



## ARTICLES

### RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

# THE DOUBLE FACE OF THE RULE OF LAW IN THE EUROPEAN LEGAL ORDER: AN ADMINISTRATIVE LAW PERSPECTIVE

ALDO SANDULLI\*

TABLE OF CONTENTS: I. The paradox of the European rule of law. – II. The rule of law in the modern State and in the European legal order. – III. The genetic heritage of the rule of law in the European legal order. – IV. Technocratic legitimacy and the progressive construction of a living constitution. – V. Administrative law and constitutional law in the European legal order. – VI. Reconnecting citizens to the European institutions: the role of law in Europe. – VII. The rule of law in action from the administrative law standpoint.

ABSTRACT: This *Article* aims to outline three problematic aspects arising from the peculiar, composite nature of the European legal system considering its many asymmetries. The first element is of a cultural-historical nature, and the goal is to highlight that, in terms of scientific and methodological ascendancy, the European order came into being with a different genetic heritage from that of modern States. The second aspect concerns the relationship between economics and law and the growing process of “juridification” of economic rules. The aim is to show how this process may have altered the traditional concept of the rule of law as it has taken shape in democracies. The third part explores the idea that this may have affected the diversified and asymmetric development of administrative and constitutional law in the European legal order. It then looks at how this asymmetry may have contributed to the aforementioned disconnect between citizens and institutions. The *Article* concludes by arguing that the attempt to reconnect European citizens and Institutions needs to start from a non-infrastructural and non-instrumental concept of law and from a consistent balance in the relationship between administrative and constitutional law.

KEYWORDS: rule of law – European legal order – legitimacy – democracy – administrative law – constitutional law.

\* Full Professor of Administrative Law, Department of Law, LUISS Guido Carli (Rome), [asan-dulli@luiss.it](mailto:asan-dulli@luiss.it). This research was carried out as part of the RECONNECT project, which has received funding from the European Union’s Horizon 2020 research and innovation programme under Grant Agreement no 770142. The information in this article reflects only the Authors’ views and the European Union is not liable for any use that may be made of it.

## I. THE PARADOX OF THE EUROPEAN RULE OF LAW

In recent years, the European legal system has been considered as a shield against the so-called rule of law backsliding,<sup>1</sup> i.e. against the attacks on the guarantee of fundamental rights, the rise of illiberal democracies and, in particular, against the attempt to undermine the effective and independent judicial protection in EU countries that were once considered to fulfill the values of Art. 2 TEU.<sup>2</sup>

From the Treaty of Rome to Ursula von der Leyen's recent opening speech,<sup>3</sup> the European rule of law has always been interpreted as a foundational value and a cornerstone in the protection of the European democratic order. However, conflicting views exist regarding the concept of European rule of law as it has developed during the European integration process, especially after the failure to adopt the European Constitution, and the subsequent global economic and financial crisis.

It has been pointed out – as in the recent intervention of Peter Huber, an influential judge of the German Constitutional Court – that the high level of independence of the European Central Bank (ECB) in managing monetary policy raises serious questions about the democratic legitimacy of that policy. Similar observations have also been made with regard to European Agencies.<sup>4</sup>

The deep-rooted causes of this paradox, i.e. the tension between the policy-making role of these independent actors and their weak democratic legitimacy, have certainly led to the growing disconnect between the citizenry and the European institutions, which has impinged upon the legal systems of the Member States (under the form of sovereignty, populism, and not least, Brexit).

This *Article* aims to outline some problematic aspects arising from the peculiar, composite nature of the European legal system and the many asymmetries it presents, namely the asymmetries between economics and law, between law and politics, between administrative law and constitutional law, and relatedly between the protection of economic and social rights. These problematic aspects all stem from the nature of the European system as a dynamic, evolving system, so that the process of European

<sup>1</sup> See, among others, L. PECH, S. PLATON, *Judicial independence under threat: The Court of Justice to the rescue in the ASJP case*, in *Common Market Law Review*, 2018, p. 1827 *et seq.*

<sup>2</sup> See, for instance, Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*; judgment of 8 April 2014, case C-288/12, *Commission v. Hungary*; and cases C-66/18 and C-78/18 still pending; judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*; judgment of 5 November 2019, case C-192/18, *Commission v. Poland II*; judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*.

<sup>3</sup> Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission, Strasbourg, 16 July 2019, ec.europa.eu.

<sup>4</sup> P.M. HUBER, *The ECB under the scrutiny of the Bundesverfassungsgericht*, in *Building Bridges: Central Banking Law in an Interconnected World*, ECB Legal Conference, 2019, ecb.europa.eu, p. 28 *et seq.*

integration may in fact be viewed from different angles, as having a double face, as it will be explained.

The first element to note is cultural-historical in nature and, in terms of scientific and methodological ascendancy, it derives from the fact that the European order came into being with a different genetic "pedigree" compared to what has been witnessed in relation to modern States. Therefore, it will be necessary to understand how, in historical terms, this may have influenced the subsequent developments of the European integration process.

The second aspect concerns the relationship between economics and law and the growing process of "juridification" of the rules governing the economy. This process, indeed, may have altered the traditional concept of the rule of law as it has taken shape in national democracies.

The third problematic aspect refers to the circumstance that the codification of economic rules may have affected the diversified and asymmetric development of administrative and constitutional law in the European legal order, which in turn can be seen as one of the elements underlying the disconnect between citizens and institutions.

The *Article* concludes by arguing that the attempt to reconnect European citizens and EU institutions needs to start from a non-infrastructural and instrumental concept of law, i.e. looking at the substance of what EU regulates and should regulate, and from a consistent balance in the relationship between administrative and constitutional law.

## II. THE RULE OF LAW IN THE MODERN STATE AND IN THE EUROPEAN LEGAL ORDER

The concept of rule of law has been fundamental in the construction of the modern State. The law has been an instrument to organize political power, and its exercise has been planned in a sort of consubstantiation between the State and the law and between the law and the State. The law has been understood as a tool for the State and the State apparatus has been functional to the enforcement of the law.

The evolution of the rule of law has led to the autonomous affirmation of law and rights, especially in the constitutional and welfare States of the third quarter of the twentieth century, in the wake of the transition from the modern to the post-modern age, grounded in constitutional pluralism. In the major States of Western Europe, political representation, democracy, freedom, solidarity, justice, and access to independent and impartial courts have portrayed the fundamental contents of the rule of law.<sup>5</sup>

At a time when the rule of law was undergoing its greatest development in the constitutional State in the 1950s, the European legal order was growing fast. A good start-

<sup>5</sup> On history and the principles of the rule of law see, *ex multis*, T. BINGHAM, *The Rule of Law*, London: Penguin, 2011.

ing point for an assessment of how the rule of law in Europe has developed might be the distinction between the modern State and the post-modern European legal system.

A major distinction concerns the nature of the institutions, namely the composite and diarchic nature of the European legal order. It is based, on the one hand, on the dissolution of the “State” experience within the new paradigm of “diffused” or “multi-level” governance,<sup>6</sup> in which plans mingle and combine in the absence of any reference to a social model at least endowed with primacy. On the other hand, the European legal system is founded, on the constant presence of Members States’ governments in the decision-making, the so-called intergovernmental model,<sup>7</sup> which conditions the nature of the European legal order and that has been further strengthened in recent years.<sup>8</sup> This structure of governance has favoured the growth of administrative law at European level, while constitutional law continues to stay in the background – given the EU’s lack of authority to constitute power – ,<sup>9</sup> despite a few significant developments, such as the ability of the Court of Justice to curb and channel economic integration as well as to protect fundamental rights.<sup>10</sup>

But there is also a second distinction to bear in mind when analysing the rule of law in Europe. It concerns the distinct genetic nature of the European supranational order compared to that of the modern State, which came into being with its own legal (and philosophical) inherent features as, by the seventeenth and eighteenth centuries, law (together with philosophy) was an ancient and established social science. Thus, the law itself was the driver of the economic, political, and social developments of Europe from the seventeenth to the twentieth century. Economics was little more than an embryonic science, and the foundations of sociology emerged during the nineteenth century. This does not mean that, back then, rulers took decisions without considering also political and economic factors, but these were factual elements that were not elaborated through a solid scientific and methodological apparatus. The legal method character-

<sup>6</sup> See, among others, I. PERNICE, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited*, in *Common Market Law Review*, 1999, p. 703 *et seq.* More recently, I. PERNICE, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, in *European Public Law Review*, 2015, p. 541 *et seq.* Against the theory of multilevel governance and in favour of the theory of the composite nature of the European legal order, see S. CASSESE, *L’Unione europea come organizzazione pubblica composita*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2000; S. CASSESE, *La crisi dello Stato*, Roma-Bari: Laterza, 2002, p. 71 *et seq.*; G. DELLA CANANEA, *L’Unione europea. Un ordinamento composito*, Roma-Bari: Laterza, 2003.

<sup>7</sup> See A. MORAVISCK, F. SCHIMMELFENNIG, *Liberal Intergovernmentalism*, in A. WIENER, T. A. BÖRZEL, T. RISSE (eds), *European Integration Theory*, Oxford: Oxford University Press, 2019, p. 64 *et seq.*

<sup>8</sup> C.J. BICKERTON, D. HODSON, U. PUETTER, *The New Intergovernmentalism and the Study of European Integration*, in C.J. BICKERTON, D. HODSON, U. PUETTER (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford: Oxford University Press, 2015, p. 1 *et seq.*

<sup>9</sup> See P.L. LINDSETH, *Power and Legitimacy. Reconciling Europe with the Nation State*, Oxford: Oxford University Press, 2010, chapter 5.

<sup>10</sup> See M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, 2010.

ised the development of the modern State in the dual directions of the welfare State and the constitutional State.

The “genome” of the European supranational order, instead, is made up of a multiplicity of “chromosomes”. By the mid-twentieth century, in addition to law, a series of other social sciences, such as economics, sociology, political science and statistics, had already come of age. The European Union, therefore, is an original system not only by virtue of its supranational and composite nature, but also because it is built upon a plurality of social science methods. Of these, in addition to the legal method, the economic method has held a position of particular importance, focusing especially on economic and technical-bureaucratic expertise at the European level,<sup>11</sup> with politics being left to the Member States.<sup>12</sup> The functionalist model has sought to foster integration through the market, trying above all to implement the ordoliberal theories of the social market economy. As has been pointed out, “European integration has always been driven by political factors [...]. Yet while the goals were always political, the means were always economic”.<sup>13</sup>

The task of the law, in this context, was above all to give material constitutional force<sup>14</sup> to the process of economic integration (fostering *Integration through Law*),<sup>15</sup> especially through the role played by the Court of Justice.

But the dual genome has meant that the production of EU norms had also been understood as a set of incentives and a system of cost-benefits that guide the behaviour of the EU policy-makers and of the Member States in terms of economic advantages and disadvantages, between ends and means, namely profit-economic effectiveness/efficiency, on the one hand, and proportionality/appropriacy, on the other. The preferred method through which EU policy-makers proceed is empirical, since the study of public and private behaviour – the omnipresent *ex ante* impact assessments – always precedes the definition of the rule, and the reasoning does not revolve much, or not primarily at least, around the principles of legality-equality-solidarity standing alone but on a rationale articulated around goals-results-social-well-being.<sup>16</sup>

<sup>11</sup> For a more extensive and in-depth analysis, see A. SANDULLI, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo*, Milano: Franco Angeli, 2018, in particular chapter II, p. 59 *et seq.*

<sup>12</sup> See V.A. SCHMIDT, *Democracy in Europe: The EU and National Politics*, Oxford: Oxford University Press, 2006.

<sup>13</sup> R. BALDWIN, C. WYMPLOSZ, *The Economics of European Integration*, Maidenhead: McGraw-Hill Education, 2015, p. 31.

<sup>14</sup> The theory of material constitution was developed, as well known, by C. MORTATI, *La Costituzione in senso materiale*, Milano: Giuffrè, 1940.

<sup>15</sup> As known, “Integration through Law” was the project, started in Florence, at the European University Institute, in 1978 and directed by Mauro Cappelletti, Monica Seccombe and Joseph H.H. Weiler. In the 1980s, de Gruyter (Berlin) published five volumes as the result of this research project. On the contemporary relevance of that model see D. AUGENSTEIN (ed), *“Integration through Law” Revisited: The Making of the European Polity*, Farnham: Ashgate, 2012.

<sup>16</sup> A. SANDULLI, *Il ruolo del diritto in Europa*, cit., pp. 61-62.

The question is whether this different genetic code determines a distinct functional attitude on the part of the national systems and of the European supranational system and thus of the way each system (and the courts that make them up) views certain fundamental rights and ensures their protection. It is a legal question that has been posed in different ways: either a question of the non-coaxial nature of the national and the supranational systems, or else the issue of the sustainable diversity existing among them.<sup>17</sup>

In particular, the question arises as to whether the functional approach to EU integration has not inevitably given to the development of European law a market-oriented slant, thereby leading to the creation of economic models that structurally bias the European institutions in favour of liberalisation to the detriment of social policies. This also seems to be the case of the Court of Justice, which appears not to foreground the protection of fundamental rights as its primary target – unlike what the constitutional courts of the Member States do – but the four freedoms of market operators, so the protection of social rights is indirect, derived, and episodic.<sup>18</sup> The constitutional courts of the Member States therefore threaten to defend their rule of law through jurisdictional mechanisms such as “counter-limits”.<sup>19</sup> This functional approach would therefore appear to be one of the main reasons for disconnection between European institutions and citizens.

The European institutions and the Court of Justice embody not only different manifestations of how the rule of law has developed compared to the national understanding of the rule of law, but they also constitute a shield protecting the foundations of the European rule of law both in relation to the legal systems of the Member States and with regard to the law of international organisations. The *Kadi* case,<sup>20</sup> regarding the protection of the rule of law outside the European legal order, but with significant implications for the EU

<sup>17</sup> See, in particular, R. BIN, *Critica alla teoria dei diritti*, Milano: Franco Angeli, 2018.

<sup>18</sup> See, among others, M. GOLDMANN, *The Great Recurrence. Karl Polanyi and the Crises of the European Union*, in *European Law Journal*, 2017, p. 262 *et seq.* See also D. GRIMM, *The Constitution of European Democracy*, Oxford: Oxford University Press, 2017, pp. 98-99: “The asymmetry also accounts for the liberalizing tendency of the ECJ’s jurisprudence. This is not to say that the ECJ pursues an agenda of economic liberalism. It rather pursues the treaty goal to establish and maintain the single market. Yet, since the vast majority of requests for a preliminary ruling – which reach the ECJ – has its origin in actions by economic actors who see their interests threatened by national legislation, and since the ECJ can contribute to the establishment of the single market only negatively, the result is a structural bias in favour of liberalization. This, in turn, affects social policy. Although reserved for Member States, social policy comes under pressure because of the liberalizing effects of the ECJ’s jurisprudence, combined with the effects of globalization, while the national social policy comes under pressure because upholding a high standard of social security tends to weaken the competitiveness of national economy”.

<sup>19</sup> See, e.g., the Italian Constitutional Court, judgment of 22 June 1983, no. 183 and, even more so, judgment of 21 April 1989, no. 232.

<sup>20</sup> Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v Council and Commission*, on which see, in particular, the commentary by G. DE BÚRCA, *The EU, the European Court of Justice and the International Legal Order after Kadi*, in *Harvard International Law Journal*, 2009, 1 *et seq.*

itself, and the recent cases against Hungary and Poland,<sup>21</sup> or the *Associação Sindical dos Juizes Portugueses* case,<sup>22</sup> on the enforcement of the rule of law within Member States, are cases in point. In *Kadi* the Court of Justice limits the implementation of the UN Security Council's anti-terrorist sanctions regime, by annulling the relevant EU regulation adopted in relation to Mr Kadi that violated the right to property and the due process, two crucial principles of the rule of law and safeguards against the unconditional application of international law in the EU context. In the more recent cases, instead, it is the principle of judicial independence that occupies a central stage. The rule of law discourse, in these cases, emerge under the duty of the Member States to ensure "remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Art. 19, para. 1, TEU), to be guaranteed (also) through national judges as judges of EU law. If their independence is endangered through various measures – e.g. salary and benefit cuts and forced early retirement – effective legal protection and remedies accorded by EU law are undermined as well (Art. 47 of the Charter of Fundamental Rights).

### III. THE GENETIC HERITAGE OF THE RULE OF LAW IN THE EUROPEAN LEGAL ORDER

A second line of reasoning to unpack the rule of law in the EU derived from the peculiar relationship between law and economics in this context.

Grounded in the ordoliberal theories of the Freiburg School established in Germany in opposition to both state totalitarianism and market liberalism,<sup>23</sup> the neo-liberal doctrine of the Chicago School emerged in the 1990s and since then has started to influence the European integration process. Deregulation, the corporatisation of the machinery of State, new public management, constraints on public finance, and the reduction of social benefits have thus paved the way to a self-serving and teleocratic productivist and contractual vision of the legal order, overshadowing the nomocratic vision typical of political philosophy that had developed in the European legal and political culture over centuries.

The new European rule of law established itself from these complex lines of development, "born already hybrid: its legitimacy comes not only from its *auctoritas* (formally valid "legislative" law) but also and above all from its *ratio* (the substantive and procedural rights and principles of justice)".<sup>24</sup> The fundamental transition that had already taken place from *Rechtsstaat* to a community of law was based on the rule of law and defined by

<sup>21</sup> See above, footnote 2.

<sup>22</sup> Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*.

<sup>23</sup> See in particular, J. HIENM, C. JOERGES (eds), *Ordoliberalism, Law and the Rule of Economics*, Portland: Bloomsbury, 2017.

<sup>24</sup> M. VOGLIOTTI, *Legalità*, in *Enciclopedia del diritto - Annali*, 2013, p. 371 *et seq.*, in particular p. 410 *et seq.*

the Court of Justice via *Integration through law*, which resulted from the European Treaties' provisions and the general principles of EU law as identified by the Court.<sup>25</sup>

However, that was a way of make law that was hybrid from the start, above all due to its dual genetic "pedigree" as described above: it is a model created on European functionalist lines, developed in the market for the market, largely using economic (and, to a lesser extent, sociological and political) methods. And after an initial period of equilibrium, in the last twenty-five years, the economy has even strengthened its dominant role with the creation and consolidation of the Economic and Monetary Union.

The hallmark of the evolution that has taken place in the European legal order is the fact that the economic method has "broken into" the legal sphere through a process of "juridification",<sup>26</sup> and the law has been exploited as an "infrastructure" to disseminate such method throughout the legal system.

Precepts from management have been translated into legal principles and this "juridification", focusing on economic rationality, has transformed the subject matter and the concept of legality: as it has been pointed out elsewhere, if "acting legally is no longer synonymous with acting efficiently, when the latter inspires the legal determination of administrative practice, all is lost".<sup>27</sup> Such a form of "juridified" efficiency has turned the necessarily dynamic and open-ended character of an economic process – into formal and binding rules, constraining and transforming them into legalism, and causing a logical and systemic short-circuit.

The resulting neo-liberal economic "constitution" has finally shaped the integration process in its various stages. The sovereign debt crisis has led to the development of an original regulatory framework, within which financial interests (and with them the related technicality of the sector) have shaped a new economic governance: an exceptional regulatory framework, in which the European institutions with specific technical expertise and a minimum degree of democratic legitimacy, like the ECB and various agencies, end up enjoying substantially unlimited powers.<sup>28</sup>

This regulatory system, in which both hard and soft law operate, gives rise to a series of paradoxes. EU norms delegate supranational independent authorities with purely technical skills (like the ECB and European Securities and Markets Authority) the exer-

<sup>25</sup> See Court of Justice, judgment of 23 April 1986, case C-294/83, *Les Verts v Parliament*, also drawing on Walter Hallstein famous speech in October 1964, see W. HALLSTEIN, *L'unité de l'action européenne*, Lausanne: Centre de Recherche Européenne, 1965, p. 5 *et seq.*

<sup>26</sup> J. CHEVALLIER, *La juridicisation des préceptes managériaux*, in *Politiques et Management Public*, 1993, p. 111 *et seq.*

<sup>27</sup> A. R. TASSONE, *Sulla formula "amministrazione per risultati"*, in *Scritti in onore di Elio Casetta*, Napoli: Jovene, 2001, p. 813 *et seq.*, in particular p. 823 (own translation).

<sup>28</sup> Although, in relation to the ECB, the Court of Justice has set some conditions: see judgment of 16 June 2015, case C-62/14, *Peter Gauweiler and Others v. ECB*, and judgment of 11 December 2018, case C-493/17, *Heinrich Weiss and Others v. ECB*.



cise significant discretionary powers, while the discretion of the national administrations is increasingly limited. As has been pointed out,

“If public legal regulation is fundamentally based on the conformity/non-conformity binomial (of conduct and acts) with respect to a law and is thus based on the legal/illegal premise, which in turn allows judicial control – the new governance, on the other hand, revolves to a large extent around evaluations, i.e., around another binomial, that of the success/failure of the economic performance of States and, therefore, of the policies they plan or implement”.<sup>29</sup>

In this respect, it is interesting to ask whether, especially after the serious economic crisis of 2008, European fiscal principles within the Euro system have become elements of the rule of law notion in the European Union,<sup>30</sup> given that they bind the governments of the Member States.<sup>31</sup> Some have argued that the responses to the financial and to the public debt crisis have caused a constitutional mutation in the European legal order;<sup>32</sup> others, by contrast, believe that a transformation has occurred, but it has been limited to institutional variation.<sup>33</sup>

The changes occurred in relation to the new economic governance, however, are essential to understand two distinct but related challenges to the rule of law, both of which dependent on the emergence of European administrative law: a) the fact that the consolidation of high levels of technical expertise has not been balanced by increased levels of political legitimacy of the policy-makers thereby posing a problem of democratic accountability in relation of the decision-making process; b) the lack of a parallel development of

<sup>29</sup> L. DE LUCIA, “Pastorato” e “disciplinamento” nella governance economica europea, in *Diritto pubblico*, 2016, p. 867 et seq. (own translation).

<sup>30</sup> See, *ex multis*, C. KILPATRICK, *The EU and its Sovereign Debt Programmes: the Challenges of Liminal Legality*, in *Current Legal Problems*, 2017, p. 337 et seq. It may be assumed that this has indeed come about, at least on the formal level. On the substantive level, however, as these rules have little democratic legitimacy, they do not contribute to the rule of law in a strict sense.

<sup>31</sup> See, *ex multis*, L. BESSELINK, J.H. REESTMAN, *The Fiscal Compact and the European Constitutions: ‘Europe Speaking German’*, in *European Constitutional Law Review*, 2012, p. 1 et seq.; K. TUORI, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014; N. SCICLUNA, *European Union Constitutionalism in Crisis*, London-New York: Routledge, 2014. With regard to the Fiscal Compact and the so-called Golden Rule, see, among others, F. FABBRINI, *The Fiscal Compact, the ‘Golden Rule’ and the Paradox of European Federalism*, in *Boston College International and Comparative Law Review*, 2013, p. 1 et seq.

<sup>32</sup> E. CHITI, P.G. TEIXEIRA, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Market Law Review*, 2013, p. 683 et seq.; M. DAWSON, F. DE WITTE, *Constitutional Balance in the EU after the Euro-Crisis*, in *Modern Law Review*, 2013, p. 817 et seq.; C. JOERGES, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, in *German Law Journal*, 2014, p. 985 et seq.; M. DAWSON, F. DE WITTE, *From Balance to Conflict: a New Constitution for EU*, in *European Law Journal*, 2016, p. 204 et seq.

<sup>33</sup> B. DE WITTE, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?*, in *European Constitutional Law Review*, 2015, p. 434 et seq.

administrative and constitutional law in the European legal system, the latter being still marginal, leads to an overall democratic weakness of the European integration process.

#### IV. TECHNOCRATIC LEGITIMACY AND THE PROGRESSIVE CONSTRUCTION OF A LIVING CONSTITUTION

The issue of the technical expertise as a ground to take legitimate decisions, bureaucrats with high levels of technical knowledge who exercise increasing powers within the European institutional system, has given rise to a broad debate. While guaranteeing a high level of technical performance, this model of post-national democracy raises problems regarding the lack of political and democratic legitimacy and the lack of adequate checks to balance this ontological weakness.<sup>34</sup> European spill-over was based, in functional terms, on the neutrality of technical decision-makers, relying on output legitimacy, as technocratic legitimacy has been defined. This, of course, favoured the emergence of administrative law, which found a favourable environment for its evolution and adaptation.

It has already been stated that the mechanisms of political accountability cannot easily be transposed in the European institutional system due to the way the accountability chain developed in the Member States, and it anyway needs to follow different paths on the basis of the organisational models to which it is meant to be applied.

In addition to this, two further problems have come to the fore. The first is a substantive question. The decision-making process followed by European agencies and other technical bodies operating within the EU institutional framework is lacking any link to electoral accountability and elections, which, instead, can be easily found, for example, in the United States, in the form of Presidential monitoring and direction over the federal agencies.

The second question is a procedural one. Among the European technical bodies, this presumed neutrality does not go hand in hand with adequate procedural guarantees on how technical authorities arrive at decisions, or, in procedural terms, on the judicial review of such technical decisions.

These problems have been dealt with in depth by the literature on the so-called "democratic deficit" and, for the purpose of this analysis two main opposite positions can be recalled here. On the one hand, Peter Lindseth claims that the European governance is eminently administrative in nature, with the consequence that European institutions, made up of bodies of bureaucrats with a technical training, are delegated by the Member States, which are the only subjects provided with a democratic legitimacy derived from the electorate (input democracy), to exercise regulatory power and to carry out tasks of social and economic regulation.<sup>35</sup>

<sup>34</sup> On neutrality and lack of accountability of the European institutions, see, *ex multis*, E. CHITI, *Is EU Administrative Failing in Some of Its Crucial Tasks?*, in *European Law Journal*, 2016, p. 576 *et seq.*

<sup>35</sup> P. LINDSETH, *Power and Legitimacy. Reconciling Europe and the Nation-State*, cit.

The second approach, illustrated, among others, by Deirdre Curtin,<sup>36</sup> is based on the composite nature of the European order and on the gradual construction of a living European Constitution. Actions shaping the European integration are sedimented and added together, as it happens between different geological layers. The current democratic deficit is acknowledged, but also the progress made over the last few decades, for example in relation to the empowerment of the European Parliament, are taken into consideration. Fragmentation and institutional pluralism, on the other hand, are ontologically part of the European order and derive from the high degree of conflict that arises from the multiplicity and diversity of the institutional actors and the interests at stake. Consequently, according to this strand of scholarship, to gradually overcome the current deficit, in the short to medium term, a proactive role of the Court of Justice, the increased use of political safeguard and transparency mechanisms, the greater involvement of national parliaments as well as the better implementation of the organizational principle of accountability are needed.

This idea of the European legal order as a progressively evolving phenomenon could pave the way for the introduction of instruments aiming to reconnect citizens with political decision-making processes at the European level and that would include a more political form of democratic legitimacy.

## V. ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW IN THE EUROPEAN LEGAL ORDER

Therefore, on the one hand, the functional and progressive development of the European legal order, above all of the economic and technically-oriented decisions and bodies, leaving politics mostly to the Member States, has made the rise and the consolidation of European constitutional law problematic; on the other hand, European administrative law has evolved rather easily, encountering few obstacles in its path.

Constitutional law experienced difficulties with regard to the construction of a European constitutional identity and the settlement of a supranational form of government, both in terms of the democratic deficit and the lack of transparency and public participation in the decision-making process and ultimately for the flexibility in the way the law is produced. With this regard, a sensitive area is that of the distribution of competences, regarding which, despite the progress made through the Treaty of Lisbon, a series of unresolved issues remain.<sup>37</sup> Likewise, for what concerns the protection of rights, despite the significant steps taken by the Court of Justice, there is still asymmetry in relation to the European Convention on Human Rights and a marked difference be-

<sup>36</sup> D. CURTIN, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford: Oxford University Press, 2009.

<sup>37</sup> S. GARBEN, I. GOVAERE (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future*, Oxford: Hart, 2017.

tween the rulings of the European Court and their concrete application by the other European institutions.

These ambiguities had an effect on the (failed) attempt to adopt the European Constitution. While it is true that much of the content found its way into the Lisbon Treaty, it is also true that this failure has been a setback for European constitutional politics and that the Treaties are currently suffering from over-constitutionalisation, i.e. the excessive codification of EU rules and procedure at level of primary law, as Dieter Grimm notes.<sup>38</sup>

European administrative law has taken quite the opposite route. Until a few decades ago, administrative law could only be linked to the State and could not exist beyond it. The last few decades have shown quite a different development and, especially after the Single European Act, the direction of European administrative law has been marked by enormous expansion in terms of scope of functions and competences, depth of development of principles and institutions, and the complexity of organisational configurations. Administrative law has freed itself of the State and has begun to explore unknown territories, both on continental and global levels, blooming and acting as a centre of gravity – a point of equilibrium – for the legal space beyond the State.

European administrative law initially developed through direct and shared administration only in a few specific, though essential, sectors, such as competition and agriculture. After the Single European Act and especially after the Maastricht Treaty (with its pillars and increased European competences), it has undergone an enormous increase in the scope of action in matter of economic and social cohesion, as well as in environmental policies. The steady growth of European agencies has further increased the importance of administrative law, although in some areas it has not produced the results expected, namely in the fields of social cohesion and open coordination, also due the limited competences enjoyed by the EU in this field.

Today this is no longer enough. The two-way process of constitutionalising administrative law and “administrativising” constitutional law,<sup>39</sup> which began and has developed in Europe itself, calls for a joint analysis of administrative and constitutional law. From this point of view, administrative law, given the way it developed at supranational level and globally, can be used as a basis for a renewed impetus for European constitutional law, or rather for European public law. The construction of a new institutional and polit-

<sup>38</sup> D. GRIMM, *The Constitution of European Democracy*, cit., p. 99: “Different from national constitutions, the treaties are not confined to those provisions that reflect the functions of a constitution. They are full of provisions that would be ordinary law in Member States. This is why they are so voluminous. As long as the treaties were treated as international law this was not a problem. As soon as they were constitutionalized their volume become problematic: in the EU the crucial difference between the rules for political decisions and the decisions themselves is too a large extent levelled. The EU is over-constitutionalized”.

<sup>39</sup> See, among others, F. WOLLENSCHLÄGER, *Constitutionalisation and Deconstitutionalisation of Administrative Law in View of Europeanisation and Emancipation*, in *Review of European Administrative Law*, 2017, p. 7 et seq.

ical structure for the Union is not reasonably possible without the decisive contribution of constitutional law.

This combination of administrative and constitutional law could bring beneficial effects, especially on the most controversial points in the European agenda: the development of European solidarity policies.<sup>40</sup> Policies of cohesion and cooperation have not worked well so far. But it may also be argued that, for the future of Europe, investment in solidarity, the protection of social rights, and the redistribution of wealth could also be a winning choice from the utilitarian, Benthamian, perspective.

## VI. RECONNECTING CITIZENS TO THE EUROPEAN INSTITUTIONS: THE ROLE OF LAW IN EUROPE

With a view to reconnect citizens with the European institutions the lost balance between law, economics and politics has to be restored. Historical cycles bear witness to the need for law, politics, economics, and the other social sciences to proceed according to an equilibrium, in a relationship of mutual exchange.

In order to do this, we first need to be clear about the underlying objective. If we are merely interested in a common market, a Europe of economic interests, able to address the other economic blocs with adequate tonnage, this union can only be temporary and instrumental, implying a tenuous link among the political, social and identity perspectives: in other words, as long as there is an economic advantage, all well and good; but if this is no longer the case, then each to his own.

The sudden EU eastwards enlargement of the borders has caused problems regarding the very structure of this supranational legal system and they cannot be ignored.

If, by contrast, the intention is to create a European order that can represent the home for the European peoples, then another direction has to be established: "If Europe does not want to run aground, it must no longer appear as a technical-pragmatic construct of economic rationality; it must present itself as an idea of order and be anchored in a vision of the political will of the peoples no less than of individuals".<sup>41</sup> First of all, it is necessary to rebuild the equilibria of the social model, making the contributions of the "partial systems" of the social sciences and the different methods symmetrical and mutually beneficial. This must be done in such a way that partiality does not prevail and that an interdisciplinary combination can be reconstituted.

<sup>40</sup> S. SCIARRA, *Solidarity and Conflict. European Social Law in Crisis*, Cambridge: Cambridge University Press, 2018.

<sup>41</sup> E-W. BÖCKENFÖRDE, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, Roma: Laterza, 2010, pp. 200-201. See M. KÜNKLER, T. STEIN, *Statism, Secularism, Liberalism – Böckenförde's Contributions to German Staatsrechtslehre in the Light of Contemporary Challenges Within and Beyond the State*, in *German Law Journal*, 2018, p. 137 et seq.

The way forward, in this direction, seems to be to strengthen cooperation between a small and cohesive group of countries in a union that can not only be economic, but also constitutional and political.<sup>42</sup> These countries could more or less coincide with the founding States, which, having historically shared the founding principles of the democratic state, could be able to construct a new European order built on unity in difference, also working on the constitutional, political, and social levels to protect fundamental rights.

For this reason it is also important to reconstruct the deep contents of the European rule of law, bringing the substance of this concept back to the legal sphere. Indeed, we are witnessing several troubles in the application of the rule of law, in which we see formally non-legal norms endowed with real normative scope and, on the contrary, formally legal standards with dubious material normativity. It is therefore necessary to go back to the roots of European legality, emphasising once more the extrinsic and intrinsic aims of the law. A concept of law rich in substance referred to the ultimate values – one that avoids isolation and relegation to the role of law as mere infrastructure – is needed. It is true that law is a second-degree concept, not primeval like morality, spirituality, politics and economics, and has thus been continuously exploited throughout history, with religion, politics, and economics sometimes using it for marginal and instrumental goals, adapting it to their purposes. It is also true, however, that there exists a fundamental characteristic of legality, in its intrinsic, “militant” goals, one might say: it tends to guide society through a sense of normative value, in a search for proportion and, therefore, for the right balance between the many interests coexisting in society and among the goals of the various social sciences, and it shall be pursued through reasonable and accepted regulation, in such a way as to be able to continually adapt to social change.

It also follows that the law is naturally inspired by the form and limitations of the influence coming from the methods and goals of the other social sciences: the rule of law, understood in a substantive sense, constitutes a check against the primordial instincts leading to the prevalence of the methods and aims of one social science over the others. And, with this meaning, law plays a fundamental role in coalescing the aims of the other sciences at a given historical moment in order to transform their reasons into rules. Therefore, the lost balance between the different social sciences must be found once again: law, in this context, represents both the means through which this new balance may be found and the goal to be pursued precisely through the discovery of the right proportion.

This does not imply an absence of asymmetries and differences. It has been noted in this regard that a sustainable degree of asymmetry may even be a factor for integration, rather than disintegration, if “exercised in compliance with certain (procedural and

<sup>42</sup> See, amongst many, F. SCHIMMELFENNIG, D. LEUFFEN, B. RITTBERGER, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation*, in *Journal of European Public Policy*, 2015, p. 764 et seq.; B. DE WITTE, *Variable Geometry and Differentiation as Structural Features of the EU Legal Order*, in B. DE WITTE, A. OTT, E. VOS (eds), *Between Flexibility and Disintegration The Trajectory of Differentiation in EU Law*, Cheltenham: Edward Elgar, 2017, p. 9 et seq.

substantive) guarantees in order to safeguard the constitutional core of the system of reference".<sup>43</sup>

In conclusion, law can act as an infrastructure, but it must not deviate from the fundamental values (namely democracy and justice) at the heart of liberal constitutionalism. What is needed is a return to the "constitutional moment",<sup>44</sup> to the innermost meaning of "integration through law", to the original post-war period when law, politics, and economics merged in an efficacious union; a return to the 1944 Philadelphia Declaration, the expression, as an appendix to the horrors of the Second World War, of the will to construct a new international order based on law and justice and on the protection of fundamental rights.

## VII. THE RULE OF LAW IN ACTION FROM THE ADMINISTRATIVE LAW STANDPOINT

In practical terms, in what directions can we work to build up a different structure for the European legal order, strengthening its democratic legitimacy and reconnecting citizens to the European institutions?

From the administrative law standpoint, there are basically three ways forward. First of all, there is the administrative procedure. A positive move would be to adopt a European administrative procedure Act, based on those already in place in the vast majority of Member States.<sup>45</sup> Although many principles and rules for administrative action have been drawn up in Court of Justice's case law, it is significant that the decisions of the European institutions based on technical expertise are often marked by opacity in terms of mechanisms for fair procedure, due process, and transparency.

A second area to work on might be the substantive aspects of the decision-making process. Procedural aspects must go hand in hand with substantive ones as far as the content of public decisions is concerned. From this point of view, the principle of proportionality is of vital importance for all the technical work carried out by the European institutions and in particular for the regulation of the financial markets: the decisions taken at European level must guarantee the least possible sacrifice for the holders of conflicting public and private interests.<sup>46</sup>

<sup>43</sup> G. MARTINICO, *Quanto è sostenibile l'integrazione (asimmetrica) sovranazionale. Note di diritto comparato*, in *Istituzioni del federalismo*, 2018, p. 299 (own translation) and R. BELLAMY, S. KRÖGER, *Differentiated Integration as a Fair Scheme of Cooperation*, in *EUI Working Paper RSCAS*, no. 27, 2019.

<sup>44</sup> B. ACKERMAN, *We the People, Volume 1: Foundations*, Cambridge, MA: The Belknap Press of Harvard University Press, 1991.

<sup>45</sup> See the European Parliament resolutions, 15 January 2013 and 9 June 2016. See also the project ReNEUAL (renewal.eu): in particular, P. CRAIG, H.C.H. HOFMANN, J.-P. SCHNEIDER, J. ZILLER (eds), *ReNEUAL. Model Rules on EU Administrative Procedures*, Oxford: Oxford University Press, 2017.

<sup>46</sup> The democratic legitimacy of the public authorities and the contemporary needs for an administrative action based on reason are central questions not only in Europe, but also in the United States. In the last few years, Donald Trump has developed a plebiscitarian concept of democracy and interpreted

However, it would be a mistake to think that the acts adopted by the European institutions should simply be the result of the balance between the interests of the Member States (and the interests of private parties) in substantive and procedural terms. Administrative law alone is not enough; constitutional law and the clear adherence to and promotion of fundamental values in the adoption of common policies are also required.

This means intervening in the mixed field (at the same time constitutional and administrative) of the distribution of competences and of the institutional structure, the most delicate part of the integration process.

Emphasis should be given to the division of competences between supranational and national institutions and to the legitimacy of the European institutions' powers in the complex administrative integration: in particular, the unsolved accountability problems determined by the overcoming of the *Meroni* non-delegation doctrine and the division of powers between the European Commission, the EU agencies and national governments and administrations has to be tackled.<sup>47</sup>

Moreover, differentiated integration could allow the implementation of common policies in the fields of taxation and banking. But it is above all through the revitalisation of policies fostering solidarity, the redistribution of wealth, and the management of borders that the ability to reconnect the European institutions with their citizens will come about: from these actions, European citizens will be able to appreciate once again the importance of a shared sense of belonging to this particular legal system.

The evolution of the European legal order shows that the current crisis is mainly one of legitimacy and political accountability, with a series of consequences for their operationalisation in terms of both *input* and *output legitimacy*. It also implies the demise of *political messianism*, which has marked the construction of Europe since the Schuman declaration.<sup>48</sup> In this regard, Joseph Weiler aptly remarks that "Democracy was not part of the original DNA of European Integration. It still feels like a foreign implant. With the collapse of its original political Messianism, the alienation we are now witnessing is only to be expected".<sup>49</sup>

"its electoral mandate as a mandate to engage in quasi-authoritarian rule": see J.L. MASHAW, *Reasoned Administration and Democratic Legitimacy. How Administrative Law Supports Democratic Government*, Cambridge: Cambridge University Press, 2018, p. viii. Nevertheless, the author argues that the model of reasoned administration is still at the heart of modern American administrative law.

<sup>47</sup> See, in particular, M. SIMONCINI, *Administrative Regulation Beyond the Non-delegation Doctrine. A Study on EU Agencies*, Oxford: Hart, 2018.

<sup>48</sup> J.H.H. WEILER, *In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration*, in *Journal of European Integration*, 2012, p. 825 *et seq.*

<sup>49</sup> J.H.H. WEILER, *60 Years since the First European Community – Reflections on Political Messianism*, in *European Journal of International Law*, 2011. See also in this *Special Section* L. RYE, *The Legitimacy of the EU in Historical Perspective. History of a Never-ending Quest*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 191 *et seq.*



We must not underestimate, as mentioned above, the other side of the coin. Compared to the national level of government, the European institutions and the Court of Justice are not only different manifestations of how the rule of law has developed as a result of financial and fiscal transformations. They also constitute a shield protecting the foundations of the European rule of law both in relation to the legal systems of the Member States and to international organisations, as shown by the aforementioned case law – *Kadi*, *Associação Sindical dos Juizes Portugueses* and the judgments against Hungary and Poland.

A recent example of this very important function performed by the European rule of law is the judgment of the Court of Justice on the independence of the Polish Supreme Court (C-619/18, *Commission v. Poland*). Three key issues emerge from this case: 1) the Court of Justice plays a central role in the EU's unique institutional organisation, since the European legal order has an unquestionable judicial traction; as in previous critical junctures, it is the court that gives new vigour to the integration process, through the law; 2) the constitutional legitimacy of the EU, weakened by the wreck of the draft European Constitution, can find renewed strength through the rediscovery and enhancement of the founding principles of the European order, as set out in the Treaties; 3) the move towards authoritarianism that is affecting some countries in particular, as well as the shift towards sovereignty and populism across the entire continent, can be curbed through law.

It is with this regard that the force of law needs to be understood not as mere infrastructure but as a form of enhancement of the principles underpinning the pact between the peoples of Europe.

Defence of the substantive principles of the rule of law and of the democratic structures based on checks and balances is the most important legacy of the past, to be protected in order to guarantee a solid future to the European citizens. To this end, it is to be hoped that the law – not seen in the merely formal or instrumental sense, but for its substance – will regain a central role in the European order.

