[67].

The work that Kaiser coordinated aimed to prudently circumvent that debate, and it did so in two respects. First, it observed that, in any event, a certain 'planning' is intrinsic to good practices of government and must be accomplished in all the actions referring to the State authority. Hence, the concept was 'freed' of its socialist legacy and deployed as a neutral field for debate[68]. In this line, as pointed out by Ulrich Scheuner in another

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[61] A. Predieri, *Pianificazione e Costituzione* (1964) spec. 105f., *passim*.

[62] See E.-U. Petersmann, *German and European ordo-liberalism and constitutionalism in the post-war development of international economic law*, in *EUI Working Papers* 2020/01, 1-21 (2020).

[63] A. Arena, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of* Costa *v.* ENEL, 40(3) *European Journal of International Law* 1017-1037 (2019).

[64] C. Ribolzi, *La nazionalizzazione dell'energia elettrica in Italia e la Comunità Economica europea* 5 *Foro Padano* 29 (1964); see, more generally, G. Mori, *La nazionalizzazione in Italia: il dibattito politico ed economico*, in *La nazionalizzazione dell'energia elettrica: L'esperienza italiana e di altri paesi europei*: *atti del convegno internazionale di studi del 9-10 novembre 1988 per il XXV anniversario dell'istituzione dell'Enel* (1989) 91-115.

[65] See C. Schmitt, *Starker Staat und gesunde Wirtschaft* (1932) English ed.: *Strong State in Sound Economy*, in R. Cristi (ed.) *Carl Schmitt and authoritarian liberalism: strong state, free economy* (1998) 213-232.

[66] E. Forsthoff, *Der Totale Staat* (1933) 29; cfr. R. Laleff Ilieff, *Schmitt y la paradoja del Estado Total*, in *Discusiones filosóficas*, 33-47 (2015).

[67] W. Bonefeld, *Authoritarian Liberalism: From Schmitt via Ordoliberalism to the* Euro, 43 *Critical Sociology* 747-761 (2017).

[68] See H. D. Fangmann, *Staatliche Wirtschaftsplanung und Staatsrechtsideologie*, 5:1 *Kritische Justiz* 1-15 (1975).

chapter of the same volume[69], '*Planung*' referred to a legal concept of constitutional relevance that was to be regarded as fundamental for all State's activities, as it possessed a twofold side: on one hand, the collective dimension of the pre-ordinated planning of activities directed at the satisfaction of *Leistungsrechte*[70]; on the other hand, the individual dimension of rights and liberties thriving in a constitutionally protected European space[71].

Within this context, the project enshrined in the Community Treaties echoed the 'French-imported' idea of a supranational *Plan* cited by Robert Schuman; also, simultaneously, it repaired in the same constitutional concepts underpinning national *Planung*. Thus, '*Planung*' came to be a concept of constitutional lineage and, at the same time, one that was deeply entrenched in supranationality.

Against this background, Ophüls earned free room to argue that the Treaties were similar to constitutions in that respect – *i.e.*, as the basic founding charters of such planning – and to tie this conclusion to the special intent of the Founding Member States. In fact – he underscored – those States had undertaken to engage in a common project of high constitutional ambition. Such project, pursuant to the action of common institutions, envisaged the common planning of entire sectors of the respective national economies, and did it in light of the initial will of the Member States aiming at an ever closer union. Accordingly, the national planning efforts in those sectors, as part of the national constitutional settlement, were to converge towards a single plan to be developed by common institutions.

Thereby, the *Planungsverfassung* concept outlines a theory to account for the Communities as both a constitutional entity and as an 'entity in the making', in relation to which emphasis should be put on the future perspective, rather than on the (then) current state of integration. While reinforcing the constitutional tone of the Community planning as functional to an ever-closer union, this

[69] U. Scheuner, *Verfassungsrechtliche Probleme einer zentralen staatlichen Planung*, in J.H. Kaiser (ed.) *Planung I*, fn. 61, 67-90.

[70] P. Häberle, *Grundrechte im Leistungsstaat*, in P. Häberle, W. Martens, *Grundrechte im Leistungsstaat. Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung*, in *VVDStRL*, 30 46 (1972); see G. Ferrara, *Lo «Stato pluriclasse»: un protagonista del «secolo breve»*, in S. Cassese, G. Guarino (eds.) *Dallo Stato monoclasse alla globalizzazione* (2000) 74-92.

[71] See F. Álvarez-Ossorio Micheo, '*Europa como espacio integrado de libertad*, 3:5 *Araucaria – Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, 93-122 (2001).

theory also possessed a political background: it offered a common ground to the socialist-liberal battle on the Western general political orientation, which was to incline towards the latter but could not completely set aside the former[72]. In this regard, the European project acted as the tool for neutralisation and de-politicisation[73] of the conflicts arising in national areas[74]. Most crucially, the *constitution-to-be* showed potential in reducing the left-wing scepticism toward the Community's progress:[75] if accounted for in the seductive, yet illusionary perspective of a soon-to-be-achieved fully-fledged integration[76], advancements in economic areas (solely) could be taken as temporary gains in view of a cosmopolitan construct[77] of Kantian flavour[78]. As a result, the left-wing battle towards constitutional change could be either postponed forever or canalised into a prohibitive battle for *euro-constitutionalism*[79].

Whether this idea got close to what Rosenstiel had foreseen, and Schmitt subscribed to, is in fact matter for an ongoing debate.[80] Yet, put in this way, the neutralisation carried by the *Planungverfassung* concept was legally tied to the promised

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[72] R. Bin, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa* – Speech at Catania University, 30-31 May 2014, in A. Ciancio (ed.) *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa* (2014) 497-512.

[73] The quote comes from Carl Schmitt, *Die Europäische Kultur im Zwischenstadium der Neutralisierung* – Speech at *European Cultural League* Meeting, Barcelona, 12 October 1929, republished as *Das Zeitalter der Neutralisierung und Entpolitisierung*, in C. Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Korollarien* (1963) 79-95. See also F. Rosenstiel, *Le principe de supranationalité*, fn. 42, cited by the very Carl Schmitt in his last-quoted work (at fn 2) as regards the 'attempt to achieve the unity of Europe by means of neutralisations (so-called integration)'.

[74] M.A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (2021) 81, 95.

[75] P. Gerbet, *La genèse du Plan Schuman. Des origines à la Déclaration du 9 mai 1950*, 6(3) *Revue Française de Sciences Politiques* 525-553 (1956).

[76] M.S. Adesso, *Il consenso delle sinistre italiane all'integrazione europea (1950-1969)*, 9:1 *Diacronie. Studi di Storia Contemporanea* IV-14 (2012).

[77] A. Stone Sweet, *A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe*, 1(1) *Global Constitutionalism* 53-90 (2012).

[78] I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795) 20.

[79] More in G. Vosa, *Sull'equilibrio costituzionale dell'Unione europea. La costituzione "nata dal cambiamento" e i limiti alla priorità applicativa del diritto sovranazionale*, 3 *Costituzionalismo.it*, 1-45 (2021).

[80] René Barents, cit. fn. 44, 39. See T. Molnar, *The Interplay between the EU's Return* Acquis *and International Law* (2021) 15 and the bibliography cited therein.

development of the social, political and economic planning enshrined in the constitutions of the Member States. In this line, the European project matched, and perpetuated, national constitutional projects: both pointed to the protection and perpetuation of the fragile equilibrium between different groups and ideologies whose pacific co-existence Member States had formalized in their constitutions.

The combination of these two lines worked as a platform for the construction of an argument whose influence on the 'integration through law' toolkit has been remarkable.

5. The Rise of the *Planungsverfassung* Argument

In the early 60s', international law was still dominated by positivist views, according to which limitations to national sovereignty should be expressly consented upon by the contracting States. An oft-quoted, terse statement frequently cited even in recent times reported that 'where there is State will, there is international law: no will, no law'[81]. The *Lotus* case, dating back to the interwar period, put the question in the simplest terms:

> 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed'[82].

After the war, in spite of some scholars' constructivist temptations[83], *Lotus* remained a landmark case[84] and a milestone as for the arguments admitted in international law.[85] Still in 1959, Bin Cheng's work on *General Principles of Law as applied by International*

[81] A. Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 26 *Australian Yearbook of International Law* 22-53, 22 (1988-'89).

[82] P.C.I.J., *Lotus*, 1927 (ser. A) No. 10, 18.

[83] J.-L. Brierly *The 'Lotus' Case*, 44 *Law Quarterly Review* 154-155 (1928).

[84] L. Henkin, *International Law: Politics, Values and Functions*, in *Collected Courses of The Hague Academy of International Law*, IV, I-416, 278 (1989).

[85] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005) 255.

Courts began with a thorough examination of *Lotus*[86]; in the same years, Hersch Lauterpacht admitted that the 'state of international integration has not allowed the Court [of International Justice] to attain the goals which the drafters of the Statute had set'[87].

A sort of vicious circle emerged: so long as there was no sufficient international integration, there could be little or no constructivism by the side of the courts; but without a more courageous constructivist approach taken by the courts, no sufficient international integration would have ever taken place.

The *Planungsverfassung* assumption attacks this circularity. As far as this theory is concerned, the special commitment expressed by the Member States in setting the elements of a 'constitution-to-be' – that is, in the common planning of entire sectors of their national economies towards common objectives to be pursued by common institutions – endows Community law with a background that marks a step ahead *vis-à-vis* international law as regards legal interpretation.

The concerned argument goes as follows: since the Community Treaties issue a planning that is to be unfolded by common institutions, the law stemming from these institutions is to be interpreted in a way that furthers the unfolding of that planning, because such an interpretation would be the most faithful translation of the original intent of the Member States[88].

Therefore, Community law is entitled to claim applicative priority *vis-à-vis* national law in an ever-expanding range of cases, for such an expansion would amount to pursuing the 'ever closer union' project in accordance with the will of the contracting States[89].

As a result, the *Planungsverfassung* leads to overthrowing the *Lotus* doctrine without formally contesting it: in fact, it looks like a feasible evolution thereof. Accordingly, limitations to national sovereignty not only *can*, but also *must* be presumed: for this was the supposed will of the Member States as they decided, in their

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[86] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1959) 29.

[87] H. Lauterpacht, *The Development of International Law by the International Court* (1958) 3.

[88] C.F. Ophüls, *Report*, in *Zehn Jahre Rechtsprechung des Gerichtshofs der europäischen Gemeinschaften* (Institut für das Recht der europäischen Gemeinschaft, Köln, 24-26 April 1963 (1965) 213.

[89] C. Ribolzi, *Problemi costituzionali concernenti i Trattati delle Comunità Europee*, IV *Il Foro Padano* 41-42 (1965).

sovereign freedom, to agree on the common planning enshrined by the Treaties[90]. Hence, the wording of the Treaties, as well as of all the legal measures issued on the basis thereof, is to be understood in light of this enhanced teleology, which operates as an implicit *pro-Europe* bias influencing textual reading[91]. Thus, the original intent argument finds itself decoupled from the textual argument and results in a teleological argument aiming at further integration.

This passage decisively conditions the interpretation of the Treaties. In fact, the vicious circle that prevented judicial constructivism is broken without formally undermining the supremacy accorded to the 'sovereign will' of the States, the 'Masters of the Treaties'. Moreover, the claim for the nobility of the European cause, which in the earliest years of the Community was falling short of legal grounds, found in the *Planungsverfassung* construct what it needed to vest the 'ever closer union' project with a constitutional allure: the constitutional *acquis* of the Member States was to be defended by mutual neutralisation of the national institutions.

Eventually, the strong *Europeanism* infusing the approach of early Community lawyers – to the extent that an Italian legal philosopher accused them, playing with Kelsen's words, of confusing the 'wish' with the 'ought'[92] – found a juridical ground to challenge the hegemony of legal positivism, as national institutions were to be tamed in the name of the cited neutralisation – which was tantamount to establishing Community law's applicative priority on national laws[93], and to do so through the judiciaries[94].

Consequently, a complex, balanced intertwining of voluntarism and moralism rests at the core of the *Planungsverfassung* argument, which indeed contains two separate

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[90] A. Miaja de la Muela, *La primacía sobre los ordenamientos jurídicos internos del Derecho internacional y del Derecho Comunitario europeo*, I:3 *Revista de Instituciones europeas* 987-1029 (1974).

[91] See J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis* (1970).

[92] R. Treves, *Introduzione*, in Id., *Diritto delle Comunità europee e diritto degli Stati membri* (1969) 15.

[93] H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986) 379.

[94] M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (1968) 6; see J.H.H. Weiler, D. Lustig, *Judicial review in the contemporary world – Retrospective and prospective*, 16(2) *International Journal of Constitutional Law* 315-372 (2018).

propositions. One builds on *formal* reasoning and applies a teleological argument, although disguised as an original intent one in light of the ever-closer union clause. The other relies on *substantive* reasoning to endorse a value-based argument tied to an alleged moral superiority of the ever-closer union project as the best option to perpetuate the political-constitutional settlement enshrined in the national constitutions. One builds on the Member States' *special commitment* to engage in a common planning towards an ever-closer union; the other one refers to such an 'ever closer union' project as the ultimate defender of a noble, morally preferable cause. The idea was that a sound balance between ethics and will should have been stricken to defend and perpetuate the constitutional *acquis* of the European States in the aftermaths of World War II, and to make sure that no such tragedy would ever happen again[95].

The combination of these propositions has silently worked to overturn the very same reasoning that had hitherto governed legal interpretation. Suffice it to consider the rationale of the *effet utile*[96], labelled a 'meta-rule'[97] as foundational to a *modus cogitandi* that slightly subverts the logics of legal positivism. In the name of the States' original intent, it allows a given Community law measure to find application 'otherwise it could not attain its objective'[98]. Noticeably, in positivist logics, this reasoning makes little sense: a legal measure is able to attain its objective only once its applicability is formally confirmed[99]. The attainment of the objective is the

[95] See P. Ridola, *I diritti di cittadinanza, il pluralismo e il tempo dell'ordine costituzionale europeo. Le "tradizioni costituzionali comuni" e l'identità culturale europea in una prospettiva storica*, in Id., *Diritto comparato e diritto costituzionale europeo* (2010) 51-75.

[96] U. Šadl, *The Role of* Effet Utile *in Preserving the Continuity and Authority of European Union law*, 8 *European Journal of Legal Studies* (2015) 18-45; see A. von Oettingen, Effet utile *und individuelle Rechte im Recht der Europäischen Union* (2010) 25, and I. Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (2017) 24.

[97] S. Mayr, *Putting a Leash on the Court of Justice? Preconceptions in National Methodology* v Effet Utile *as a Meta-Rule*, 5(2) *European Journal of Legal Studies* 8-21 (2012).

[98] See J. Lindeboom, *The Autonomy of EU Law: A Hartian View*, 13(1) *European Journal of Legal Studies* 271-307, 284 (2021).

[99] G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012) 52, 117, 201.

consequence – *effect* – of prior application, and it could not be at the same time the *cause* thereof.

It is worth to highlight that all the numerous concepts deployed to enforce Community law's priority-in-application in an ever-expanding array of cases seem to revolve around this double-decked idea: Community law is both a legal order of a new kind based on the Member States' special original will, and at the same time one that *ought* to be implemented as *preferable*[100]. Hence, a strong moral argument overlaps the 'original intent' and decouples it from the wording of the legal texts: voluntarism is no longer assumed as coincident with textualism, but with enhanced teleologism.

Yet, this coincidence presents as an inherent condition that the European project be oriented at the defence of the socio-political constitutional settlements enshrined in national constitutions. In fact, the defence of this settlement was precisely what urged the *Master of the Treaties* to set in motion the European project. Such link is not only an ideal-political one, but has legal repercussions, as displayed in the twofold proposition of the theory that paves the way to Europe's legal integration.

The point is that such a condition could be rightfully presumed to exist during the late decades of the XX century, that is, along the road taking to the European Constitutional Treaty. After the latter's demise, conflicts have emerged in a way that seemingly renders such a presumption misleading, or mistaken altogether.

6. Decline

If the reasoning followed hitherto is accepted, a link emerges between national constitutions and the 'ever-closer union' project. This link points to the perpetuation of the core national political-constitutional settlement with a view to neutralising the alleged authoritarian inclination of sovereign Nation-States.[101] Due to this link, Community law entered the domain of national constitutional

[100] P. Pescatore, *Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice*, in *Studia ab discipulis amicisque in honorem egregii professoris W. J. Ganshof van der Meersch* (1972) 325, 345.
[101] A. S. Milward, *The European Rescue of the Nation State* (1992: 2nd ed. 2000) 21, 121.

law to create a European constitutional law of principles[102], albeit not exempt from constitutional conflicts[103], Nowadays, this latter view, aptly dubbed *irenic*,[104] of the integration leaves room to more disenchanted comments.[105] In recent literature, works that express critical considerations on the European integration being in line with *post*-WWII constitutions surface with increasing frequency.

Unsurprisingly, several of them display as a point of departure for the investigations concerned a refreshed view of certain segments of Europe's institutional history. Amedeo Arena, in a careful historical survey of *Costa* v *ENEL*, unveils the monarchic (prior fascist) sympathy of the animator of the case, Mr. Stendardi – a skilled lawyer himself, and an expert in the field of the relations between national and international law, who knowingly enforced Community law's primacy to defend liberal views against the nationalisation of electricity[106]. More generally, just to quote few scholars, Morten Rasmussen[107] has provided valuable examples of how history needs to enter the realm of legal analysis as regards the European integration[108]; Stefan Vogenauer and Sigfrido Ramírez have presented a project of an oral history of the Court of Justice itself[109].

Such examples are less frequent, but present, in previous times. Just to give other two examples: some twenty years ago, Christian Joerges and Navraj Singh Ghaleigh cast light on the 'dark side' of the European Union's constitutional legacy by elucidating

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[102] *Adde* F. Balaguer Callejón, *Derecho Constitucional Europeo*, in Id. (ed.) *Manual de Derecho Constitucional* (2020) 202-275.

[103] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (2022) 106.

[104] M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico' 51:2 *Giurisprudenza costituzionale*, 1644-1669 (2006).

[105] C. Amirante, *Costituzionalismo e Costituzione nel nuovo contesto europeo* (2003) 15; see also C. Joerges, M. Weimar, *A Crisis of Executive Managerialism in the EU: No Alternative?*, in G. de Búrca, C. Kilpatrick, J. Scott (eds.) *Critical Legal Perspectives on Global Governance:* Liber Amicorum *David M. Trubek* (2014) 295-321.

[106] A. Arena, fn. 64, 1022.

[107] M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, 4:2 *Journal of European Integration History* 77-98 (2008).

[108] A. Boerger, M. Rasmussen, *Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993*, 10(1) *European Constitutional Law Review* 199-225 (2014).

[109] S. Ramírez Pérez, S. Vogenauer, *Using Oral Methods for European Legal History: Methods, Sources, Projects*, 29 *Rechtsgeschichte - Legal History* 154-156 (2021).

ties with certain legal, political and economic concepts arisen in the twilights of Weimarian Germany[110]. Even before, David Dyzenhaus pointed to Weimar's experiences as a paradigm for democratic response to fundamental challenges, opening the door to a comparison with more recent events[111].

However, it is only pursuant to the 2008 crisis that the eerie analogies between the current times and the Weimar age have been accepted as part of the debate. Correspondences with Herman Heller's diagnosis of 'authoritarian liberalism'[112] have been found[113] in political[114], social[115], economic[116] and legal terms[117]. Regulatory asymmetries between the two poles of the (common) market – capital *v* labour – have been traced as elements of a *diagonal conflict*[118] entailed by the integration project, the solution of which escapes the operational range of both national and supranational institutions[119]. Such accounts, alongside many others, prove a sham the idea of 'justice through market'[120]: the

[110] C. Joerges, *Europe a* Großraum*? Shifting Legal Conceptualisations of the Integration Project*, in C. Joerges, N. Singh Ghaleigh (eds.) *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions* (2003) 167-191.

[111] D. Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons*, 91(1) *American Political Science Review* 121-134 (1997).

[112] H. Heller, *Autoritärer Liberalismus?*, 44 *Die neue Rundschau* 289-298 (1933); see English ed. (S. Paulson), *Authoritarian Liberalism*, 21(3) *European Law Journal* 295-301 (2015).

[113] A. J. Menéndez, *Hermann Heller NOW* (Editorial), 21(4) *European Law Journal* 284-294 (2015).

[114] M.A. Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, 21(3) *European Law Journal* 313-339 (2015).

[115] C.E. Mattei, *The Guardians of Capitalism: International Consensus and Fascist Technocratic Implementation of Austerity* (2017) 44(1) *Journal of Law and Society* 10-31.

[116] F.W. Scharpf, *Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy*, MPIfG Discussion Paper 11/2011, 1-40.

[117] C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15(5) *German Law Journal*, 985-1028 (2014)

[118] C.I. Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation* à l'européenne, 21:5 *German Law Journal*, 838-866 (2020).

[119] M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (2013) 151.

[120] A. Guazzarotti, *Crisi dell'euro e conflitto sociale. L'illusione della giustizia attraverso il mercato* (2016) 27.

'spectre of authoritarian liberalism'[121] envisages a 'liberty without liberation'[122] which turns Europe's 'constitutional dream' into Goya's *Sleep of Reason*[123].

Undeniably, the European Council's *Conclusions* adopted on 10-12 December 2008 offer arguments in support of such analogies, as they provide evidence of two points.[124] First, the Union's Heads of State and Government openly refused to assume political responsibility for the crisis and admitted that they had met in Washington to discreetly agree on certain measures whose quick implementation the institutions were requested to carry. Then, soon afterwards, that blatant derogation to established procedures led to the establishment of the 'secular triptych'[125] in support of the newly shaped EMU, as well as to the signature of the notorious ESM Treaty and to the likewise famous ECB's 'whatever it takes' strategy – all measures whose compatibility with Union law is as doubtful as politically sensitive[126].

At that juncture, the presumption backing the constitutional continuity between national constitutions and the European project turned untenable. As the narrative portraying the European integration as the best option to perpetuate the national constitutional legacy with benefits for all the States and peoples involved faded away, the continuity between the post-war constitutional achievements and the applicative priority accorded

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121 M.A. Wilkinson, *The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14(5) *German Law Journal* 527-560 (2013).

122 M. Benvenuti, *Libertà senza liberazione. Per una critica della ragione costituzionale dell'Unione europea* (2016) 36.

123 J.L. Requejo Pagés, *El sueño constitucional* (2016) 204.

124 European Council, *Conclusions*, Bruxelles, 11-12 December 2008, Point 5 – see at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf

125 P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. Adams, F. Fabbrini, P. Larouche (eds.) *The Constitutionalization of European Budgetary Constraints* (2014) 19-42.

126 C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35:2 *Oxford Journal of Legal Studies*, 325-353, 338 (2015); see also R.A. Lorz and H. Sauer, *Ersatzunionsrecht und Grundgesetz. Verfassungsrechtliche Zustimmungsgrundlagen für den Fiskalpakt, den ESM-Vertrag und die Änderung des AEUV*, 15 *Die öffentliche Verwaltung*, 573-581 (2012) and C. Kilpatrick, *The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality*, 70 *Current Legal Problems*, 337-363, 348 (2017).

to Union law on an ever-expanding range of cases fell under severe question, too. The *Planungsverfassung*, as a consequence, exposed multiple creeps in both the argumentative line and the outcomes delivered.

In this regard, the reasoning that the Court of Justice deployed in *Pringle* offers good, tangible evidence.[127]

The facts are renowned. With the multiple preliminary questions submitted to the Court of Justice, the Irish Supreme Court essentially seeks an answer to the following point: whether the ratification of the ESM Treaty violates Union law.

As a first question, the Court is called to decide on whether ESM affects monetary policy; should it be the case, the ESM Treaty would enter a field of Union's exclusive competence.[128]

The Court outlines both 'economic policy' and 'monetary policy' in pure teleological fashion: it argues that the TFEU contains neither a definition nor any guideline in this respect, but 'objectives'[129] and concludes that 'the primary objective of the Union's monetary policy is to maintain price stability'.[130] Then it comes to assess 'whether or not the objectives to be attained' by the ESM and the 'instruments provided to that end fall within monetary policy'.[131] The answer is in the negative; anyhow, the scrutiny the Court carries is limited to a quote of what the ESM Treaty itself provides in that regard, and this response – the judges add – would stand even if evidence were provided of certain ESM measures concretely affecting price stability, thus entering the realm of monetary policy as designed by the Court itself.

> Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.[132]

Along this line, a restrictive interpretation of the boundaries of Union law – *i.e.*, of the powers conferred on by the Treaty – is confirmed, but with no argument other than a reference to

[127] CJEU, C-370/12, *Pringle* (n. 19).
[128] *Ibid.*, 52.
[129] *Ibid.*, 53.
[130] *Ibid.*, 54.
[131] *Ibid.*, 55.
[132] *Ibid.*, 56.

definitions provided by the Member States in the ESM Treaty. Yet, apparently, this 'sovereign will' is interpreted in a manner that runs contrarily to the *Planungsverfassung* argument. According to the latter, Union law must have priority *vis-à-vis* national law in an ever-expanding applicative scope due to the twofold proposition elucidated above. But this is *not* what the Court states: quite the opposite. In light of the reasoning deployed in *Pringle*, Union law must abdicate before the will of the Member States as expressed in the wording of ESM. Nothing is said on the moral *preferability* of the European project in comparison with the many novelties the ESM introduces[133]: it is the simple *today's* will of the *Master of the Treaties* as resulting from the ESM itself what abruptly reverses the trend of the ever-closer union. On that basis, a restrictive reading of Union law as regards its scope of application is endorsed while surrendering applicative priority to national law[134]. Teleology applies, but in a direction that runs contrarily to an expansion of the Union law's applicative scope: it applies to reduce that scope.

Hence, the moral pro-integration rationale changes: if worded, it would no longer sound like 'an expansion of Union law's applicative scope is the best way to pursue the European project that corresponds to the original will of the States as enshrined in their constitutions' but rather something like 'reducing the scope of Union law is, in this moment, the best way to pursue the integration project'.

To the reader's utter bemusement, *Pringle* contains another line of reasoning that, conversely, leads to a seeming half-restauration of the *Planungsverfassung* construct but is, in fact, another nail in the coffin thereof, and another menace to the constitutional compatibility of the measures in question. As it comes to decide whether the *no-bailout clause* laid down in Article 125 TFEU is compatible with ESM, the Court builds on a teleological interpretation of the States' original intent by resorting, *inter alia*, to the Maastricht's *travaux préparatoires*.[135] Nonetheless, it is worth to note that, as a consequence of this reading, the scope of Article 125 TFEU is *reduced*, rather than expanded – again, conversely to what the *Planungsverfassung* argument assumes. In fact, as far as the

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133 P. Craig, Pringle*: Legal Reasoning, Text, Purpose and Teleology*, 20:1 *Maastricht Journal of European and Comparative Law* – Guest Editorial 3-11 (2013).

134 P.-A. van Malleghem, Pringle*: A Paradigm Shift in the European Union's Monetary Constitution*, 14:1 *German Law Journal* 141-168 (2013).

135 CJEU, C-370/12, *Pringle*, fn. 19, 136.

Court is concerned, Article 125 TFEU would only apply to *bailouts* 'as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished'[136]; thus, other *bailouts* – such as those envisaged in the ESM Treaty – fall outside the applicative scope of that Union law provision[137].

To sum up: after the demise of the European Constitutional Treaty, an age of crises has perturbed the integration project, which has affected the European narrative and undermined the *Planungsverfassung* construct. More specifically, in *Pringle*, this doctrine is contradicted in two respects. First, the related argument is overturned: the will of the States as it was at the time of the foundation needs to be replaced by the will of the States as it was today. Second, this replacement backs a teleological-systematic interpretation of Union law aiming to restrict the latter's applicative scope. Eventually, no reason is offered for this turn: the judges accept as a fact that the argument is to be deployed, so to say, opportunistically. Thus, Union's law and constitutional architecture, like a cane in the wind, bend before the (executives of the) Member States and the goals they declare to (be willing to) pursue.

This loophole in the reasoning of the Court accounts for the ignited conflict that, in times of gruesome crises, undermines the European edifice.[138] As a result, unsurprisingly, increasing rates of uncertainty affect the communicative capacity of judicial arguments.[139] The Luxembourg judges have, on one hand, confronted tenacious resistances from the side of national capitals while coming to support, on the other hand, even more ambitious, and further enhanced, claims for prior application of Union law. Eventually, the decline of the *Planungsverfassung* as a constitutional theory and as a legal argument unleashes the transfiguration of both.

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[136] *Ibid*.

[137] A. Aguilar Calahorro, 'La decisión *Pringle* en el proceso de constitucionalización de la Unión Europea', 101 *Revista española de Derecho constitucional* 337-380 (2014).

[138] D. Chalmers, *The European Redistributive State and a European Law of Struggle*, 18(5) *European Law Journal* 667-693 (2012).

[139] P.J. Martín Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, 12(2) *European Constitutional Law Review* 265-293 (2016).

7. Transfiguration

In principle, the yet evident decline of the *Planugsverfassung* has not entailed a retreat of the Union's normative claim *vis-à-vis* national law. Expansive priority in application regularly leans on a robust teleological pedestal,[140] and the claim in favour of such a priority enhancing the defence of common values is raised with reinforced vigour.[141] Nonetheless, the ties with the original consent of the States look no longer solid, sometimes even purely fictitious – to the extent that sensitive national interests are hurt yet in the name of their original will. Formal and substantive discriminations among Member States as for the application of Union law have started to occur quite routinely.[142]

A formal discrimination happens when a Member State manages to get away with the non-application of certain measures of Union law, while other States must comply with it. Examples in this respect are abundant, yet diverse among each other.

On a first plane, the argument raised by the Hungarian Constitutional Court in the 2016 case on migrations[143] signpost an attack to supranationality *as such*[144]*:* Union law is downgraded to the rank of 'mere' international law in light of an *introvert* concept of national identity that echoes Schmitt's[145].

On a second plane, a slightly more dialogued approach has been endorsed by the Spanish Supreme Court in a case concerning the right to compensation as a remedy against abuse of temporary

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[140] A. Śledzińska-Simon, P. Bárd, *The* Telos *and the Anatomy of the Rule of Law in EU Infringement Procedures*, 11 *Hague Journal on the Rule of Law* 439-445 (2019).

[141] See, *inter alia*, K. Lenaerts, J.A. Gutiérrez-Fons, *Epilogue*. High Hopes*: Autonomy and the Identity of the EU*, 8(3) *European Papers* 1495-1511 (2023).

[142] G. Zaccaroni, *Equality and Non-Discrimination in the EU. The Foundations of the EU Legal Order*, (2021) 8f. Recently, for an apparently moral-biased conception of equality, F. L. Gatta, *La legge (dell'Unione europea) è uguale per tutti: il principio di uguaglianza degli Stati membri davanti ai Trattati*, 1 *Il Diritto dell'Unione Europea*, 1-41, 37f., 38, fns 134-135 (2024).

[143] Hungarian Constitutional Court, Decision 22/2016 (xii 5) ab. (30 November 2016).

[144] See G. Halmai, *Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, 43(1) *Review of Central and East European Law* 23-42, 25 (2018).

[145] Law being ‚a unity of order and localization' (*Einheit von Ordnung und Ortung*): Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950) 13.

employment contracts (*de Diego Porras*)[146] and by the Italian Constitutional Court as for the defence of the legality principle as applicable to penal prescription (*Taricco*)[147]. The *Tribunal Supremo* was more successful than the *Tribunal Constitucional* in opposing Union's priority claim[148]: it managed to grant national authorities wider room to decide on the merits, which was denied in *Melloni*[149]. Likewise, the *Corte costituzionale* has prompted the Court of Justice to swallow a similar pill in *Taricco*[150]. More than that[151], the Italian judges have claimed jurisdiction on the Union law's applicative scope *vis-à-vis* national supreme principles 'whenever the rights of

[146] CJEU, C-596/14, 14 September 2016, ECLI:EU:C:2016:683 (preliminary question issued by the *Tribunal Superior de Justicia de Madrid*, and C-619/17, 21 November 2018, ECLI:EU:C:2018:936 (preliminary question issued by the *Tribunal Supremo*) 84; see A. de la Puebla Pinilla, *Principio y fin de la doctrina «de Diego Porras», o de cómo, en ocasiones, «el sueño de la tutela multinivel produce monstruos»*, 7 *Revista de información laboral* 17-38 (2018).

[147] Italian Constitutional Court, Order No. 24/2017, 26 January 2017, at 6; see C. Rauchegger, *National constitutional rights and the primacy of EU law:* M.A.S., 55(5) *Common Market Law Review* 1521-1547 (2018), and G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16(6) *German Law Journal*, 1449-1470 (2015).

[148] J. I. Ugartemendía Eceizabarrena, S. Ripoll Carulla, *Del recato de la jurisprudencia del Tribunal Constitucional sobre la tutela judicial de los DFUE y de las cuestiones y problemas asociados a la misma (a propósito de la STC 26/2014, de 13 de febrero)* 50 *Revista Española de Derecho Europeo* 105-149 (2014).

[149] CJEU, C-399/11, *Stefano Melloni* v *Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107; see F.J. Donaire Villa, *Supremacía de la Constitución versus primacía del Derecho de la UE en materia de Derechos fundamentales: concordancias y discordancias entre el Tribunal Constitucional y el Tribunal de Justicia de la UE en el asunto* Melloni, 39 *Teoría y Realidad Constitucional* 637-654 (2017).

[150] *Corte costituzionale*, Judgment n. 269/2017, 14 December; see D. Gallo, 'La Corte costituzionale chiude la "saga *Taricco*" tra riserva di legge, opposizione *de facto* del controlimite e implicita negazione dell'effetto diretto' (2018) 3(2) *European Papers* 885-895 and G. Piccirilli, 'The '*Taricco* Saga': the Italian Constitutional Court continues its European Journey' (2018) 14(4) *European Constitutional Law Review* 814-833.

[151] See M. Cartabia, 'Of Bridges and Walls: The 'Italian Style' of Constitutional Adjudication' 8:1 *Italian Journal of Public Law* 37-55 (2016). A recent, wide-ranging analysis in F. Saitto, *Giurisdizione costituzionale e protezione dei diritti fondamentali in Europa. I sistemi accentrati di fronte alle sfide della legalità costituzionale europea* (2024); on the last constitutional case-law concerning the relations among legal orders, critically R. Mastroianni, *La sentenza della Corte costituzionale n. 181 del 2024 in tema di rapporti tra ordinamenti, ovvero la scomparsa dell'articolo 11 della Costituzione*, 1 *Quaderni AISDUE* 1-29 (2025).

the persons' come at stake[152]. Soon afterwards, this approach was followed in *DB*[153], and a practice has been established consistently, as later demonstrated by a referral on a highly sensitive topic – the minimum income guaranteed by the State[154] – concerning an alleged infringement of the non-discrimination principle. This route has suffered only minor variations, as highlighted in the scholarship[155].

On a third plane, the Danish Supreme Court in *Ajos*[156] claimed that Union law, in imposing prior application on national law in a case of non-discrimination on grounds of age[157], violated a structural principle pertaining to the national constitutional *acquis*: legal certainty[158]. In this view, all binding norms of Union law must present *sufficient ties* to the powers conferred by the Treaty on the law-making institutions, as they are express in the wording of the concerned acts; otherwise, they would amount to unpredictable legal consequences to a certain conduct, thus in breach of legal certainty. The *BVerfG*, too, has walked that path and defended a structural constitutional principle protecting, in the name of human dignity, the 'substantive content of the right to vote'[159] – *i.e.*, to democratically decide on the content of one's own rights[160] – that is

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[152] *Corte costituzionale*, Judgment n. 269/2017, *Cons. dir.* 5.2.

[153] CJEU, C-481/19, *DB*, 3 February 2021, ECLI:EU:C:2021:84, 43f., 57.

[154] Milan Court of Appeal – Labour Section – Order No. 100, 31 May 2022.

[155] D. Gallo, G. Piccirilli, *Dual Preliminarity, Today. Evaluating the Impact of Judgment No. 269/2017 of the Italian Constitutional Court*, 15:1 *Italian Journal of Public Law* 1-7 (2023); compare G. della Cananea, *The Italian Legal Order and the European Union: an Evolving Relationship*, 15:2 *Italian Journal of Public Law* 165-199 (2023) and the other articles published in that *Issue*. The Italian Constitutional Court's *Servizio Studi* has published a *Dossier* on the topic: *Il rinvio pregiudiziale della Corte costituzionale alla Corte di giustizia dell'Unione europea*, in www.cortecostituzionale.it, 1-304, including as the last document Order No. 161, 7 October 2024.

[156] Danish Supreme Court, Judgment No. 15/2014, 6 December 2016.

[157] CJEU, C-441-14, *D.I. – Dansk Industri*, 19 April 2016, ECLI:EU:C:2016:278.

[158] M.R. Madsen, H.P. Olsen and U. Šadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the* Ajos *Case and the National Limits of Judicial Cooperation*, 23(1-2) *European Law Journal* 140-150 (2017).

[159] See A. Steinbach, *The Lisbon Judgment of the Federal Constitutional Court – New Guidance to the Limits of European Integration?*, 11(4) *German Law Journal* 367-390, 381 (2014).

[160] G. Vosa, *Early Traits of an Essentiality Principle: A (Counterintuitive) European Lesson from Karlsruhe?*, 68 *Revista de Derecho Comunitario Europeo* 113-155 (2021).

at the core of the post-war constitutions[161]. Most recently, other courts have depicted the relation between the national and the Union's order in a similar fashion: Portugal,[162] Poland[163] and Rumania[164] have attempted to construe their argument in defence of a threefold line that goes from legal certainty to the legality principle and, hence, to parliamentarism as the bulwark of pluralist democracy.

A substantive discrimination occurs when a certain measure of Union law applies in all States though it affects interests referring to political-constitutional structure (under Article 4(2) TEU) of some of them while bringing advantages, even conspicuous, to others. The Court of Justice has more often than not stated that, in such cases, the interest referring to Union law's primacy is the utmost, even when fundamental rights are at stake.

In the above-cited *Melloni*, Union law's uniform application prevailed on the claim referring to a fundamental right that national law protected; the argument concerned treated the 'equivalent standard clause' laid in Art. 53 of the Union Charter of Fundamental Rights as *tout court* subordinated to primacy[165].

In other cases, the reasoning deployed by the Court of Justice has been even more laconic. In *ESMA*[166], a secondary legal basis creating an independent body for the surveillance of the financial markets and entrusting it with the power to adopt uniform rules if necessary was based on Article 114 TFEU (approximation of the laws for the attainment of the common market)[167]. The Court contradicted the *Opinion* of Advocate General Niilo Jääskinen (who argued for the inadequacy of the legal basis)[168] and settled a *counterintuitive*, so to say, equivalence: 'approximation' of national

[161] M. Luciani, *La "Costituzione dei diritti" e la "Costituzione dei poteri". Noterelle brevi su un modello interpretativo ricorrente*, in *Scritti in onore di Vezio Crisafulli* – II (1985) 497.

[162] *Tribunal Constitucional*, *Acórdão* 422/2020, 15 July 2020.

[163] *Trybunał Konstytucyjny*, Judgment No. K-3/21, 7 October 2021.

[164] *Curtea Constituțională*, Judgment No. 390/2021, 8 June 2021.

[165] A. Torres Pérez, Melloni *in Three Acts: From Dialogue to Monologue*, 10(2) European Constitutional Law Review 308-331 (2014).

[166] CJEU, C-270/12, *United Kingdom* v *Council*, 'ESMA', 22 January 2014, ECLI:EU:C:2014:18.

[167] See J. Mendes, *Discretion, care and public interests in the EU administration: probing the limits of law*, 53(1) *Common Market Law Review* 419-452 (2016).

[168] *Opinion* of Advocate General Niilo Jääskinen, 12 September 2013, ECLI:EU:C:2013:562, 37.

laws was held a synonym for 'replacement' thereof. In *Gauweiler*[169], it has been noticed that the Court read monetary policy in pure teleological terms, somehow symmetrically to *Pringle*[170]: an equally 'featherweight review', as commented in the literature[171]. As a result, the ECB was granted the power to interpret its own mandate according to what it deemed, in its *independence*, the *right way* to pursue the objectives laid down in the Treaty.[172] A similar account emerged in *Weiss*[173], which has triggered the caustic *BVerfG*'s reply in *PSPP*[174] and, in the yet understandable heat of counter replying, a number of awkward reactions in the literature[175].

As a further example: in *Rimšēvičs*[176], the Court cancelled a measure issued by a Latvian administrative authority which suspended from office the Governor of the national Central Bank (member of the ECB's *Board of Governors*) due to bribery accusations. The Kirchberg judges went as far as to read the provision laid down in Article 14(2) of the SECB Statute as a fully-fledged protection of 'the functional independence of the governors of the national central banks'[177]. On this ground, they claimed 'jurisdiction to hear and determine an action brought against a measure'[178] such as the one at debate, and denied jurisdiction to the national authorities that were competent to act under Latvian law. Most notably, the Court's response went farther than the ECB and

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[169] CJEU, C-62/14, *Gauweiler* et alt. v. *Deutscher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400

[170] See F. Munari, *Da* Pringle *a* Gauweiler*: i tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo*, 4 *Il Diritto dell'Unione europea* 723-755 (2015).

[171] M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, (2017) 7 *ARENA Working Paper* 1-28, 7.

[172] A. Hinarejos, Gauweiler *and the* Outright Monetary Transactions *Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, 11(3) *European Constitutional Law Review* 563-576 (2015).

[173] C-493/17, *Weiss*, 11 December 2018, ECLI:EU:C:2018:1000.

[174] *BVerfG*, 2 BvR 859/15, "PSPP", 5 May 2020. See S. Doroga, A. Mercescu, *A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the* PSPP *Ruling*, 13(2) *European Journal of Legal Studies* 87-120 (2021).

[175] See the discussion in F. Fabbrini, *Suing the BVG*, in *Verfassungsblog.de*, 15 May 2020.

[176] CJEU, Joined Cases C-202/18 and C-238/18, *Ilmārs Rimšēvičs and European Central Bank* v *Republic of Latvia*, 26 February 2019, ECLI:EU:C:2019:139.

[177] *Ibid*., 48.

[178] *Ibid*., 62.

the Governor themselves[179] had asked when referring the case to Luxembourg.

Another highly conflictive field points to the threats to the *rule of law* occurring in Central-Eastern Member States. Particularly, the abundant case-law on judicial independence displays at least five controversial lines of reasoning.

First: the overstretched application of Article 19(2) TEU has been meticulously, but pretentiously, prepared by the Court in the *obiter dicta* of a different case, which amounts to a critical self-construction of legal arguments[180].

Second: it is unclear whether the principle of effective judicial protection laid down in Art. 19(1) TEU is a pre-condition, or an effect, of the principle of fair cooperation, as the former has undergone a significant alteration in nature, meaning and scope that may result in profound modifications of the relationship between national law and Union law[181].

Third, a 'systemic deficiencies' concept is alleged to account for breaches of Union law that are not concerned with actual violations of specific measures of Union law, which highlights a problematic re-construction of the 'infringement' as a notion and of the judicial procedure concerned *ex* Article 258 TFEU[182].

Fourth, to set aside national laws due to alleged contrast with the rule of law takes for granted a straightforward correlation between the 'values' enshrined by Article 2 TEU and the 'rules' that form the object of an infringement scrutiny – a correlation that is, nevertheless, far from obvious[183].

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179 D. Sarmiento Ramírez-Escudero, 'Crossing the Baltic Rubicon', *Verfassungsblog*, 4 March 2019.

180 See CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas*, 27 February 2018, ECLI:EU:C:2018:117, 29ff.; comments in M. Krajevski, Associação Sindical dos Juízes Portugueses*: The Court of Justice and Athena's Dilemma*, (3(1) *European Papers* 395-407 (2018); M. Bonelli, M. Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16,* Associação Sindical dos Juízes Portugueses, 14(3) *European Constitutional Law Review* 622-643 (2018).

181 M.E. Bartoloni, *La natura poliedrica del principio della tutela giurisdizionale effettiva ai sensi dell'art. 19, par.1, TUE*, 2 *Il Diritto dell'Unione europea* 245-259 (2019).

182 A. von Bogdandy, *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, *MPIL Research Paper* 2019-14, 1-33.

183 *Ibid*., 13-14; compare M. Schmidt, P. Bogdanowicz, *The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU*, 5(4) *Common Market Law Review* 1061-1100 (2018), and M. Rodríguez-Izquierdo Serrano, *Los derechos fundamentales en el procedimiento por incumplimiento y la adecuación*

Fifth, primacy is grounded on an alleged commonality of values (despite the evidence of radical constitutional conflicts) and builds on mutual trust; yet, the latter is caught in an ambiguous relation with the former. Is mutual trust the consequence of common values, or the cause[184]? If it were the cause, primacy, as grounded on such values, would be tied to a fully political unit of measurement, certain infringements of Union law being allowed to governments that enjoy the trust of their fellows in Bruxelles, but not to those who lack that trust. In this case, the Union would look more like a *club* of political *élites* than like a union of States, let alone of peoples, regulated by law[185].

Eventually, the judgments concerning the 'rule of law conditionality', as well as the Rumanian *saga* on judicial independence, expose the profound, 'structural'[186] transformation of Union law from a 'tolerant' to a 'militant' paradigm[187]. On one hand, primacy rests on a purely moral basis as Art. 2 TEU supplies the principle of effective judicial protection with the *status* to set aside all national laws, even in matters of national competence[188]. On the other hand, 'mutual trust' among the members of the Union

constitucional de las actuaciones de los Estados miembros, 61 *Revista de Derecho Comunitario Europeo* 933-971 (2018).

[184] See CJEU, C-619/18, *European Commission* v *Poland*, 24 June 2019, ECLI:EU:C:2019:531, at paras. 42-43: 'As is apparent from Article 49 TEU, […] the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, […] EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values […] That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected'. This construct's compatibility with the conferral principle laid down in Art. 4(1) TEU seems doubtful, unless the latter is simply neglected and eventually ousted when it comes to police the divide between national and Union law.

[185] See D. Chalmers, *The European Union and the re-establishment of democratic authority*, 1 *European Law Journal* – Early View 2022, 1-20.

[186] A. von Bogdandy, *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft* (2022) 21, 37.

[187] M. Ovádek, *Has the CJEU just Reconfigured the EU Constitutional Order?*, *Verfassungsblog.de*, 28 February 2018.

[188] A. Favi, *La dimensione "assiologica" della tutela giurisdizionale effettiva nella giurisprudenza della Corte di giustizia in tema di crisi dello Stato di diritto: quali ricadute sulla protezione degli individui?*, 4 *Il Diritto dell'Unione Europea* 795-821 (2020).

club has been presented as the ultimate ground for the Union law's very legitimacy, which is instrumental to severing the link with national constitutions as well as with the Member States' initial (and actual) effective intent[189].

Conclusively, this twofold transfiguration of the *Planungsverfassung* seems to bring about two effects.

First, as it comes to applying Union law, strictly legal reasons leave the floor to *other* grounds. The actual interests at stake, the institutional strategy deployed by the Court(s), the bargaining tactics, and, finally, the political-economic weight of the States involved enter the rationale of the final decision, something which has been aptly accounted for as 'all the Courts are equal, but some are more equal than others'[190].

In these cases, the two propositions of the *Planungsverfassung* argument apply randomly, as Union law sometimes accepts national law divergences but, some other times, diversities of similar range and extent are rejected. Hence, neither the Union's project can be regarded as morally preferable because it protects the Member States' constitutional legacy, nor can it be held any longer to correspond to their will, initial or actual: simply, the logics of politics outweigh the reasons of law in the attempt to keep running the Union's business.

Second, when the Union is utterly determined to impose its own law, it has no fear of resorting to self-established value judgments disguised as law. Such judgments, yet presented as a consolidation of the political, economic, and social arrangements protected by the national constitutions, entertain with them purely virtual relations[191]: they apply straightforwardly, with little or no balancing process from 'value' to 'rule'[192].

Thus, the *Planungsverfassung* argument does no longer sustain a teleological reading of the States' original intent as laid down in

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[189] L. Boháček, *Mutual Trust in EU Law: Trust "In What" and "Between Whom"?*, 14(1) *European Journal of Legal Studies* 103-140 (2022).

[190] M.A. Wilkinson, *Economic Messianism and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others'*, 26 *LSE – Law, Society and Economy Working Papers* 1-33 (2014).

[191] CJEU, C-156/21, *Hungary* v *Parliament & Council*, 16 February 2022, ECLI:EU:C:2022:97, 234. See A. Baraggia, M. Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23(2) *German Law Journal* 131-156 (2022).

[192] *Ex multis*, G. Zagrebelsky, *La legge e la sua giustizia* (2nd ed., 2017) 223.

written provisions. For rude it may be, it simply backs no predictable construction. When deemed necessary, the conferral is simply neglected as a criterion for Union law to respect, whereas the autonomy of the latter presumptively relies on the defence of values reported as 'common'. As a result, the cited argument comes to overlap with a moral claim presenting the ever-closer union project as an end *per se* that *ought to* be pursued at any cost.

Needless to say, whether one agrees with the moral judgments envisaged by such claim is not part of the scope of this work. What must fall under question instead is whether the *Planungsverfassung* argument and its corollaries survive intact in their legal bite as their moral part is utterly emphasised while the other, voluntarist in nature, and ethically neutral, is progressively abandoned.

8. Conclusions: Still Towards an 'Ever Closer Union'?

The analysis attempted aims to illustrate how the ever-closer union formula laid down in the TEEC Preamble has fostered a theory and a legal argument based on the following idea: the European project aims to protect and perpetuate the after-war constitutional legacy agreed within and among the Member States. In this view, the Community's purpose is to establish a supranational legal, institutional and political layer capable of neutralising the once sovereign Nation-States, which helps defending their new-born constitutions against the possible comebacks of aggressive nationalisms.

The *Planungsverfassung* doctrine is instrumental to this project in two respects. First, it supplies it with a constitutional perspective, yet *in fieri*, which gives it a definitive moral *preferability* in light of the utmost desirability of its purpose. Second, it backs the same project with an expansive teleological argument presented as fulfilling the Member States' initial will: as the latter is to be seen as directed at an ever-closer union, then the law that implements the ever-closer union project must be given prior application over national laws. Apparently, this idea lays at the core of the whole legal toolkit deployed by the Court of Justice to broaden Community law's applicative scope – from *effet utile* to the others.

During the multiple crises of the last decade, such a prior, ever-expanding application has been severely contested, and challenged in manifold respects. However, the Court of Justice has

not ceased to make use of the legal toolkit based on the same argument; to the contrary, claims for unrestrained primacy in areas external to the Union's competence have been raised with enhanced vigour. Yet, under the mutated circumstances, to deploy the same line of reasoning, even pushing it one step ahead, entails a transfiguration of the original argument.

Such a transfiguration does not come without consequences. Cutting off the ties between the *Planungsverfassung*'s two propositions has a twofold effect. First, it renders the 'ever-closer union' project definitively independent from the socio-political and constitutional settlement Member States were determined to share on a common plane. Second, it makes the moral argument based on the European project's *preferability* definitively independent from the argument based on the wording of legal texts[193].

This could pave the way to constitutional changes in the name of contingent ideologies, and could deprive law of a sufficiently thick, ethically neutral voluntarist substrate – something that in modern times has invariably been held as an essential component thereof, from Kelsen's 'pure' theory[194] onwards[195].

Eventually, one should wonder whether this overall *motus* is consistent with the idea that once backed Europe's project: *i.e.*, that perpetuating the legacy of national constitutions was the best option to avoid the comeback of aggressive regimes. Should the answer be in the negative, it would rather amount to a shift back to earlier XX century times, in which war was well-present within the range of suitable options – along with some conceptions of the individual and of power that Europe was set to leave for good.

Such a question is left to the appreciation of the reader.[196] However, what a constitutional scholar has to do[197] is twofold. First, to suggest that the prospected scenario may be incompatible with national constitutions. Second, that those constitutions, being

[193] G. Azzariti, *Diritto o barbarie. Il costituzionalismo moderno al bivio* (2021) 15, 58, 206.

[194] H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934; 2008) 25.

[195] N. Bobbio, *La teoria pura del diritto e i suoi critici* (1954) in Id., *Diritto e potere. Saggi su Kelsen* (ed. T. Greco, 2014) 13-74.

[196] G. Azzariti, *Per un costituzionalismo critico*, *Costituzionalismo.it* 3, 1-28, 11 (2024).

[197] G. Zagrebelsky, *Tempi difficili per la Costituzione. Gli smarrimenti dei costituzionalisti* (2023) *passim*.

obviously rigid[198], are still in force, and cannot be reported as tacitly revoked, or silently mutated, or anyhow impotent when new-old kinds of crypto-authoritarian regimes[199] deploy Union values as a narrative *escamotage* to prepare the ground for a comeback.

[198] A. Pace, *I limiti alla revisione costituzionale nell'ordinamento italiano ed europeo*, 1 *Nomos*, 1-6 (2016) and the bibliography quoted thereby.

[199] L. Carlassare, *Diritti e garanzie nel riaffiorare dei modelli autoritari* (2009) 1 *Costituzionalismo.it* 1, 1-15 (2010).