



ARTICLES

INTERDEPENDENCE AND CONTESTATION IN EUROPEAN INTEGRATION

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ABSTRACT: The past years has seen a dramatic rise in the contestation of the European Union and its policies. This *Article* seeks to understand this rise as a result of the way in which we “do” integration. This method, which heavily relies on the use of law to prevent the creation of negative externalities among the Member States, has increasingly limited the scope for political self-determination within and between the Member States. The ensuing contestation, it is argued, cannot solely be resolved by re-assessing the role of law in the process of integration, but requires a significant institutional reconfiguration as well.

KEYWORDS: interdependence – institutional structure of EU – nature of EU law – contestation – conflict – legitimacy of the EU.

I. INTRODUCTION

This history of European integration has been a history of structuring ties of interdependence between Member States. This interdependence between States is at once the problem that the integration process attempts to solve *and* its very purpose – the *end*

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of integration.¹ The ambiguous relationship between interdependence and integration explains, it will be argued, both the nature of the integration process as well as the increase in contestation that it has engendered in the past decades.

At the start of the process of European integration, interdependence between States in specific policy areas was primarily understood as something that could prevent the imposition of costs between neighbouring States – be it in economic, social or military terms. On this account, a range of institutional innovations, on both the national and supranational level, were meant to create the preconditions for a stable relationship of interdependence between States. This consisted, on the one hand, of an institutional structure that allowed for collective decision-making, thereby solidifying existing ties of interdependence and internalising the imposition of costs between Member States. On the other hand, it was based on a very specific role for law – which became an integrative force in and of itself. On this view, the authority of the EU legal order is explicitly justified with reference to its potential to manage the interdependence between Member States. In the last decades of integration, the interdependence between Member States has been extended to politically salient areas such as migration and budgetary politics, with an increasing need for law to stabilise the ensuing complexity (section II).

The history of European integration has also been a history of ever greater contestation of the EU's authority. Properly understood, this contestation centres on *what the EU does*, rather than the EU in itself. The main sites where such contestation has emerged – ranging from distributive politics to differentiated integration and Brexit – have one thing in common. In these domains, the EU struggles to legitimise its policy orientation because it uses law to constrain domestic political mandates. In this fashion, EU law keeps generating sites of conflict and resistance throughout the policy domains that it engages with. The use of law as an instrument to tie Member States to the common project and prevent the imposition of costs between them, in other words, destabilises rather than stabilises the project of integration. Crucially, the EU increasingly struggles to articulate a way to productively institutionalise this contestation and the ensuing political conflict (section III).

These two stories of European integration suggest that if we want to analyse the EU's current predicament, and think of ways to overcome it, we ought to think of ways in which the EU can become more sensitive to instances of contestation. The question that is crucial to the legitimacy of the EU, then, has changed from 1957. If in 1957 the question was how to manage interdependence between Member States; the question today is how to manage contestation in conditions of interdependence.² Some com-

¹ See F. SCHIMMELFENNIG, D. LEUFFEN, B. RITTEBERGER, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation*, in *Journal of European Public Policy*, 2015, p. 771, who argue that interdependence lies at the core of all theoretical and explanatory accounts of integration.

² For the sake of simplicity, I refer everywhere to "EU" rather than European Economy Community (EEC) or European Community (EC).

mentators have suggested that the answer lies in the use of law. What we ought to aim for, in other words, is contestation *through* law. The logic, here, is that the process of integration through law can only be meaningfully resisted by judicial actors on the national level. Other commentators have suggested that what we need is not contestation through law, but contestation *of* law. This solution focuses on the re-assertion of the primacy of politics over law. The way in which this ought to happen is disputed. While some commentators suggest that the Council is the most appropriate site for “taking back control”, others have suggested that national parliaments or national electorates ought to be in the driving seat.

This *Article* suggests that the twin processes of interdependence and contestation demand that we move away from such solutions. On the one hand, contestation in conditions of interdependence requires decisions to be taken beyond the level of the nation State. After all, national decisions affect citizens in other States that have not been consulted on the choice. On the other hand, contestation in a situation of interdependence requires the process through which decisions are taken to be sensitive to *substantive* policy claims. Strengthening the hold of institutions that represent national interests over the course of integration achieves the opposite: rather than allowing citizens to contest and control the direction of the integration process, it creates even more need for legal constraints on national decisions, justified in order to manage their external effects (section IV).

This *Article* calls for a re-imagination of how we “do” integration in a way that allows the EU to be sensitive to its own limits. This would require a simultaneous concern with structuring ties of interdependence across borders *as well as* with the contestation or resistance that the management of these ties engender. In the long term, widespread contestation *of* the EU may be prevented only by creating a space for contestation *within* the EU.

II. INSTITUTIONALISING INTERDEPENDENCE

The conceptual puzzle that undergirds much of EU law is the puzzle of interdependence. In a sense, interdependence is the constructive translation of the destruction brought about by the two world wars. It takes as given the tendency of Europe’s powers to create significant costs on their neighbours, be it in economic, social, or military terms. The immediate preoccupation for most European States, after the Second World War, then, was to create a structure through which these costs could be prevented – or at least anticipated and mediated. The process of European integration can be seen as such a structure. It seeks – in different, and arguably contradictory ways – to prevent, anticipate and mediate in conflicts among its Member States that are generated where one State’s internal decision imposes an external cost on its neighbour. Confusingly, one of the solutions to the *problem* of interdependence has been the *perpetuation* of interdependence – the logic being that once nation States are inextricably tied to each other, economic or military con-

flict becomes an exercise in self-harm, and, thereby, extremely unlikely. This interaction between the negative side to interdependence (which understands it as a *problem*, in so far as it allows States to impose costs on each other) and the positive side to interdependence (which understands interdependence as the *solution* and starting point towards more peaceful relations between States) has been central to the integration process – and can explicitly be traced in the Schuman declaration.³

From the start of the integration process, then, a central question has been how to manage the interdependence between States. What makes the different options to achieve this more or less attractive is not only their capacity to instantiate ties of interdependence, and to prevent the imposition of costs by States on neighbouring States; but also their capacity to do so in a way that respects each State's independence, sovereignty, or autonomy. This is the problem that the European project has grappled with from the start, and has come back with a vengeance after the Euro-crisis, refugee crisis, and Brexit: how to institutionalise the tension between, on the one hand, the interdependence between States, and, on the other hand, the independence of States.⁴

At the core of this tension – that is central to the legitimacy of the EU – lies the principle of congruence. This principle is firmly rooted in democratic theory, and suggests that democratic authority is to a large extent premised on the approximation (or congruence) between those making a decision and those affected by that decision, that is, between the objects and subjects of rule.⁵ We may think it is inappropriate if Member State A builds a fossil fuel factory on the border with Member State B, with the prevailing winds carrying any pollution into the territory of Member State B. This allows Member State A to reap the benefits of its decision while externalising the costs onto Member State B. Member State B, on the other hand, is faced with the costs while not having access to the associated benefits. At the same time, this example loses much of its problematic nature if the citizens of Member State B democratically accept the decision of Member State A, or are compensated for it by having access to Member State A's energy supplies. What lies at the

³ Schuman Declaration of 9 May 1950, available at www.europa.eu.

⁴ M. JACHTENFUCHS, C. KASACK, *Balancing Sub-unit Autonomy and Collective Problem-solving by Varying Exit and Voice. An Analytical Framework*, in *Journal of European Public Policy*, 2017, p. 598.

⁵ Often referred to as the "all-affected principle" as well. See, for example, R. DAHL, *After the Revolution. Authority in a Good Society*, Yale: Yale University Press, 1970, p. 64; L. BECKMAN, *Democratic Inclusion, Law, and Causes*, in *Ratio Juris*, 2008, p. 348 *et seq.*; R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, in *Philosophy and Public Affairs*, 2007, p. 40 *et seq.* The principle of congruence, however, is more than a formalistic instrument that can help us determine the scope of democratic inclusion required. It serves important substantive functions, too. Beyond the evident representative element, the principle of congruence also serves to internalise dissent, mediate conflict, and legitimise any coercive action taken in the implementation of a certain decision.

core of the principle of congruence, then, is that the legitimacy of a decision requires a link between those making a decision and those affected by it.⁶

There is, of course, an evident conceptual blind spot to the principle of congruence or affect: the question *who* ought to be involved in making a decision is conditional upon the substantive outcome of that same decision.⁷ In other words: if the citizens in Member State A vote in favour of building a fossil fuel factory on the border with Member State B, the citizens of Member State B ought to have been involved in making that decision. If, on the other hand, the citizens of Member State A decide *not* to build the reactor, the citizens of Member State B do *not* need to be involved. If we take the principle of congruence to its logical extreme, the personal scope of decision-making changes depending on the nature of the policy question and the specific *answer* to every question.

Traditionally, this blind spot has been overcome by the use of proxies. As Goodin highlights, geographical proximity and the ethno-historical alliances that have crystallised into bounded political communities are used as shortcuts. The assumption, here, is that choices made by individuals or groups that live in close proximity, or that are historically intertwined, are likely to affect fellow members of that group.⁸ The institutional machinery of the nation State has served to solidify these shortcuts. At the same time, these proxies have always been unstable, as the perpetual wars and shifting borders in Europe highlight. More importantly, they have always remained proxies. As Goodin puts it, "constituting a demos on the basis of shared territory or history or nationality is thus only an approximation to constituting it on the basis of what really matters, which is interlinking interests".⁹ In the past decades, the use of the nation State as a proxy for congruence has become increasingly anachronistic. The advent of the internet, the technological ease of communication, travel, and business has massively increased the capacity of States at other ends of the world to impose costs on each other. Russia has been accused of meddling in the United States (US) elections through hacking; the United Kingdom (UK) threatens the EU by slashing its corporate tax rates after Brexit; the US' decision to withdraw from the Paris Agreement will have an effect on living conditions in Bangladesh; Facebook's global privacy settings are dictated by litigation brought in Ireland by an Austrian activist; a war in Syria brings European politics close to collapse; and rating agencies in New York affect the life of pensioners in Greece. All these examples suggest, at the very least, that the spatial unit of the nation State is increas-

⁶ R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 51; R. DAHL *After the Revolution*, cit., p. 64.

⁷ As a result, much of academic work on the principle has dealt with how to institutionalize it. See for example L. BECKMAN, *Democratic Inclusion, Law, and Causes*, cit., and R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., with alternative accounts. Law seems to play an important role for both in determining the appropriate scope for the principle.

⁸ R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 48.

⁹ *Ibid.*, p. 49.

ingly unable to remain committed to the principle of congruence – which requires approximation between those making a decision and those affected by it.¹⁰

This is most clearly felt if we turn the principle of congruence on its head. After all, it is not only about ensuring the approximation between those making a decision and those affected by it; but also requires that *those that are affected by a decision ought to be able to change it*. This shows how far we are removed from meeting the principle of congruence today. It also explains the purchase of the political narrative of “taking back control” that is emerging in many western countries, as well as, ironically, its impossible realisation on the national level. At the same time, focusing on the notion that those affected by a decision should have the capacity to alter it (“taking back control”) serves to open up space and imagination towards novel ways of achieving it. It leads us in the direction of an idea of congruence that focuses on the active agency of a community of affected individuals, rather than a managerial approach that constrains the capacity of groups of citizens or States to make decisions that affect outsiders.

This section traces how the EU understands the principle of congruence. It does so by disentangling the different understandings of interdependence that are implicit in the functioning of the EU. It suggests that, originally, the scope and nature of the ties of interdependence between Member States was managed by creating transnational forums for decision-making and for the enforcement of those decisions. In such a setting, congruence is secured by enhancing the reference group for the making of *the type of decisions that are likely to affect others* (sub-section II.1). Law plays an important role in this solution. The notion of “integration through law”, wherein legal principles serve to constrain the capacity of Member States to go back on its commitments or impose costs on its neighbours, has become the central instrument for the management of interdependence between States. On this view, congruence is secured by preventing the imposition of costs among States (sub-section II.2). The last decades of integration have seen a move towards creating interdependence between Member States in some of the most salient policy domains – ranging from immigration control to fiscal policies – which makes securing the principle of congruence increasingly complex. Legal constraints now operate in fields that were previously considered the bread and butter of domestic politics (sub-section II.3). As the following section will highlight, this move has led to a significant increase in contestation of the EU.

II.1. THE INSTITUTIONS OF INTERDEPENDENCE

The solution to interdependence that the original Treaty establishing the European Economic Community (EEC Treaty) suggested rested on the pooling of sovereignty, with the management of certain policy areas being transferred to the level beyond the State.

¹⁰ F. DE WITTE, *EU Law, Politics, and the Social Question*, in *German Law Journal*, 2013, p. 583.

As such, the creation of a range of novel institutions, such as the European Commission, the Court of Justice, and the Parliamentary Assembly served to aid the process through which States – now formally meeting as part of the Council – would make *collective* decisions, the enforcement of which would be delegated to impartial and apolitical institutions. Interdependence, and the impossibility of State decisions to impose costs on its neighbours, then, was secured by insisting that certain *types* of decisions that had this potential were taken collectively on the European level. This also explains why integration was primarily limited to policy domains where the risk of cross-border externalities were considered to be the highest, and where cooperation therefore offered the biggest potential to inextricably link Member States (such as coal, steel, and the production and distribution of food). Conversely, policy areas that were considered to impose few costs across borders, or where cooperation was unlikely to structurally link Member States' together, such as welfare policies, were left on the national level.¹¹

The EU's institutional structure, on this view, was meant to create the preconditions for a stable relationship of interdependence between Member States. Joint decision-making in Brussels, and constrained capacity of policy options at home, then, would prevent and institutionalise conflict and cost-attribution across borders. The joint exercise of state power would simultaneously safeguard Member State power and eviscerate its potential to impose costs on others.¹² At the most basic level this is, of course, still a central part of the EU's functioning. Standardisation or harmonisation of Member State rules is nothing more than an expression of State power in a way that prevents (or at least internalises) the uneven imposition of costs between those States. Congruence, in such a model, is secured by scaling up the reference group for the making of decisions: if all decisions are taken jointly, the uneven imposition of costs and benefits is automatically mediated. The upshot of this method is that it also captures the more positive understanding of interdependence, which sees interdependence as a *solution* rather than a problem. On this view, the creation of an institutional structure for collective co-decision would make Member States structurally sensitive to each other's needs, prevent the gratuitous use of vetoes, socialise its members, gradually entangle their economic interests, and lead to the articulation of shared or collective values across the Member States. In such a setting, waging war would, to use Schuman's words, be "not merely unthinkable, but materially impossible". The obsession of academics and politicians with the idea of a European identity stems from this mode of "doing" integration: as something that would simultaneously result from the creation of collective institutions and further galvanise their effectiveness.

¹¹ See e.g. S. GIUBBONI, *Social Right and Market Freedom in the European Constitution*, Cambridge: Cambridge University Press, 2006, p. 29 *et seq.* and J. RUGGIE, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in *International Organization*, 1982, p. 379 *et seq.*

¹² A. MILWARD, *The European Rescue of the Nation State*, Abingdon: Routledge, 2000, p. 3.

In the initial phase of integration, then, interdependence was structured by scaling up the level of decision-making of the *type* of decisions that were considered to lead to costs between neighbouring States. The problem with this approach is, of course, that it perpetuates the very problem that it is meant to solve. Joint decisions on the European level, after all, remain conditional upon the acquiescence of each individual State. The two main crisis of the early decades of integration – the collapse of the proposed European Defence Community and the “empty chair” crisis, whereby De Gaulle refused to participate in Council discussions – indicate this point well: domestic opposition in *one* Member State could stop the whole process.¹³ Rather than *solving* conceptually the problem of how States could affect the interests of others, then, the earliest days of integration focused on institutionalising this potential. This is not to say that it failed in its objective: the secondary effects of socialisation and cooperation cannot be underestimated, nor can the move to qualified majority voting (with its potential to sidestep this type of institutional paralysis) be explained without it.¹⁴

II.2. INTERDEPENDENCE THROUGH LAW?

The introduction to the Commission's 2017 *White Paper on the Future of the EU* highlights another way to structure the interdependence between States. It reads: “Sixty years ago, inspired by that dream of a peaceful, shared future, the EU's founding members [...] agreed to settle their conflicts around the table rather than in battlefields. *They replaced the use of armed forces by the force of law*.”¹⁵ This story is one that EU lawyers are familiar with. It is the story of integration through law, which, essentially, describes how law has become the instrument through which interdependence between States is stabilised. Properly understood, this “integration through law” is a complement to the institutional solution outlined in the previous section rather than a substitute. The doctrines of direct effect and supremacy, on this view, serve to prevent “selective exit” by Member States that attempt to go back on their commitments towards integration, or that attempt to impose costs on their neighbours.¹⁶ Such behaviour becomes *legally impossible*. Securing congruence, in other words, is simultaneously the justification for, and the objective of, the particular nature of the EU's legal order.¹⁷

¹³ R. DWAN, *Jean Monnet and the European Defence Community 1950-54*, in *Cold War History*, 2001, p. 141.

¹⁴ Thanks to Niamh Dunne for pointing this out.

¹⁵ Communication COM(2017) 2025 final of 1 March 2017 from the Commission, *White Paper on the Future of the EU: Reflections and Scenarios for the EU27 by 2025*, p. 6. Emphasis added. See also L. AZOULAI, “*Integration Through Law*” and Us, in *International Journal of Constitutional Law*, 2016, p. 450.

¹⁶ J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2412.

¹⁷ See S. SAURUGGER, *Politicisation and Integration Through Law: Whither Integration Theory?*, in *West European Politics*, 2016, p. 933.

The starting point for this story are the rulings by the Court in *Van Gend en Loos* and *Costa v. ENEL*.¹⁸ In creating the doctrines of direct effect and supremacy, the Court altered the relationship between law and politics in the process of integration.¹⁹ The legal norms in the Treaty – primarily the free movement provisions – became directly applicable within domestic legal orders, and automatically displaced conflicting national norms.²⁰ This “new legal order” that is created, then, understands law to be both the *object* and *agent* of integration.²¹ The justification for this particular role of law is that it can successfully manage interdependence between States by insulating its central norms from political contestation on the national level, and by constraining the capacity of States to make choices that impose costs on their neighbours.²²

This is best explained with reference to the free movement provisions. These provisions guarantee the free circulation of goods, services, capital, workers, and, more recently, citizens. National decisions, even if democratically legitimated, that prevent such circulation – whether by the imposition of discriminatory rules or indistinctly applicable rules that limit market access – are illegal under EU law, and are declared inapplicable.²³ This structure clearly hampers the capacity of national political actors to determine policy outcomes, allowing only those choices that are sufficiently sensitive to the interests of outside actors. And that is *exactly* the point of the free movement provisions, of course: to secure congruence by making domestic political choices sensitive to the interests of outsiders that are affected by those choices. As Azoulai has put it, the free movement provisions “help the Member States to “recontextualise” the decision-making process at national level to force them to take account of interests coming from or situations in other Member States, which are not only interests of firms but also of citizens, workers or students”.²⁴ Even more explicitly, AG Maduro’s opinion in *CEZ* highlights that the interpretation of the free movement provisions ought to be “guided by the goal of making national authorities, insofar as is possible, attentive to the impact of their deci-

¹⁸ Court of Justice: judgment of 5 February 1963, case 26-62, *Van Gend en Loos*; judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

¹⁹ J.H.H. WEILER, *The Transformation of Europe*, cit., p. 2403.

²⁰ A. VAUCHEZ, *Démocratiser l’Europe*, Paris: Seuil, 2013, pp. 39-40.

²¹ See M. CAPPELLETTI, M. SECCOMBE, J. WEILER (eds), *Integration Through Law: Europe and the American Federal Experience*, Antwerpen: De Gruyter, 1987; D. AUGENSTEIN (ed.), *“Integration Through Law” Revisited: The Making of the European Polity*, Abingdon: Routledge, 2012; L. AZOULAI, *“Integration Through Law” and Us*, cit., p. 461.

²² See also D. GRIMM, *The Democratic Costs of Constitutionalism: The European Case*, in *European Law Journal*, 2015, p. 460.

²³ Traditional account is M. POIARES MADURO, *We, the Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998, p. 166; C. JOERGES, *Unity in Diversity as Europe’s Vocation and Conflict Law as Europe’s Constitutional Form*, in *LSE Europe in Question Discussion Paper Series*, no. 28, 2010, www.lse.ac.uk.

²⁴ L. AZOULAI, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation*, in *Common Market Law Review*, 2008, pp. 1342-1343.

sions on the interests of other Member States and their citizens since that goal can be said to be at the core of the project of European integration and to be embedded in its rules".²⁵ The role of law, then, in the EU, is to manage interdependence by simply making certain domestic policy choices legally unavailable.

This centrality of law as the instrument to manage interdependence and secure congruence comes with a number of assumptions about law, the most crucial of which is that it can somehow *replace* politics. Not only does it suggest that law can replace politics *for the purpose of managing interdependence between States* – in so far political agreement on the European level is no longer necessary to push forward integration; but also that the use of law in and of itself can somehow stabilise that process integration. As Azoulai puts it, "this vision presented law not only as a functional tool but as a cultural or symbolic form, as a carrier of a new spirit of cooperation and solidarity, and as a medium capable of containing political, economic and social forces, as well as the cement capable of holding these divergent forces together".²⁶ More than that, law is understood as being able to "stabilise expectations, command authority, institutionalise certain values, resolve differences and communicate collective decisions to all parts of society",²⁷ in particular because EU law is enforced through domestic judicial and administrative actors, which are imbued with a degree of social authority that derives from the domestic constitutional settlement.²⁸ As we will see below, this depoliticised and depoliticising nature of EU law becomes more problematic once contestation emerges around the values that it articulates.²⁹

Integration through law, then, sees to the construction of a new order that takes its authority from the successful construction and management of interdependence.³⁰ Or, to put it another way, the reason why we *need* EU law to be so powerful is simultaneously to tie Member States to their common ambitions, and to manage the complex structures of interdependence that exist between States. Only by significantly constraining the room for manoeuvre of national political actors can EU law ensure that they do not take decisions that impose costs on other States, their citizens or companies.

At the same time, the story of integration through law is only partially committed to the idea of congruence. While its authority derives from the fact that it prevents a decision of State A that does not comply with the collectively-agreed rules or that imposes costs on

²⁵ Opinion of AG Maduro delivered on 22 April 2009, case C-115/08, *Land Oberösterreich v. ČEZ*, paras 1 and 23.

²⁶ L. AZOULAI, "Integration Through Law" and Us, cit., p. 450.

²⁷ D. CHALMERS, *The Unconfined Power of European Union Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 412. Note that Chalmers does not think EU law has the ability to secure this.

²⁸ J.H.H. WEILER, Van Gend en Loos: *The Individual as Subject and Object and the Dilemma of European Legitimacy*, in *International Journal of Constitutional Law*, 2014, p. 94 *et seq.*

²⁹ See *supra*, section 2.

³⁰ L. AZOULAI, "Integration Through Law" and Us, cit., p. 450.

State B; it is not capable, in and of itself, of articulating a more positive or active understanding of congruence whereby those citizens that are affected by a certain decision are also able to change it. For the latter, the institutional route discussed in the previous section remains crucial. Problematically, however, the constraints that exist on legislative action by the EU institutions – ranging from high majority thresholds, joint-decision traps and limited competences to inertia and unbridgeable differences in political economy between the Member States – mean that EU law often operates in isolation from its institutional component.³¹ This has led to an often-rehearsed critique that the way in which integration takes place – wherein legal constraints rather than political preferences dominate the EU's policy orientation – leads to problems of legitimacy for the Union.³²

II.3. 1992-2019: EVER FURTHER INTERDEPENDENCE

Around the time of the Treaty of Maastricht (1992), the web of interdependence at the centre of the integration project becomes even more intricate. While integration before 1992 focused mainly on low-salience and regulatory policies, in 1992 it moves into high-salience, redistributive and politically contested policy domains. The perpetuation of ever further interdependence between Member States in these areas – which include those most central to a State's sovereignty, such as monetary and border policies – creates a problem for its management. While EU law has been central in this management, it increasingly operates in isolation from the institutional process that was meant to ensure congruence in the management of the ties of interdependence. In consequence, as we will see in the next section, EU law increasingly struggles to legitimately settle high-salience policy questions.

The two policy domains in which this escalation of interdependence is clearest are Schengen and the creation of the European Monetary Union (EMU). Both, of course, carry significant advantages for the integration process, such as the decrease of transaction costs and administrative burdens, as well as being symbolic markers for the progress of the process of integration. What is clear, in both policy domains, however, is that the increase in inter-state interdependence is significant. Once a single monetary policy is agreed, after all, Member States become interdependent in welfare policy, labour and employment policy, and fiscal policy. The decision of the Greek government to offer holiday payments to Greek pensioners, for example, appears to have such an impact on Finnish fiscal sustainability that judicial constraints on the former are justified

³¹ The seminal works here are J.H.H. WEILER, *The Transformation of Europe*, cit.; and F. SCHARPF, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999.

³² See generally J.H.H. WEILER, *The Transformation of Europe*, cit., and F. SCHARPF, *Governing in Europe*, cit. See also McCrea, who locates the contestation as collapse of the socio-economic consensus between the six founding Member States in the early decades of integration. R. MCCREA, *Forward or Back: The Future of European Integration and the Impossibility of the Status Quo*, in *European Law Journal*, 2017, p. 73.

with reference to the latter. These interdependencies are *created* by the decision to have a single monetary policy. They are not a pre-existing interdependence that requires management to secure peaceful cooperation between States, but a constructed one. The very decision to launch the EMU, in fact, was explicitly justified with reference to need to institutionalise and contain the economic potential of a reunified Germany and its D-mark.³³ Once again, this shows the ambivalent link between interdependence and the process of integration: it is perceived as the very purpose of integration, but also as a problem that requires careful management.

The Schengen agreement can be understood in similar terms. It is clear that without internal borders, Member States become interdependent in domains as diverse as asylum, terrorism prevention, criminal law or the enforcement of judicial and administrative decisions. A decision by Spain, for example, to open its borders in Ceuta and Melilla, or not extradite a certain criminal, might lead to the collapse of, say, the Dutch government. And, once again, judicial constraints on the former are justified with reference to the need to prevent the latter. These complex webs of interdependence do not necessarily exist by virtue of the close geographical proximity between Member States. They have been created by a deliberate decision to abolish internal borders between the Member States that participate in Schengen. The Schengen Agreement is premised partially on the desire by the participating Member States to “strengthen the solidarity between their people”.³⁴ As Durkheim had already noticed, creating complex webs of interdependence is the most effective way of generating a sense of organic solidarity.³⁵ It might be a stretch to suggest that the Schengen agreement had the explicit purpose of strengthening the interdependence between the Member States. At the same time, it cannot be underestimated how close the symbolic narrative of Schengen, especially when tied to the simultaneous emergence of EU citizenship, comes to that vision.

What has typified the development of the Schengen area, the scope of Union citizenship, and the EMU ever since its inception is the reliance on law to secure its smooth functioning. As legislative action by the EU in these areas was thought to be politically too divisive (or legally constrained with reference to domestic constitutional guarantees) core questions related to the management of, say, the welfare state, fiscal policies, criminal law, or law enforcement were left on the national level. Instead, the increase in

³³ H. SCHULZ-FORBERG, B. STRATH, *The Political History of European Integration: The Hypocrisy of Democracy-through-Market*, Abingdon: Routledge, 2014, p. 48. On an alternative reading, the EMU can be understood as part of the globalization drive, which similarly understands interdependence as a good *per se*. D. RODRIK, *The Globalization Paradox*, Oxford: Oxford University Press, 2012.

³⁴ Preamble to the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders.

³⁵ See Durkheim for idea of organic solidarity as implicit in complex webs of interdependence: E. DURKHEIM, *The Division of Labour in Society*, Basingstoke: Palgrave, 1984.

interdependence between Member States is stabilised by constraining the type of decisions that Member States are allowed to take in these areas. EU law serves to constrain national policy autonomy so that domestic decisions conform to the standards and principles that govern the EU's policy. The stability and growth pact or Dublin Regulation serve, on this view, the same purpose: to ensure that Member States' domestic policy choices do not impose costs on its neighbouring States.

This indicates how the pursuit of congruence becomes ever more skewed in the EU: the exercise of law, which constraints national policy choices with reference to the need to prevent the imposition of costs on neighbouring States, is no longer accompanied by its institutional component, which serves to ensure that all those affected by a policy decision get to have a voice in creating it.³⁶ The way in which the Euro-crisis has been "solved" is indicative of this – the six-pack, the golden budget rule, the stability and growth pact, the prescriptive mandate for the European Central Bank (ECB), and the codification of the ban on haircuts, and the constitutionalisation of austerity in *Pringle* are all examples of the reliance on law in the management of possible externalities generated by the creation of the EMU.³⁷ Crucially, this depoliticising role for EU law has been explicitly justified with reference to its capacity to prevent Member States from imposing costs on each other. To the extent that political institutions *have* played a role in adopting these rules, it is clear that Treaty provisions on the equality between States, on the substantive constraints imposed by the competence catalogue, and on the involvement of representative institutions have been stretched beyond recognition.³⁸ All this leads to a problem in the pursuit of congruence. More and more often, EU law imposes constraints on national policy choices that Member States are unable to resist *even* when their democratic mandate suggests that they should.³⁹

The evolution of the integration process since 1992 makes the assessment of the state of interdependence in the EU even more muddled and ambivalent. In the first decades of integration the principle of congruence was more or less protected by the combination of, on the one hand, an institutional structure through which all affected Member States could articulate their views on a policy question, and, on the other hand, a legal order that secured compliance with the agreed policy orientation and made unavailable

³⁶ F. SCHARPF, *The Asymmetry of European Integration, or: Why the EU Cannot Be a "Social Market Economy"*, in *Socioeconomic Review*, 2010, p. 218.

³⁷ Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

³⁸ See M. DAWSON, F. DE WITTE, *Constitutional Balance in the EU After the Euro-crisis*, in *The Modern Law Review*, 2013, p. 817; S. GARREN, *Confronting the Competence Conundrum: Democratising the European Union Through an Expansion of Its Legislative Powers*, in *Oxford Journal of Legal Studies*, 2015, p. 55.

³⁹ More cynically, one could even say that this process was reinforced by national politicians, more interested in being part of intergovernmental power structures than in representing particular groups in their societies under scrutiny of domestic representative institutions. C. BICKERTON, *European Integration: From Nation States to Member States*, Oxford: Oxford University Press, 2012, p. 113.

those domestic policy choices that imposed costs on neighbouring States.⁴⁰ Over the course of the process of integration, and as more and more interdependence between Member States was created in high-salient policy fields, this balance has been gradually lost. Given that legislative action in these areas is legally or politically difficult and heavily contested, the EU has increasingly secured congruence through the use of law. The use of law, here, is justified with reference to the need to stabilise the interdependent relationship between States.⁴¹ Crucially, however, it also exacerbates the partial commitment to the principle of congruence that is implicit in the very nature of EU law. EU law is successful in preventing the imposition of costs by one State on another by constraining domestic rules on taxation, border controls, environmental policy or domestic budgets. At the same time, EU law is structurally incapable of articulating or institutionalising the more active component of the principle of congruence, which suggests that all that are affected by a certain decision ought to be able to *change* that decision.

III. INSTITUTIONALISING CONTESTATION

The history of the European integration process is not only a story of ever closer interdependence. It is also indisputably a history of ever increasing contestation. Until the early 2000s, integration had famously been described as premised on a “permissive consensus” among the EU’s electorates about the nature, direction, and organisation of the EU.⁴² The period since the early 2000s has seen the emergence of numerous sites of conflict and resistance to the EU – which range from problematizing specific policy orientations or institutions, to all-out rejections of its very existence. Such contestation comes from political and judicial actors alike, has emerged in each Member States (if in different forms), from all sides of the political spectrum, and in almost all policy areas that the EU engages with. The last decades, in other words, have turned the “permissive consensus” into a “constraining dissensus”.⁴³

My argument, in this *Article*, is that the story of interdependence and the story of contestation are closely linked. Simply put, the increasing contestation of the EU and its policies can be traced back to how we “do” integration, and particularly the reliance on law. EU law is, as we will see below, structurally unable to internalise and institutionalise contestation as to the substantive norms and values that it articulates. This means that EU law struggles to legitimise those norms and values. This structural inability to internalise

⁴⁰ Even if, of course, some of these dynamics were clearly already at play before 1992. See *supra* note 31.

⁴¹ See on the role of law and the (ab)use of the narrative of “there is no alternative”, M. WILKINSON, *The Euro Is Irreversible! ... Or Is It?: On OMT, Austerity and the Threat of “Grexit”*, in *German Law Journal*, 2015, p. 1049 *et seq.*

⁴² L. HOOGHE, G. MARKS, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Science*, 2009, p. 5.

⁴³ *Ibidem.*

contestation points towards a wider and more conceptual problem, whereby the distance between those affected by EU law norms and those able to alter them has increased exponentially over the past decades. Empirical work, for example, seems to suggest much more resistance against *what the EU is doing* than against the EU as such.⁴⁴ For domestic electorates, however, changing what the EU *does* is much more difficult than simply leaving the EU. This premise lies at the very core of the EU's current crisis, and is best unpacked by looking at the diverse sites where contestation of the EU has emerged.

This section highlights different sites of contestation in the EU, and traces this contestation back to the predominant use of EU law in securing congruence and stabilising interdependence between States. The problem with this approach to the management of interdependence is that it does not leave sufficient space for the more active component of the principle of congruence, which focuses on the need for those affected to be able to *change* a decision. First, contestation has emerged where EU law tries to make sense of redistributive questions. This can be seen in the context of the free movement – think of the contestation of the conditions under which migrants can access welfare benefits in their host State – but also in the context of the Euro-crisis (sub-section III.1). The second site of contestation is where EU law balances between individual rights and collective public policy norms – which is aimed at the conceptual and normative centrality of the individual in the nature of EU law (sub-section III.2). The third site of contestation that has emerged is where the EU's norms are perceived to lead to identity costs on the national level. This can be traced in the refugee crisis, and, perhaps more structurally, in the process of differentiated integration (sub-section III.3). Brexit, finally, can be understood as the re-articulation of contestation of particular values or norms of EU law in a much more explosive format. The rejection of the whole edifice of integration is the logical conclusion of the processes discussed above. Without possibility to contest what the EU *does*, the only alternative form of contestation becomes the contestation of what the EU *is* (sub-section III.4).

If the purpose of European integration, as discussed above, is to structure the ties of interdependence between Member States, EU law is increasingly unable to deliver this. If anything, EU law's tendency to articulate a type of society, citizen, and polity that it considers appropriate continues to generate sites of conflict and resistance throughout the policy domains that it engages with.⁴⁵ Such conflict about the values or norms that a polity articulates is not problematic *per se*. However, to translate substantive policy contestation into a productive and legitimating force, any polity requires a sophisticated institutional structure that can internalise such claims and make sense of them. What we see in the EU, instead, is the realisation that the management of interdepend-

⁴⁴ S. HOBOLT, J. TILLEY, *Blaming Europe: Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014.

⁴⁵ L. AZOULAI, "Integration Through Law" and Us, cit., p. 460.

ence does not stabilise but destabilises the process of integration. The reason for this is a complete disregard to the more active component of the principle of congruence: whereby those affected by a decision ought to be able to alter that decision.

III.1. BEYOND THE REGULATORY POLITY

The first site where major conflict and contestation emerges in the EU is where it redistributes. This takes place across its policies, but is most explicit in the austerity drive that has followed the Euro-crisis and in the controversy surrounding access to welfare benefits for intra-EU migrants in the host State. In both areas, contestation is articulated in terms of justice. Should Greek hospitals have their budgets slashed in order to repay banks in creditor States? Should an economically inactive Belgian national have access to basic subsistence allowances if he has lived in Poland for three years? The answers to these questions differ from person to person – as they are based on moral or intuitive sensitivities for equality, desert, and need. Such differences exist within and across polities. The difference is that *within* polities, sophisticated institutional machineries exist that can collect the individuals' answers, mediate between them, and legitimise the redistributive outcome. On the European level, all prerequisites for such institutional machinery are currently lacking. Instead, redistributive choices in the EU are primarily legitimised through *law*.

The rights that a migrant EU citizen has in her host State, for example, are solely determined by the Court's interpretation of Directive 2004/38,⁴⁶ the conditions of "real link", "degree of integration" and the length of economic activity.⁴⁷ The austerity conditions imposed on financially struggling Member States are negotiated politically, but in such a rigid legal framework that any choice but austerity is in fact considered illegal under EU law. The constitutionalisation of austerity by the Court in *Pringle* and *Gauweiler*⁴⁸ allows statements such as Schäuble's quip that debt relief for Greece is *illegal* under EU law and German constitutional law.⁴⁹ Contestation about these values – about the appropriate division of resources in society – in other words, has no place in the EU polity and cannot be internalised within its institutional structure.

⁴⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

⁴⁷ This does not mean that these judicial doctrines are unrelated to considerations of justice – but simply that these have not been politicized. See F. DE WITTE, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015.

⁴⁸ Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler* [GC].

⁴⁹ See C. GERNER-BEUERLE, *There is Little Legal Basis for Wolfgang Schäuble's Claim That Debt Restructuring Is Incompatible with Euro Membership*, in *The London School of Economics Politics and Policy (EUROPP) Blog*, 22 July 2015, www.blogs.lse.ac.uk.

What follows is a legitimacy problem. When faced with openly redistributive questions, EU law relies on its trusted method of legally enshrining policy orientations. This tactic is predominant throughout the EU's policy domains. As Davies and Bartl highlight, the justification for legislative action from the side of the EU is its capacity to attain highly prescribed functional objectives, such as abolishing barriers to trade or securing free competition.⁵⁰ This level of functional prescription serves to do two things at once. On the one hand, it prevents the capacity of states to impose costs on its neighbours, as domestic decisions that go against these functional objectives are illegal. On the other hand, it prevents dissent, and makes those functional objectives incontestable.⁵¹ Once the EU moves beyond these clearly defined regulatory or functional objectives, however, it struggles to source authority for its policy choices – as a consequence of its operation in isolation from sophisticated political processes that can institutionalise the clash of competing claims.⁵² The EU is unable to internalise the struggle, mutually incompatible claims, and coercive authority that typifies redistributive questions.⁵³ What follows, instead, is redistribution without politicisation, premised on a deeply unstable use of EU law.

III.2. BEYOND THE INDIVIDUAL

The second site where contestation of the EU has emerged is where it tries to balance individual with collective values. It struggles to do so appropriately – or at least legitimately – because of the way in which EU law operates. The EU's legal authority, as many scholars have argued, is premised on the creation of a range of individual rights on the EU level that can be asserted against public policy decisions on the national level. This structurally skews EU law in favour of individual rights, and, typically, against collective values that have been democratically agreed upon on the national level, which may range from social protection,⁵⁴ communitarian ideas of justice,⁵⁵ health protection⁵⁶ or consumer protection.⁵⁷ The centrality of individual rights in the EU order has led Weiler to suggest that we can best understand individual rights as a mode of governance of the EU. This suggests that the role of individual rights serves not only to secure the objectives of the EU, but also to prevent contestation of its values. The legal order created

⁵⁰ G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *Oxford Journal of Legal Studies*, 2015, p. 1 *et seq.*; M. BARTL, *The Way We Do Europe: Subsidiarity and the Substantive Democracy Deficit*, in *European Law Journal*, 2015, p. 23 *et seq.*

⁵¹ A. VAUCHEZ, *Démocratiser l'Europe*, cit., p. 20.

⁵² On why the EU does not meet these standards see *infra*, section IV.3.

⁵³ See D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, in *European Law Journal*, 2012, p. 667 *et seq.*

⁵⁴ Court of Justice, judgment of 11 December 2007, case C-438/05, *Viking* [GC].

⁵⁵ Court of Justice, judgment of 16 May 2006, case C-372/04, *Watts* [GC].

⁵⁶ Court of Justice, judgment of 23 December 2015, case C-333/14, *Scotch Whisky Association*.

⁵⁷ Court of Justice, judgment of 5 February 2004, case C-24/00, *Commission v. France (French Vitamins)*.

by EU law in fact piggybacks on the domestic constitutional order, and employs domestic judicial institutions to enforce the primacy of individual rights derived from EU law where they clash with domestic norms of public policy.⁵⁸

More often than not, these individual rights are *economic* in nature, such as the free movement provisions. In a recent example, the Scottish policy to introduce a minimum price per unit of alcohol to limit alcohol addiction was rejected by the Court with reference to the individual right of producers of alcohol to be able to effectively compete on the Scottish alcohol market.⁵⁹ The way in which the Court makes sense of the clash between such an individual right and a norm of public policy – through the principle of proportionality – betrays an additional structural bias in favour of the former. In a number of cases, domestic policy choices, such as the fight against alcohol addiction,⁶⁰ or the right to strike,⁶¹ or norms governing the availability of pharmacies in rural areas, have been invalidated because they restrict the individual right to trade more than absolutely necessary.⁶²

This bias in the Court's methodology exacerbates the bias that is already implicit in EU law: it not only favours individual rights compared to collective values; but also favours economic values compared to non-economic values. This additional bias can be traced back to the EU's understanding that its authority is sourced from granting individuals access to opportunities, values, or goods that cannot be made available by Member States alone.⁶³ As Chalmers has argued, this has led to the excessive responsabilisation of the individual, which alienates them from an understanding of life as embedded in a range of daily activities that link to wider communities.⁶⁴ EU law, then, is not only structurally blind to collective values by virtue of the way in which it has constructed its legal authority; it also understands the individual as an actor in isolation from collective values and the processes that generate those values.

The problem with the EU's structural focus on the individual as a disembodied subject is that it creates resistance. Such resistance might emerge where economic values trump cherished collective values, and where EU law is understood as pitting mobile EU citizens against immobile EU citizens in access to jobs or welfare structures.⁶⁵ Whether these conflicts are empirically demonstrable or not is beside the point. The point is that such contestation finds no place *within* the EU: individualism, and the protection of individual rights, lies both at the conceptual and normative core of EU *law*. Contestation

⁵⁸ J.H.H. WEILER, *Van Gend en Loos*, cit., p. 94.

⁵⁹ *Scotch Whisky Association*, cit.

⁶⁰ *Ibidem*.

⁶¹ *Viking* [GC], cit.

⁶² Court of Justice, judgment of 19 October 2016, case C-148/15, *Deutsche Parkinson*.

⁶³ D. CHALMERS, *The Unconfined Power of European Union Law*, cit., p. 413.

⁶⁴ *Ibid.*, p. 407; A. SOMEK, *Alienation, Despair and Social Freedom*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, Oxford: Hart, 2016, p. 36 *et seq.*

⁶⁵ *Viking* [GC], cit. See also A. VAUCHEZ, *Démocratiser l'Europe*, cit., pp. 70-71.

of these values is made practically impossible. Even where the EU possesses the legislative competences to overturn the *status quo* as decided in a ruling by the Court, this requires a majority of institutional support that is – on the domestic level – reserved for constitutional amendments, and, ultimately, can still be overturned by the Court with reference to its compatibility with the free movement provisions.⁶⁶ What is left is a range of salient and highly politicised policy questions that can no longer be decided with reference to the needs and desires of those affected by them.

III.3. BEYOND UNIFORMITY

The third site of contestation of the EU can be found where the EU is perceived to be insensitive to the identity of and the difference between its Member States. This type of contestation takes place in different forms, which all challenge the assumption of uniformity that is central to EU law. What underlies this challenge is the claim that certain questions that go to the identity or self-understanding of a community ought to remain in the hands of that community. Crucially, this is not contestation of the process of integration as such. Rather, it is contestation of the way in which we “do” integration, which leaves insufficient space for Member States to contest the instances where EU law is insensitive to a state’s self-understanding or perceived identity.

On the most structural level, this rejection can be traced in the process of differentiated integration. At the moment, only six Member States participate in all EU policies. All others having opted out of one or more policy areas.⁶⁷ This differentiation can be explained by the fact that different policy questions are considered salient or controversial in different States. As Schimmelfennig, Leuffen, and Rittberger have highlighted, differentiated integration can in fact best be seen as an interaction between interdependence and politicisation.⁶⁸ While the former is a driver of integration, the latter is a brake on integration. In other words, the higher the policy interdependence between States in a certain policy area, the greater the desire for integration and cooperation (and the greater the cost of non-cooperation). Conversely, the higher the politicisation of a policy question, by which the authors mean the extent to which a policy question is considered salient in the domestic setting or tied to national identity, the higher the costs of integration, and the

⁶⁶ A good example is the recast Posting of Workers Directive, Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM/2016/0128 final. See for a conceptualization of the potential to revert judicial decisions in the EU, D. SINDBJERG MARTINSEN, *An Ever More Powerful Court? The Political Constraints on Legal Integration in the EU*, Oxford: Oxford University Press, 2015.

⁶⁷ Austria, Belgium, France, Germany, Slovenia, Portugal. See for a schematic overview, www.delorsinstitute.eu.

⁶⁸ F. SCHIMMELFENNIG, D. LEUFFEN, B. RITTBERGER, *The European Union as a System of Differentiated Integration*, cit., p. 766.

more resistance and contestation that integration will produce.⁶⁹ It is not particularly complicated to understand the logic here: Member States are aware that cooperation in policy area X means that they will no longer be able to control the norms that govern that policy area. EU law, after all, will trump domestic political choices. If the domestic electorate – for cultural, social, political, or ethical reasons – thinks that a specific outcome in policy area X is crucial to their autonomy, identity, or self-understanding as a community, they are likely to resist integration in this policy domain.

Other examples of this tension between uniformity and national self-understanding can be found throughout EU law. A recent example is the Hungarian referendum, which sought to resist a (lawful) decision to re-allocate refugees throughout the EU.⁷⁰ The referendum question was phrased as follows: “Do you want to allow the European Union to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?”. The question was rejected by 98 per cent of voters, albeit with only 44 per cent turnout. The point, here, however, is not the outcome of the vote. The point is the way in which the question and debate were framed. The focus seems not to be the compulsory migrant quota, but the capacity of the EU to cause both identity and autonomy costs for Hungary *without the approval of Hungarian Parliament*. What appears to be contested is less the substantive decision of the EU, but rather its very capacity to make these specific type of decisions.⁷¹ A less dramatic example is the German Constitutional Court’s famous *Lisbon* ruling, in which it offered an account of national constitutional identity that suggested that certain policy areas were so central to the identity of the German State that the self-determination and autonomy of its citizens would be irreparably affected if they were ever decided on the European level, and without explicit consent of the German Parliament.⁷² While the language employed in these two examples might be radically different, the message is the same: the EU is incapable of being sensitive to claims of identity or self-understanding of a community. In consequence, the EU ought to not intervene in the policy domains linked to those claims.

This critique is, in fact, also immanent to EU law. On this account, EU law lacks the expressive capacity that we associate with national law. EU law is considered to be insufficiently sensitive to the social context within which it operates, and does not reflect the cultural, social, or symbolic traits of its environment.⁷³ Chalmers, for example, sug-

⁶⁹ *Ibid.*, p. 778.

⁷⁰ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷¹ This is obviously mirrored in Brexit and the narrative of “taking back control”. See more on this in the following sub-section.

⁷² Federal Constitutional Court of Germany, judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, *Gauweiler (Lisbon Treaty)*.

⁷³ G. DAVIES, *Social Legitimacy and Purposive Power: The Ends, the Means and the Consent of the People*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, Oxford: Hart, 2015, p. 259 *et seq.*

gests that the EU's "concern to secure authority by legislating better to realise certain shared activities leads to expertise heavily influencing both the incidence of EU law and to a disregard of those activities which link daily life experiences to wider processes of identity formation".⁷⁴ The result is that the subjects of EU law, that is, its citizenry, experiences EU law as something that, to put it as simple as possible, misses the point. EU law articulates an idea of community, of the individual and her life that is shallow, one-dimensional and not particularly emancipatory.⁷⁵ What lacks, then, both in the *way* we integrate and in the DNA of EU law, is space for identity, difference and contestation. This lack of space, it is argued, is the source of much of the recent contestation of the EU, and can, once again, be traced back to the reliance on law to secure (uncontestable) functional objectives. It can also, of course, be traced back to the principle of congruence, in so far that integration is understood to lead to irreparable loss of the electorates' capacity to affect policy change.

III.4. BREXIT AND STRUCTURAL CONTESTATION OF THE EU

Brexit can be understood as the culmination of the above types of contestation. It shows, simply put, that *substantive* contestation of any specific part of the integration process can transform into *structural* contestation of the edifice of integration as such, when contestation cannot be institutionalised or internalised. Contestation as such, as Dahrendorf has long argued, can be a productive and legitimising force for a polity.⁷⁶ Substantive political conflict over, say, the conditions of austerity, the limits to free movement or the possible solutions to the refugee crisis need not be problematic for the EU. It is not something that will inevitably lead to the end of integration, or cause problems in the management of interdependence. More than that, allowing citizens that are affected by these policy choices to contest them is healthy for a polity: it makes the polity sensitive to discontent, it engenders passion, channels discontent towards the centre, offers institutional mediation of conflict, legitimizes the eventual policy orientation and its enforcement, and bolsters the authority of the polity.⁷⁷ Political conflict at once "articulates the presence of dominance and problematizes it", allowing citizens to understand policy orientations as contingent, and incentivizing their engagement within the institutional machinery of the polity.⁷⁸

⁷⁴ D. CHALMERS, *The Unconfined Power of European Union Law*, cit., p. 405.

⁷⁵ See on latter point P. NEUVONEN, *Equal Citizenship and Its Limits in EU Law: We the Burden?*, Oxford: Oxford University Press, 2016.

⁷⁶ R. DAHRENDORF, *The Modern Social Conflict*, Berkeley: University of California Press, 1988.

⁷⁷ See M. DANI, *Rehabilitating Social Conflicts in European Public Law*, in *European Law Journal*, 2012, p. 621 *et seq.*; D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, cit., p. 667; M. DAWSON, F. DE WITTE, *From Balance to Conflict: A New Constitution for the EU*, in *European Law Journal*, 2016, p. 209.

⁷⁸ D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, cit., p. 673.

But for conflict and contestation to be productive forces, these forces require careful institutionalization, which entails, at the very least, substantive space for policy contestation, an institutional monopoly on voice, and a structural sensitivity for newly-emerging discontent.⁷⁹ If contestation can be productive for a polity when it is properly institutionalized, it is lethal for a polity without such institutionalization. The EU – and more specifically Brexit – shows why that is the case. To put it as simple as possible, without the possibility of contestation *within* a polity, discontent spills over as contestation *of* the polity.

Analysis of electoral data after the Brexit vote shows a remarkable cleavage between a group of citizens who fare well under (or are used to) conditions of global competition and global opportunities,⁸⁰ and those who feel that they have lost out because of the process of globalisation – be it economically, socially, or culturally.⁸¹ This new cleavage, between internationalists and nationalists, was largely mirrored in the French presidential elections of 2017, and has been a prominent theme in elections throughout the EU. Arguably, the emergence of this cleavage results (at least partially) from EU law *because EU law prevents it from being articulated*. On the EU level, a commitment to “internationalism”, in the form of the free movement of factors of production, citizens, and austerity, is constitutionalised. That means that it cannot be altered without the unanimous consent of twenty-eight governments, their parliaments, and their electorates. To put this point as starkly as possible, a 50.1 per cent majority of Maltese parliament can resist any changes to this commitment to internationalism even if all other Member States would want to.

On the national level, contestation of that commitment is equally difficult. Given the incapacity of one government to change this commitment, national political parties have an obvious incentive to prevent its politicisation. Even if they are elected on the back of a promise to change the conditions of free movement (or austerity, migration law, state aid rules), they will not be able to uphold those promises – as Tsipras most recently demonstrated.⁸² The result has been a thorough depoliticisation of the commitment to internationalism. And so while the centre-left parties throughout the EU may be uncomfortable with the liberal premise of the internal market; and the centre-right parties may disagree with the rules on free movement of persons; neither has meaningfully contested those core substantive principles governing the process of integration. Parties on the extreme left and right, on the other hand, have a much easier

⁷⁹ On what the institutionalization of conflict really requires see M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., and M. DANI, *Rehabilitating Social Conflicts in European Public Law*, cit.

⁸⁰ S. HOBOLT, *The Brexit Vote: A Divided Nation, a Divided Continent*, in *Journal of European Public Policy*, 2016, p. 1259 *et seq.*

⁸¹ M. DAWSON, *The EU Must Face the New Politics of Globalisation*, in *German Law Journal*, 2016, p. 17.

⁸² M. WILKINSON, *Constitutional Pluralism: Chronicle of a Death Foretold?*, in *European Law Journal*, 2017, p. 213 *et seq.*

sell. Whether it is Mélanchon or Le Pen, the premise is simple: only by leaving the EU will we be able to control economic policy or migration policy in a way that is sensitive to what the affected citizens want from it.⁸³ In other words, the absence of space for contestation within the EU caused a translation of substantive contestation of a certain policy orientation into structural contestation of the EU as such.

Brexit, then, as the culmination of decades of contestation of the EU, reveals a number of things about EU law. First, it shows the dark side of the current method of managing interdependence. The reliance on law throughout the process of integration is justified by its capacity to prevent Member State from taking decisions that impose costs on their neighbours. As such, it secures the principle of congruence: Member State B, whose citizens have not been consulted about a decision made by Member State A, won't have to face the costs of that decision. At the same time, it is structurally blind to the active version of the principle of congruence, whereby those citizens affected by a decision ought to be able to change it. In the EU, this is structurally impossible. This dark side of EU law causes substantive contestation of a particular norm in EU law to spill over into structural contestation of the whole edifice of integration. As Peter Mair and Robert Dahl have put it, without possibility of opposition and contestation *within* the EU, dissatisfaction quickly translates as opposition to and contestation *of* the EU.⁸⁴ Robert Dahl, in fact, is almost prophetic when, in 1965, he projects a new type of structural contestation that emerges when salient political questions are managed rather than politically contested.⁸⁵

If the first lesson from Brexit is that contestation is to be internalized if it is not to translate into structural opposition to the EU, the second lesson is that law cannot be central in that process.⁸⁶ The current conditions of integration, in particular in the interdependence in Schengen and EMU, has created a perfect storm, whereby the policy domains in which Member States are now interdependent are exactly those that are most salient domestically. The EU's policy orientation in these areas is bound to create contestation and conflict, yet is still managed through law, which is structurally blind to such contestation and makes the EU politically unresponsive. More than that, the above sections have highlighted an immanent critique of EU law, which is perceived to have little expressive capacity, to disembed the individual from the social context within

⁸³ A slightly different take on these structural forces against the EU can be that the problem is *quantitative* – that there is simply not enough policy questions left on the national level to win or lose elections on, making anti-systemic and identity politics more attractive.

⁸⁴ P. MAIR, *Ruling the Void*, London: Verso, 2013, p. 138, with reference to Dahl's idea of opposition of principle. See R. DAHL, *Reflections on Opposition in Western Democracies*, in *Government and Opposition*, 1965, p. 7 *et seq.*

⁸⁵ R. DAHL, *Reflections on Opposition in Western Democracies*, cit., pp. 21-22. See also P. MAIR, *Ruling the Void*, cit., p. 141.

⁸⁶ L. AZOULAI, *"Integration Through Law" and Us*, cit., p. 450.

which she operates, and to struggle to articulate forms of solidarity.⁸⁷ In the current conditions of integration, then, we must rethink the role of EU law as the glue that structures the interdependence between Member States. The following sections will discuss the institutional preconditions for the EU to transition from a polity that is fundamentally based on securing congruence through law to one that is more sensitive to political claims and the capacity of the EU's electorate to affect policy outcomes.

IV. INSTITUTIONALISING INTEGRATION

The two stories of European integration recounted in the previous sections suggest that if we want to analyse the EU's current predicament, we ought to think of how to institutionalise contestation in conditions of interdependence. The question that is central to the legitimacy and stability of the EU, then, has changed from 1957. If in 1957 the question was how to manage interdependence between Member States; the question today is how to manage contestation in conditions of interdependence.

The first section of this paper has suggested that the principle of congruence might offer some insights. That principle articulates a standard of legitimacy: those affected by a certain decision ought to be the ones making that decision. If we think this through in the European context it can mean one of two things. On the one hand, it can justify the creation of instruments that prevent State A from taking a decision that affects the citizens in State B (who have not been able to participate in making that decision). This first option, which focuses on the prevention of externalities created by domestic decisions, is central in the way in which the EU currently operates, and is central to the functioning of EU law. On the other hand, the principle of congruence could also be attained by scaling up the level at which a certain decision is made.⁸⁸ This would suggest that a decision that affects citizens in States A *and* B ought to be made collectively, while decisions that affect only the citizens in State A can be made domestically. This second route, of course, is implemented in the EU through the demarcation of competences and the institutional structure that legislates in the areas transferred to the EU. What the second section of this paper has argued, in the simplest terms, is that the centrality of law in the functioning of the EU (the first option) has not left sufficient space for the second option, which is premised on political and institutional cooperation. The arrival in quick succession of the three major crises of the EU's history have highlighted, moreover, that using law only gets us to a certain point. Law lacks the capacity to resolve the tension between interdependence and independence in a manner that is legitimate and authoritative where it operates in isolation from political contestation.

⁸⁷ D. CHALMERS, *The Unconfined Power of European Union Law*, cit., p. 405.

⁸⁸ R. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 63.

The current conditions of integration, typified by ever more interdependence in policy domains that are highly salient and politicised, are likely to engender more and more contestation in and of the EU. Without changes to the way in which such contestation is institutionalised, it is likely to spill over from a substantive domain into a structural contestation of the EU as a whole. Ultimately, interdependence cannot be managed without remaining sensitive to the claims of those that are faced with its consequences. How can we rethink the way in which we manage interdependence under the current social and political conditions of wide-spread contestation? Several scholars have (more or less explicitly) engaged with this question. They fall in three camps. In the first camp we find those that argue for contestation of the EU *through* law. The logic, here, is that much of the power of the EU, and its incapacity to institutionalise contestation, emerges through the force of its legal order (sub-section IV.1). In the second camp we find those that argue for contestation *of* law. They argue for an explicit (and legally enshrined) retrenchment of the power of EU law, and a strengthening of the power of political actors within the existing institutional framework of the EU (sub-section IV.2). The third camp suggests that contestation in conditions of interdependence inevitably requires substantive policy decisions to be taken beyond the level of the nation State. What requires changing, then, is the way in which decisions are made in the EU. In short, this argument suggests that the EU needs to become more sensitive to the *substantive* policy claims and substantive contestation in the way it takes decisions (sub-section IV.3).

IV.1. CONTESTATION *THROUGH* LAW?

The first way in which the space for contestation could be created is through legal means. Much of the depoliticising nature of the EU and the inability to contest its values comes from the doctrines of direct effect and supremacy. Limiting the reach of these doctrines, the thinking goes, can carve out more space for contestation of the substantive orientation of the integration project on the national level. The crucial actors in this vision of resistance to the EU are national courts. The doctrines of direct effect and supremacy are crucially dependent on national courts: without the latter's capacity to restrain domestic political decisions and overturn those decisions when they conflict with EU law, EU law loses much of its effectiveness.

Several authors have suggested that the effects of EU law ought to be resisted by national courts. Menéndez, for example, has argued that the national constitutional courts ought to more actively resist the dismantling of the principles of the *Rechtsstaat* in the aftermath of the Euro-crisis;⁸⁹ while Davies has argued that the British contestation of the consequences of free movement could (even should) have been articulated by the judicial

⁸⁹ A. MENENDEZ, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 525.

branch.⁹⁰ More assertiveness by the judicial branch in channelling contestation, the argument goes, would prevent substantive contestation *on a specific element* of EU law from spilling over in *structural* contestation of the integration project as such.⁹¹ In simpler terms, then, articulating contestation *through* law would make EU law more sensitive to the effect it has on certain salient political questions on the national level.

Instances of domestic judicial resistance against EU law are increasing, and, crucially, are often justified with explicit reference to the need to re-assert a balance between the power of law and the power of politics in the process of integration.⁹² The *Bundesverfassungsgericht* has articulated, in a range of decisions,⁹³ a limit to the authority of EU law that is explicitly premised on the need to preserve the capacity of German representative institutions to decide on certain core policy questions that are closely tied to the redistributive and cultural identity of the German State.⁹⁴ In *Ajos*,⁹⁵ the Danish Supreme Court argued that judge-made general principles of EU law – in this case the principle of non-discrimination on the basis of age – cannot displace conflicting Danish law (that is, the supremacy of EU law does not extend to include such general principles).⁹⁶ The logic, here, is, once again, that the Danish Parliament has never consented with the general principle of non-discrimination based on age, and that principle could, therefore, not be of use in displacing conflicting Danish labour law. The underlying logic suggests that the real issue was the redistributive effect that the principle could have in Denmark – and that such redistributive effects must necessarily be mediated through political processes.

Finally, the Italian Constitutional Court, in *M.A.S. and M.B.*,⁹⁷ had to deal with a complex question relating to the statutory limitation on the value added tax (VAT) fraud. In the answer to a previous preliminary reference, the Court had understood this limitation period to be part of procedural criminal law, while under Italian law, it is considered part of substantive criminal law.⁹⁸ In a somewhat surprising move, the Italian Constitutional

⁹⁰ G. DAVIES, *Brexit and the Free Movement of Workers: A Plea for National Legal Self-assertiveness*, in *European Law Review*, 2017, p. 925 *et seq.*

⁹¹ P. MAIR, *Ruling the Void*, *cit.*, p. 138.

⁹² Obviously giving this power to judicial institutions comes with a range of problems of legitimacy and institutional capacity. See, for example, D. CHALMERS, *The Unconfined Power of European Union Law*, *cit.*, p. 422.

⁹³ Federal Constitutional Court of Germany, *Gauweiler (Lisbon Treaty)*, *cit.*

⁹⁴ C. MÖLLERS, D. HALBERSTAM, *The German Constitutional Court Says: "Ja Zu Deutschland"*, in *German Law Journal*, 2009, p. 1241 *et seq.*

⁹⁵ Supreme Court of Denmark, judgment of 6 December 2016, case 15/2014, *Danski Industri & Ajos*.

⁹⁶ M. MADSEN, H. OLSEN, U. SADL, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos case and the National Limits to Judicial Cooperation*, in *European Law Journal*, 2017, p. 140 *et seq.*

⁹⁷ Italian Constitutional Court, order of 23 November 2016, no. 24/2017, *M.A.S. and M.B.*

⁹⁸ G. RUGGE, *The Italian Constitutional Court on Taricco: Unleashing the Normative Potential of National Identity?*, in *Questions of International Law*, 2017, www.qil-qdi.org, p. 21 *et seq.*

Court argued that the rules governing statutory limitation periods are part of the Italian constitutional identity, which would, in turn, exempt them from being displaced by conflicting EU law. What is of interest, for us, is not so much whether it could plausibly be argued that these specific rules are indeed part of Italy's constitutional identity. More crucial is the assertion that *anything* (be it an entire policy area, an internal administrative rule or specific provision of criminal law) that is considered to fall under the header "national constitutional identity" is thereby immediately immune to displacement by virtue of EU law. The legal basis for this assertion is Art. 4, para. 2, TEU, which explicitly highlights that "the Union shall respect [...] national identities, inherent in the fundamental structures, political and constitutional" of the Member States. The eagerness with which national constitutional courts have used this provision to ringfence certain elements of national law and even entire policy areas from EU interference is not surprising. It offers, after all, both a *method* to contest the power of EU law (by way of suspension of the very premise of the power of EU law) and a *language* that justifies such displacement in terms of fundamental values or virtues of a politically constituted community. What follows, then, is a vision of integration whereby national courts ensure that certain salient redistributive, moral, cultural or social preferences can be decided on the national level without risk being displaced by EU law. Implicitly, this amounts to a wider claim about the limit of legal authority: certain decisions can only legitimately be made if decided through a process of political contestation and mediation.

EU law, in this way, becomes automatically and structurally sensitive to instances of substantive contestation. The argument presented in this section, then, could have softened the austerity drive in Greece by insisting on certain social standards, could have prevented the reformulation of collective labour agreements in Sweden and Finland, allowed Hungary to suspend its obligations under the relocation obligation, or the UK to decide on the conditions under which its public services could operate. The main advantage of contestation *through* law, then, is that it *works*: EU law simply cannot enforce its norms where the domestic order suspends its application, which can offer breathing space for the domestic political system to articulate alternative values.⁹⁹ There are, of course, evident drawbacks to this approach – both in terms of the institutional capacity of national courts in articulating policy contestation and in terms of the externalities of such contestation on the other Member States and their citizens.

IV.2. CONTESTATION OF LAW?

A different approach that would make the EU more sensitive to contestation of its values is one that explicitly challenges the role of law, and attempts to reassert the prima-

⁹⁹ Obviously, the Commission could start an infringement procedure against a Member States, even if it might not be particularly wise politically, and unlikely unless judicial actors openly and explicitly contest the authority of EU law.

cy of the political institutions in the way in which the EU is run. As Scharpf, one of the proponents of this route, summarises: “the rationale of the rules suggested is to enlarge, at the same time, the action spaces of national and European political processes and to reduce the constraints imposed by non-political domination”.¹⁰⁰ On this view, a double approach is required. First, it requires an explicit retrenchment of the role of law in the integration process. Authors such as Scharpf and Grimm have called for this and argued that EU law needs to be “deconstitutionalised” and “repoliticised”.¹⁰¹ What they mean by this is that, at the moment, due to the principles of supremacy and direct effect, certain values enshrined in the EU treaties cannot possibly be displaced.¹⁰² This critique is mainly directed at the EU’s “economic constitution”. The free movement provisions, in a way, have constitutionalised a commitment to globalisation that can be resisted neither by national political action (which would be illegal under EU law) nor by action on the European level (because of the limited competence catalogue or heterogeneity of policy preferences that inhibits consensus).¹⁰³ The solution offered, by these authors, is not to contest the power of law through resistance by judicial actors. Instead, they argue for a reconceptualization of the role of the EU law norms, presumably either by scrapping policy orientations from the Treaty and listing them in secondary legislation, which can more easily be amended, by explicitly highlighting that limitations in secondary legislation can affect primary Treaty provisions, or lowering voting thresholds to allow for political rejection of a Court ruling.¹⁰⁴

The explicit retrenchment of the role of law is only the starting point, however. The second part of this approach sees to the strengthening of control of political actors over the contours, direction, and intensity of integration. While commentators differ in where to locate this new power – ranging from Council to national parliaments – they argue that only by empowering national political actors can the EU remain sufficiently sensitive to the needs and desires of the electorate. The implicit assumption is that only on the national level can we find a political sphere that is sufficiently sophisticated so as to be able to mediate between alternative and conflicting policy orientations. In essence, this boils down to the normative claim that interdependence between Member States can only be managed legitimately by remaining sensitive to the independence of those Member States.¹⁰⁵

¹⁰⁰ F. SCHARPF, *After the Crash: A Perspective on Multilevel European Democracy*, in *European Law Journal*, 2015, p. 400.

¹⁰¹ D. GRIMM, *The Democratic Costs of Constitutionalism*, cit., p. 460; F. SCHARPF, *After the Crash*, cit., p. 384.

¹⁰² D. GRIMM, *The Democratic Costs of Constitutionalism*, cit., p. 460.

¹⁰³ F. SCHARPF, *After the Crash*, cit., p. 384.

¹⁰⁴ As, for example, is currently done in Art. 21 TFEU.

¹⁰⁵ This is the core premise of democracy. See F. SCHARPF, *De-constitutionalisation and Majority Rule: A Democratic Vision for Europe*, in *European Law Journal*, 2017, p. 315 *et seq.*, and K. NICOLAÏDIS, *European Democracy and Its Crisis*, in *Journal of Common Market Studies*, 2013, p. 351 *et seq.*

The exact institutions that should benefit from this recalibration of political power is unclear. Some authors suggest that we should focus on national parliaments. Chalmers, for example, argues that national parliaments are best placed to police the democratic authority of EU action.¹⁰⁶ This suggests that EU legislative action must remain conditional upon a majority of national parliaments consenting to it, and would even allow individual national parliaments to suspend the application of EU law where EU law is considered to impose more costs than benefits.¹⁰⁷ What underlies this vision of political authority for the EU is an insight, shared by authors such as Bellamy and Bickerton, that the national political space is the only one sufficiently sophisticated to allow for meaningful political expression by citizens.¹⁰⁸ Ensuring that the political power on the European level remains conditional upon national consent, then, is a way of ensuring that the domestic electorate can contest and can affect policy outcomes that determine their lives. Other authors, such as Scharpf, argue that the most appropriate forum for political control of the EU's policy orientation is the Council. His proposal is based on a number of "groundrules" that serve to simultaneously protect (political) minorities and accommodate diversity, while preventing the creation of a range of veto-players that leads to institutional paralysis.¹⁰⁹ In other words, Scharpf calls for protection of the autonomy of Member States, and their capacity to contest and resist norms emanating from the EU; but at the same time understands that the interdependence between States requires a more flexible system for decision-making. His solution to this conundrum is to institutionalise the role of opt-outs.¹¹⁰ As a rule, in Scharpf's model, Member States should be allowed to opt-out of EU legislation, unless the possibility of opt-outs is excluded by a qualified majority of Member States.

This second route towards making the EU more structurally sensitive to contestation of its values and norms lies in decreasing the hold of law over the process of integration, and shifting power towards domestic political actors (be they representative or executive), whose authority is, crucially, premised on the consent of their electorates. The logic, here, is that by bolstering the power of national actors within the EU's decision-making process, the EU will become more sensitive to forms of contestation that emerge throughout its Member States.

¹⁰⁶ D. CHALMERS, *Democratic Self-government in Europe: Domestic Solutions to the EU Legitimacy Crisis*, in *Policy Network Paper*, May 2013, www.policy-network.net.

¹⁰⁷ Albeit with explicit reference to the need to limit the imposition of externalities on neighbouring States. See D. CHALMERS, *Democratic Self-government in Europe*, cit., p. 12.

¹⁰⁸ R. BELLAMY, D. CASTIGLIONE, *Three Models of Democracy, Political Community and Representation in the EU*, in *Journal of European Public Policy*, 2013, p. 206 *et seq.*; C. BICKERTON, D. HODSON, U. PUETTER, *The New Intergovernmentalism: European Integration in the Post-Maastricht Era*, in *Journal of Common Market Studies*, 2015, p. 703 *et seq.*

¹⁰⁹ F. SCHARPF, *After the Crash*, cit., pp. 395-398.

¹¹⁰ F. SCHARPF, *De-constitutionalisation and Majority Rule*, cit., p. 327.

IV.3. CONTESTATION IN CONDITIONS OF INTERDEPENDENCE

Under the current social and political conditions of integration, typified by vast redistribution and deep interdependence between States, it is difficult to think of ways in which to institutionalise contestation. The proposals discussed in the two previous sections attempt to do so by carving out more space for political actors on the national level, and by somehow allowing these national actors to opt-out or suspend the application of EU law where it conflicts with salient political choices on the national level. This way, it is thought, the integration process becomes structurally sensitive to emerging discontent, and substantive contestation does not spill over into structural contestation of the EU. In a way, then, this new flexibility to suspend EU law *strengthens* rather than weakens the legitimacy and stability of the EU.

Arguably, the problem with this approach is that it is based on a paradox. The explicit objective of the approach is to ensure that certain decisions (typically those of a distributive, identity, or cultural nature) can be made, altered, and controlled by the national electorate. However, the attempt to achieve this objective by bolstering the political control of *national* actors has an important side effect, in so far as it irrevocably *decreases* the capacity of the electorate of their neighbouring State to do exactly the same.¹¹¹ In situations of interdependence, in other words, the capacity of national electorates to affect the outcome of a decision (or change it) are inextricably linked. A Hungarian decision that prevents the entry of refugees *does* have an effect on its neighbouring States; a ruling by the German Constitutional Court that defines debt relief for Greece illegal *does* have an effect on Greece's internal policy choices; a Finnish decision to set aside *Viking* with reference to its fundamental commitment to the right to strike *does* have an effect on companies in Estonia; and a rejection by the Greek population of certain effects of austerity *does* have an effect on the other Member States and citizens in the Eurozone. Making the EU sensitive to *national* resistance, in other words, does not appear to solve the fundamental question of how to institutionalise contestation while remaining sensitive to the principle of congruence, which suggests that *all* affected by a decision ought to be the ones making that decision, and, implicitly, that those affected by a decision ought to be able to alter it. More than that, allowing more scope for national political actors exponentially increases their capacity to impose costs on their neighbours – which is, of course, the very problem that the integration process attempts to solve.

If we take the principle of congruence as the starting point, on the other hand, we can begin to understand the changes that are required to make the EU structurally sensitive to contestation *under conditions of interdependence*. These changes, it is argued, are threefold.¹¹² First, the principle of congruence requires that policy decisions made on the

¹¹¹ This is something that even its proponents are aware of. See F. SCHARPF, *After the Crash*, cit., p. 403; and D. CHALMERS, *Democratic Self-government in Europe*, cit., p. 21.

¹¹² See for further elaboration, M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., p. 208.

European level *can actually be changed*. At the moment, the policy orientations in areas as diverse as state aid, employment policy, industrial policy, monetary policy or migration policy are constitutionally entrenched, and would require Treaty revision for any changes. As Scharpf has put it, this leads to a situation of, “politicisation without the possibility of autonomous policy choices, [which] is more likely to produce frustration, alienation, apathy or rebellion rather than democratic legitimation.”¹¹³ What is needed, then, is the capacity of the electorate to alter the EU’s policy preferences throughout all its policy domains. This will not only ensure that those preferences are democratically legitimated and secure the principle of congruence, but also imbue the EU’s electorate with the dynamism and passion that comes from simply *being able to change things*.¹¹⁴ Opening up the EU’s policy direction to contestation requires, as Scharpf calls it, a “deconstitutionalisation” of the Treaty, whereby the direction is not be legally ringfenced from political contestation, but decided *through* a process of political contestation. This requires stripping the Treaty to its bones: no longer will it detail policy orientations or policy objectives. These will be up for grabs through the decision-making process. Instead, the Treaty will detail the institutional configuration of the EU, as well as the fundamental rights that ensure equal and free participation of all Europeans to the decision-making process.

The second precondition in securing the principle of congruence in conditions of interdependence is to ensure that conflict is institutionalised along functional rather than national lines. This is crucial for the contestation of policy preferences to be a productive rather than a destructive force. At the moment, contestation in the EU is played out along national lines: the conflict between those in favour of austerity and those against is not institutionalised substantively, but is institutionalised as a number of creditor States against a number of debtor States. These national cleavages obscure the underlying functional complexity and internal differentiation, and are sticky: they follow from the assumption that political mandates are given in national general elections.¹¹⁵ And so Tsipras and Merkel both come to the table with a strong mandate that requires opposing policy outcomes, which cannot – because of the interdependence between states – be realised simultaneously.¹¹⁶ It is not difficult to understand why that makes conflict in the EU at the moment such a destructive force: given that we cannot *both* accept and reject austerity,

¹¹³ F. SCHARPF, *After the Crash*, cit., p. 398.

¹¹⁴ R. DAHL, *Can International Organisations Be Democratic? A Skeptic’s View*, in I. SHAPIRO, C. HACKER-CORDON (eds), *Democracy’s Edges*, Cambridge: Cambridge University Press, 1999, p. 20; G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, cit., p. 6.

¹¹⁵ See for a critique, C. OFFE, *Europe Entrapped: Does the EU Have the Political Capacity to Overcome Its Current Crisis?*, in *European Law Journal*, 2013, p. 595 *et seq.*

¹¹⁶ The structure of EMU in fact structurally pits Member States and national parliaments against each other. See L. BINI SMAGHI, *Governance and Conditionality: Toward a Sustainable Framework?*, in *Journal of European Integration*, 2017, p. 755 *et seq.*

some Member States (and the voice of their electorate) is simply side-lined. Their ability to affect the conditions under which they live, then, dissolves.

A way to get past these national cleavages is to attempt to construct *functional* cleavages. These cleavages are traditionally found on the national level, and offer conflicting policy orientations on the basis of functional differentiation. The traditional cleavages can be based on geography, age, religion, class, or political ideology.¹¹⁷ What such functional cleavages would allow us to do on the transnational level, is to understand what *all* citizens affected by a policy choice in EMU, Schengen, or the internal market want *as a collectivity*. Just as there will be Greeks in favour of austerity and Germans opposing it, so there will be a split between citizens who are in favour and against globalisation, that win or lose because of free movement, that oppose or support the EU's social pillar, the EU's treatment of refugees, genetically modified organisms (GMOs), or the EU's approach to combating piracy. The creation of transnational functional cleavages has the potential to significantly bolster the democratic legitimacy of the EU, as it allows all citizens affected by a certain decision to be part of making that decision, and, if necessary, to amend it. It is not a coincidence that Derrida and Habermas saw the transnational protests against the war in Iraq – simultaneously taking place in Madrid, Paris, London, Berlin and Rome – as immensely meaningful: this was perhaps the first articulation of a transnational cleavage that could genuinely legitimize transnational action.¹¹⁸ Crucially, the creation of transnational cleavages on the European level would allow us to engage with a cleavage that the Member States have struggled to internalize, which is the one that pits those in favour of globalization and free movement against those who fear its economic, social, or cultural dislocating effect. As we have seen, the inability of Member States to internalize this cleavage has greatly enhanced the appeal of the fringes of domestic politics.

The conceptual and practical difficulties in moving from a system based on national cleavages to a system based on functional cleavages are, evidently, many.¹¹⁹ As Bartolini has argued, the productive institutionalization of conflict requires a level of sophistication and centre formation that is currently absent on the European level.¹²⁰ Fostering open conflict in the absence of strong institutional structures is more likely to lead to political rupture than to legitimate policy discussions.¹²¹ This leads us to the third precondition in securing the principle of congruence on the European level. It would require radical institutional changes. For one, it would mean that (something akin to) the

¹¹⁷ S.M. LIPSET, S. ROKKAN, *Party Systems and Voter Alignments*, New York: The Free Press, 1967, p. 6.

¹¹⁸ J. HABERMAS, J. DERRIDA, *15 February, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe*, in *European Law Journal*, 2003, p. 291 *et seq.*

¹¹⁹ See for further elaboration and conceptualization, M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., pp. 211-214. See also S. BARTOLINI, *Restructuring Europe*, Oxford: Oxford University Press, 2005, p. 41.

¹²⁰ S. BARTOLINI, *Restructuring Europe*, cit., pp. 354-370.

¹²¹ *Ibid.*, p. 408. See also F. SCHARPF, *After the Crash*, cit., p. 398.

European Parliament becomes the primary site for contestation, and has the monopoly on voice in the management of that contestation.¹²² Such a monopoly on voice is necessary to ensure that discontent gets directed towards a single site that can mediate it. This, in turn, presupposes the creation of Europe-wide electoral lists for the EP elections (something that is currently discussed as an option for the vacant UK seats), and the creation of genuine transnational parties that contest the elections with their own vision for the EU, each with their own agenda and candidate for the presidency of the Commission. It would also entail a massive shift in power away from the Council to the benefit of the EP, and the generation of a culture of contestation (rather than consensus) within the EP.¹²³ The EP and Commission would relate to each other like national parliaments relate to the national government. The latter would reflect the majorities in the former, and the former will hold the latter accountable. The Council, as a representation of the Member States, would be reformed as a European Senate, in which each state holds the same number of seats, and which votes by simple majority. This would lead to a system whereby functional cleavages dominate the policy discourse, and Europe's citizens can partake in the creation of the rules that bind them in a way that reflects their equal status. It would, ultimately, allow the EU to legitimately and democratically answer the EU's current issues: how to deal with its borders, how to redistribute resources, and how to deal with Brexit. At the moment, the closest we get to understanding what citizens actually want from the EU on these issues is from Eurobarometer, which is perhaps an even more damning indictment of the state of European democracy than the low turn-out for EP elections.

The institutional reconfiguration towards an EU that can answer the basic political questions of our times also presupposes a constitutional framework that consists of institutional and administrative rules, and enumerates certain democratic principles and fundamental values that are *not* open for contestation.¹²⁴ These suggestions might sound unfeasible and to push us towards a path of a federal EU. At the same time, it is the only path that can ensure that the substance of what the EU *does* remains sensitive to what citizens want the EU to do. Only by becoming sensitive to the functional cleavages that divide the EU's electorates can the EU secure the principle of congruence while maintaining the complex web of interdependence as it currently exists.¹²⁵

¹²² S. BARTOLINI, *Restructuring Europe*, cit., p. 385.

¹²³ See for more precise recommendations M. DAWSON, F. DE WITTE, *From Balance to Conflict*, cit., p. 214.

¹²⁴ See S. BARTOLINI, *Restructuring Europe*, cit., pp. 386-390, who convincingly argues that cultural and territorial cleavages need to be placated for conflict to be institutionalized productively.

¹²⁵ Another solution, of course, is to decrease interdependence and the instances of contestation by going back on the commitments to open internal borders and monetary union.

V. CONCLUSION

This *Article* has highlighted a tension at the heart of the integration process. On the one hand, it is committed to managing the interdependence between states in a way that prevents conflict between them. On the other hand, the EU is increasingly criticised for the substantive choices that it makes in managing this interdependence, and for its inability to institutionalise the ensuing contestation. It was argued that the reason for this increase in contestation lies in how we “do” integration, that is, how the EU attempts to manage the interdependence between its members. The EU has relied predominantly on law – which serves to depoliticise policy questions and tie national actors to a centrally decided policy orientation. As EU law’s reach is extended into more salient policy domains – which distribute resources, or articulate a particular vision of community and the individual – EU law struggles to secure legitimate policy outcomes. What is more, without the possibility to contest such choices, contestation that starts in a certain policy area risks spilling over into a contestation of the process of integration as such, as we saw with Brexit.

The starting point for understanding this dynamic is the principle of congruence. This principle suggests that the citizens (or States) affected by a decision ought to play a part in making that decision. This serves to prevent the illegitimate imposition of costs by a decision in State A on its neighbouring States; and to ensure that those affected by a decision remain in a position to alter it. As the process of integration has progressed, the EU has focused more and more on the former, and forgotten about the latter. The capacity of Member States to decide on salient political questions with reference to the preferences of their electorate has progressively decreased and is progressively governed by the constraints imposed by EU law. At the same time, it has become impossible for the citizens affected by a certain EU policy to alter it. This makes the EU structurally insensitive to the discontent that it generates.

Under the current conditions of integration – characterised by vast redistributive practices, and a complex web of interdependence in the most salient of policy domains – the EU must be much more sensitive to the discontent that it generates. As Azoulai reminds us, integration is ultimately about making visible, solidifying, and eventually institutionalising the myriad relationships between citizens within and across borders, whereby “the recognition of interconnectedness is the precondition for mutual trust”.¹²⁶ Law *could* be an instrument for this, but that would require a significant rethinking of its place in the process of integration.¹²⁷ More structurally, what is required is that the EU carve out a space where this mutual interconnectedness can be translated into political idea(l)s of how to live together. Before anything else, this presupposes a space for internal contestation *within* the EU as a way to prevent external contestation *of* the EU. Only by harnessing the preferences of its citizens can the EU sustain the complex web

¹²⁶ L. AZOULAI, “*Integration Through Law*” and *Us*, cit., p. 462.

¹²⁷ *Ibid.*, p. 461.

of interdependence in a way that is neither authoritarian nor executive. If Brexit is to serve as a lesson for the EU – rather than the beginning of a low and inexorable process of ever-increasing contestation – the EU must reimagine how it “does” integration.

