



ARTICLES

SPECIAL SECTION – EUROPE AND “CRISIS” (FIRST PART)

THE PAST OF AN ILLUSION? PLURALISTIC THEORIES OF EUROPEAN LAW IN TIMES OF “CRISES”

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ABSTRACT: The deep transformation of the practice of European law calls for a systematic rethinking of the theories with the help of which European law is analysed, reconstructed and assessed. In this *Article*, I test the reconstructive potential and the normative soundness of constitutional pluralism as a constitutional theory to make sense of European integration. In Section II, I disaggregate the concept, by means of setting in their wider context the different conceptions of constitutional pluralism that had been advocated. In Section III, I show why the reconstructive potential of the most sophisticated version of constitutional pluralism, pluralistic federalism, has been drastically limited by the deep transformation of the practice of European law. In Section IV, I consider the limits of constitutional pluralism as a normative theory of European integration. The last section holds the conclusions.

KEYWORDS: European Union law – constitutional theory – legal theory – European integration – constitutional pluralism – supremacy.

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I. INTRODUCTION

The way power is organised in Europe has changed deeply and extensively in the last four decades. Such transformations have become most visible in the wake of the several crises that have hit Europe in the last decade. But it would be ill-advised to conclude that the ongoing “constitutional mutation”¹ has been the odd storm gathering in a serene sky. Rather, it is more accurate to say that the crises have exposed the far from new structural tendencies and proclivities and, at the same time, have accelerated and radicalised ongoing processes of change. In other words, the government of the crises has unleashed a new wave of transformation of the European Union,² but one that builds on the radical alterations brought about by the understanding of the relationship between politics, economics and law that emerged in the late seventies and consolidated in the early eighties as the single market and economic and monetary union (EMU) were established.³

But if the law has changed, if legal practice has changed, should that not have a major impact on the way EU law scholarship is done? In other terms, can theory remain the same when practice has radically changed? That is the question that I try to answer in this *Article*, focusing on the most popular theoretical lenses among European legal scholars, namely “constitutional pluralism”.

The *Article* is structured in three parts.

In section II, I disaggregate the concept of “constitutional pluralism” by means of considering both (1) the transformations of pluralistic theories over time, or what is the same, how the different turning points in the evolution of the practice of EU law have resulted in different understandings of “constitutional pluralism”, and (2) the underlying continuities, what elements of constitutional pluralism have proved resilient and have consequently endured. This leads me to a first and very important interim conclusion, namely that “pluralistic federalism”, as proposed by Weiler and MacCormick, is the most coherent conception of “constitutional pluralism”.

In section III, I explore the degree to which “constitutional pluralism” provides guidance in the reconstruction of the actual practice of European law. I find that while “constitutional pluralism” constituted a powerful tool to understand the functioning of European law in the late sixties and early seventies, the drive towards the single market and to economic and monetary union, and even more explicitly so, the government of the crises since 2007 have changed the fundamental structural principles and substantive content of European law to a point at which “constitutional pluralism” distorts more than clarifies the practice of European law.

¹ A.J. MENÉNDEZ, *A European Union in Constitutional Mutation*, in *European Law Journal*, 2014, p. 127 *et seq.*

² A.J. MENÉNDEZ, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 453 *et seq.*

³ A.J. MENÉNDEZ, *The Crisis of Law and the European Crises*, in *Journal of Law and Society*, 2017, p. 56 *et seq.*

In section IV, I consider the extent to which “constitutional pluralism” can still be recovered as a constitutional theory. That depends, it seems to me, on whether constitutional pluralists take seriously the reasons why they failed to realise the depth and extent of the transformation of European Union law practice, and in particular, the structural implications of the single market and the single currency, and why they failed to take critical distance from the intrinsically centralising doctrines of direct effect and primacy.

II. PLURALISTIC CONSTITUTIONAL PLURALISM? DISAGGREGATING CONSTITUTIONAL PLURALISM

While no constitutional theory is monolithic, “constitutional pluralism” is perhaps especially prone to the multiplication of variants. The result is that we are faced with an “umbrella” concept, encompassing rather diverse legal and constitutional theories. Attempts have been made at constructing a “systematic” constitutional pluralism out of the core ideas of the authors usually taken to be canonical references of that theoretical orientation.⁴ But leaving aside whether it is inherently contradictory to aim at fleshing out a monistic understanding of constitutional pluralism, the fact of the matter is that I remain unpersuaded by the attempt (even if it has contributed to my own understanding of the different authors and theories). If only because the exercise quickly becomes over-theoretical, and at any rate aloof from the actual practice of European law.

So, instead of focusing on the intrinsic theoretical merits of the different conceptions, in this section I proceed first to distinguish the different layers in the evolution of pluralistic thinking about European law, setting them in the context of the shifting practice of European law. By doing so, it is possible not only to relate the different conceptions of constitutional pluralism to the key turning points in the evolution of the practice of Union law, but also to single out the legacy of previous conceptions to the present practice of constitutional pluralism.

II.1. STRATEGIC PLURALISM

It is no secret that most of the “founding fathers” of Community law were committed to the idea of creating a European federal State; or, in the terms that were not infrequent until the mid-fifties, of a United States of Europe. The substantive content of Community law, and the perception that institutional actors, companies and citizens had of Community law, were expected to play a fundamental role in the process. In summary terms, Community law was to be the constitutional law of the United States of Europe. In itself, this understanding, more than pointing to a pluralistic understanding of the relationship between Union law and national law, points to the projection to the supranational level of the model of a rather centralised State, a trend that had been exacerbated

⁴ K. JAKLIC, *Constitutional Pluralism in the EU*, Oxford: Oxford University Press, 2014.

ed in the United States by the efforts first of economic recovery (the New Deal) and then by the strong nationalisation of power during the Second World War.⁵

However, the “founding fathers” of Community law failed at first. The bid to persuade the Court of Justice to construct the Treaty establishing the Coal and Steel Community (ECSC) in the early fifties was not successful. The quasi-constitutional Treaty that would have established the Defence and Political Communities collapsed in 1954. The Rome Treaties establishing the European Economic Community (EEC) and Euratom seemed to kick in the long grass any federal ambitions. Not only the “supranational” features of the Coal and Steel Community were diluted (the EEC Commission was much more of an international secretariat than the High Authority of the ECSC), but the fact of the matter was that there would be three Communities, with three institutional structures and three legal orders.

Out of this series of failures came a recalibration of the strategy of European “centralists”. In other words, events forced a pragmatic redefinition of what they aimed at. Instead of a straightforward claim to get Community law acknowledged as the “supreme law of the land”,⁶ the objective was to break the monopoly of ultimate authority of national legal orders. The recognition of the “equal” standing of Community law would result in opening up the legal and political space within which Community law could be turned into the supreme law of the land (at a later date). The strategy, in short, was *one aiming at a monist destination* (the law of a United States of Europe) passing *through a strategic (and transitory) endorsement of pluralism*.

This peculiar blend of pluralism and monism crystallised in litigation before the Court of Justice. The legal service of the Commission persuaded a majority of the Court to endorse strategic pluralism. Firstly, the three supranational legal orders springing from the three Community Treaties were interpreted as if making up one single Community law.⁷ Secondly, European law was affirmed as proper law in *Van Gend en Loos*.⁸ As is very well-known, the Luxembourg judges affirmed not only that “self-executing” Treaty provisions had full legal effects, but also that the specific effects exerted at the

⁵ B. ACKERMAN, *We the People II: Transformations*, Cambridge: Harvard University Press, 1998.

⁶ It would have been met with frontal opposition from national institutional actors and national legal communities. In particular, the memory of the postwar democratic constitutional refounding was rather fresh in the minds of national legal communities by the time the early Communities were established in 1951 and 1957. A (very positive) result of the new “constitutional beginning” in France, Italy and Germany was the strong association in national legal and constitutional culture between constitutional supremacy and democratic legitimacy, an association that would have on its own stopped in its tracks the claim that Community law should be regarded as the supreme law of the land. This was clearly understood by “pioneers” of Community law. Exemplary in this regard E. STEIN, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, in *Michigan Law Review*, 1965, p. 491 *et seq.*, especially at pp. 514 and 516.

⁷ See for example M. LAGRANGE, *The Court of Justice as a Factor in European Integration*, in *American Journal of Comparative Law*, 1966, p. 709 *et seq.*

⁸ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*.

national law were governed by Community law itself. The grounding of the ruling seemed at first sight to be the doctrine of "direct effect" as known in public international law. Indeed, the Court characterised Community law as a "new order of international law". However, the Court fine-tuned the argument so as to be able to rely on international law while at the same time leaving open the question of whether Community law was something else than "classical" international law. Having left the door ajar in *Van Gend en Loos*, the Court pushed it open in *Costa*.⁹ The Luxembourg judges found that States could not relativise the obligations they have assumed ratifying the Treaties by means of passing new laws in breach of the Treaties. The Treaties had to enjoy passive force over subsequent national laws, or what is the same, *prevail* over them. While this could be said to stem from the classical doctrine of supremacy in international law, the Court was keen to take distance from international law. The characterisation of Community law as a new order of international law was dropped. Community law was indeed a new legal order, but one different from those of classical international law.¹⁰

Van Gend en Loos and *Costa* contained powerful "monistic" seeds. The "new" understanding of direct effect pointed to the dilution of the borders between supranational and national law. At least the Community norms affirming the direct effect of Community norms became integral part of national legal orders. Primacy pointed in the same direction, and contained elements of a hierarchy where Community law prevailed over national law. But the monistic bid was very cautious. The immediate impact of the *Van Gend en Loos* ruling itself was marginal and transitory, while in *Costa* the Court affirmed a principle but devoid of immediate consequences. The very "thinness" of Community law, made up of a very small number of regulations and directives at that time, resulted in primacy being a lion incapable of roaring. The reaffirmation of intergovernmental leadership from 1965 onwards resulted in a careful point to point navigation in rather rough waters. The monistic élan of direct effect and primacy would remain dormant for more than a decade.¹¹

Still, this original strategic pluralism casts a long shadow not only on EU law scholarship in general, but on pluralistic theories of European law. Strategic pluralism coined the pluralistic image of the "two legal orders", while weaving it in one and the same cloth the key structural principles (of monistic lineage and potential) of direct effect and supremacy.

⁹ Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. E.N.E.L.*

¹⁰ E. STEIN, *Toward Supremacy of Treaty-Constitution by Judicial Fiat*, cit., p. 512: "A strong argument can be made, however, that in the *Costa* judgment the Community court in principle embraced the new approach, and held the rule prescribing the supremacy of Community law, although originating in the Community Treaties, binds national courts directly and must be applied by them regardless of any contrary national constitutional provisions concerning Treaty law in general".

¹¹ E. STEIN, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy*, in *University of Pennsylvania Law Review*, 1979, p. 897 *et seq.*; J.H.H. WEILER, *The Community System: The Dual Character of Supranationalism*, in *Yearbook of European Law*, 1981, p. 275.

II.2. PLURALISTIC FEDERALISM

The erosion of the underlying socio-economic consensus of the fifties and sixties around the democratic and social State revealed the extent to which the proper functioning of the supranational institutional structure and decision-making processes depended not only on institutional engineering, but on wider social, political, economic and cultural circumstances. The “evolutionary achievements” of Community law seemed to be imperilled by the economic and political crises of the Communities. The way out of the impasse was sought, as we will see in more detail in section III, in *l'Europe par le marché*, or what is the same, in the simultaneous emancipation of economic from political integration through the elimination of national economic borders, and in the transformation of the very understanding of economic freedoms and the principle of undistorted competition. While some of the changes (such as the European Monetary System) were decided intergovernmentally, others were effected by the courts, and in particular by the Court of Justice in coalition with national “lower” courts. This was clearly the case of the recharacterisation of economic freedoms, no longer operationalisations of the principle of non discrimination, but of an emerging supranational right to private property (and to entrepreneurial freedom). This move was originally resisted by some national governments and by some national constitutional courts. The latter expressed serious reservations regarding the core elements of strategic pluralism, as described in the previous section.

This was the context in which constitutional pluralism was redefined, expanding it into a full-blown constitutional theory, going beyond the resolution of the conflicts stemming from the structural relations between supranational and national law.

The new type of pluralism, federalistic pluralism, strived to give proper notice of the normative possibilities opened up by the transcendence of the aim of creating a unitary form of United States of Europe. As was said in the introduction to one of the most influential scholarly projects on the theory of European law: “Europe does not need, or could not at least digest, one comprehensive federal system, with a unique set of institutions, courts, administrative agencies and norms to deal with the challenges facing her. Pluralistic federalism would mean the setting up of interlocking circles of institutional arrangements and normative provisions accepted by different groupings of States”.¹²

The background assumption was that the European Communities was not a State in the making, but rather a non-state polity that was transforming the sense in which European States were States. Far from power shifting to the supranational centre, the institutional structure and decision-making processes of the Communities had taken a clear intergovernmental turn. Momentous in that regard was the Luxembourg compromise of

¹² M. CAPPELLETTI, M. SECCOMBE, J.H.H. WEILER, *Integration Through Law: Europe and the American Federal Experience – A General Introduction*, in M. CAPPELLETTI, M. SECCOMBE, J.H.H. WEILER (eds), *Integration Through Law*, Berlin and New York: De Gruyter, 1986, p. 67.

1966, which stopped in its tracks the move to qualified majority voting in the Council and gave way to a “symmetric form of intergovernmentalism”, or what is the same, a form of intergovernmentalism in which the equality of States was not merely formal. Federalistic pluralists assumed that nation-states were not on their way out, but had been reinforced by European integration. As Alan Milward would memorably put it, integration had “rescued” the social legitimacy of nation-states by means of creating the conditions under which national democratic and social *Rechtsstaaten* were feasible. In the process, if one is allowed to use Bickerton’s image slightly out of context, sovereign States had been turned into open and cooperative States, into Member States; but still States they were.

Two different but complementary variants of pluralistic federalism would emerge. On the one hand, some pluralists (Cappelletti and Weiler) argued that the federal balance between union and diversity hang in the balance between a symmetrically intergovernmental institutional structure and decision-making process and a directly effective and supreme supranational law (“dualistic supranationalism”), while other pluralists (MacCormick, Walker) regarded the plurality of European legal practice itself as a fundamental source of enduring pluralism (constitutional pluralism *stricto sensu*).

a) Dualistic supranationalism.

Weiler provided in his early work, and in a more complete form in his seminal *The Transformation of Europe*, a detailed reconstruction of the transformation of Community law into an autonomous legal order.¹³ The constitutional strategy behind strategic pluralism had been realised by the successive fleshing out of the doctrines of direct effect, primacy and pre-emption. But if law had become a formidable centripetal force in the process of European integration, it was still the case that Community law had not been turned into a “traditional” supreme law of the land. That was so because at the very same time that the primacy of Community law was affirmed, the design of the institutional structure and the decision-making processes of the Communities had been reshaped in such a way as to guarantee that Member States (and first, foremost and most conspicuously, national governments) retained the collective authorship of supranational law. The result of the tension between the two components of this “dualistic” constitution was a polity (and a legal order) that was neither centralised nor fragmented, but rather provided a new (and promising) embodiment of the federal principle: a genuinely *pluralistic* form of federalism. A form based on what Weiler would come to describe as “constitutional tolerance”, which guaranteed that when States obeyed Community law, States were actually obeying themselves; or as Weiler himself would

¹³ J.H.H. WEILER, *The Transformation of Europe*, in J.H.H. WEILER, *The Constitution of Europe – Do the New Clothes Have an Emperor?*, Cambridge: Cambridge University Press, 1999, p. 28: “The combination of the ‘constitutionalisation’ and the system of judicial remedies to a large extent nationalised Community obligations and introduced on the Community level the habit of obedience and the respect for the rule of law which traditionally is less associated with international obligations than national ones”.

put it, going even further than that, State obedience to Community law was a voluntary, and constantly renewed, act.

b) Constitutional pluralism stricto sensu.

Neil MacCormick (followed later by Walker) reached a similar conclusion departing from a rather different disciplinary background. European legal practice, and in particular the complex relationships between supranational and national law, struck the Scottish philosopher as evidence of the core tenets of pluralistic legal theories, including his own institutional theory of law; in particular, European legal practice proved that it was possible to decouple law from the regulatory ideal of a final or sovereign authority (be it a *sovereign* – as in Austin – or a final and ultimate rule of recognition or *Grundnorm* – as in Kelsen or Hart). By the late eighties, it could be observed that the several legal orders co-existing in the territory of the European Communities (mainly, but not exclusively, Community law and national legal orders) discharged the tasks characteristically assigned to law in modern societies (including the production of certainty about common action norms) despite the fact that there was no sovereign or final *Grundnorm* that could be resorted to determine how to solve eventual conflicts between the supranational legal orders. As long as there was a considerable substantive affinity between the co-existing legal orders (a precondition for a pluralistic legal practice), conflicts would remain limited in number and transcendence, and could be solved through means other than formalised legal decision-making. MacCormick's pluralism highlighted the limits of law in general, in line with his characterisation of law as grounded on social practice.¹⁴ His theory of Community law projected this core insight, opening the way to considering the convenience of

¹⁴ Contrary to what was the case with the perhaps two most powerful classical legal positivistic theories of the 20th century (Kelsen's and Hart's), MacCormick made an explicit effort to build legal theory "bottom-up", that is, departing from general social practices (and not elite social practices). This "sociological approach" led MacCormick to relativise the centrality of the "sovereign State", in particular "the law of the Sovereign state". The "bottom up" perspective is perhaps most clearly reflected in his recharacterisation of the rule of Kelsen's *Grundnorm* and Hart's rule of recognition. Cf. N. MACCORMICK, *Questioning Sovereignty*, Oxford: Oxford University Press, 1999, pp. 23-24: "If one attaches to the austere view of Kelsen, then the *grundnorm* can only be presupposed – a norm conferring authority on the Constitution and hence on those whom it authorises to make and enforce law [...]. Where one's concern are, as in the present work, with the interface and overlap between law and politics, such austerity is unproductive. Law is not only an object of study for legal science, but is in some form an element in the lives and actions of citizens and officials. It has a social dimension for which we must account [...]. It remains true that there is always a custom prior to any Constitution, and there can be a widespread custom of respecting a Constitution and demanding this respect as what is due. Such a customary norm of respect for the Constitution is the securest normative underpinning of it – a shared custom extended in time [...] it is only where states grow overwhelming in ambition that they seek to confine custom to the single function of working as a constitutional foundation, or to negate it altogether as a source of law [...]. At the same time they are apt to seek to redefine all forms of institutional order as existing only by delegation from and permission from the state itself". Cf. also N. MACCORMICK, *Institutions of Law*, Oxford: Oxford University Press, 2007, pp. 57 and 288.

ultimate legal conflicts being solved through a return to politics (a move which was structurally similar to Weiler’s proposed supranational constitutional court).

c) Common ground.

A shared fundamental premise was that the stability of a pluralistic legal practice was not to be taken for granted (or be expected to be assured spontaneously), but required a conscious effort. Three key conditions seem to me to emerge in the writings of pluralistic federalists.¹⁵

Firstly, the allocation of power between the European Union and the Member States should ensure the capacity of collective action through supranational institutions while avoiding the hollowing out of the national political processes.¹⁶

Secondly, the institutional structure and decision-making processes should be so designed as to embed Member States into the European Union.

Thirdly, supranational law should remain a major vehicle of pluralistic integration, something that rendered critical its being a carrier of democratic legitimacy (including its role as a belt transmitting legitimacy from the national to the supranational level).

Both Weiler and MacCormick understood (and stressed) that pluralistic federalism was not to be a one-way street. Federalism was not only about unity, but also about diversity. The two authors assumed that the existing institutional structure and substantive content of Union law created the conditions under which diversity could thrive. We will see in section III that there were good reasons to be of a different view already at the very time that Weiler and MacCormick were writing.¹⁷ At this stage in the argument, it is important to stress the structural difference between the *strategic* character of the use of the “two legal orders” image in the early doctrine of Community law and in pluralistic federalism. And, at the same time, the extent to which this image, and the companion doctrines of direct effect and primacy, were left unchallenged by pluralistic federalists.

II.3. JUDICIAL PLURALISM

By the late 1990s and early 2000s, an asymmetric economic and monetary union was launched (with apparent initial success), and the massive enlargement of EU membership

¹⁵ J.H.H. WEILER, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in M. WIND, J.H.H. WEILER (eds) *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, p. 14.

¹⁶ In that regard, existing “federal States”, such as the United States and Germany were not role models, on account of their having become too centralised.

¹⁷ The new understanding of economic freedoms was expected to be the linchpin of future political integration (Weiler and Cappelletti) and a further step in the diffusion of power (a form of “market subsidiarity” in the view of MacCormick). Economic and monetary union was welcomed by Cappelletti, on the basis of the observation that monetary power had come to be very unevenly distributed among Member States. By the early 2000s, Weiler saw in the *status quo* (by then heavily shaped by the three elements of *l’Europe par le marché*) the embodiment of constitutional tolerance, a major achievement that could be threatened by the constitutional ambitions of European political actors.

to former Communist countries was scheduled. However, the renewed “expansion” of the breadth and scope of Union law provoked a new wave of resistance to EU law. National constitutional courts imposed new limits on the core elements of the structural principles of relationship between Union law and national law, that is, direct effect and primacy.

It was at that specific turn in European integration that a third set of pluralistic theories of European law emerged. Partially building on (implicitly) strategic pluralism and (explicit) pluralistic federalism, a new set of authors focused on providing pluralistic guidelines to solve the second wave of conflicts between on the one hand the Court of Justice and on the other hand national constitutional or supreme courts. Judicial pluralists affirmed that not only the said conflicts provided the ultimate proof of the pluralistic character of European legal practice (and thus were not to be regarded as proof of its defective character, or symptoms of an underlying “constitutional” malaise) but that it was normatively commendable that instead of being progressively eliminated, conflicts would recur. The very “pluralistic” character of European Union law rendered the occurrence of conflicts a fully normal (and salutary) phenomenon:

“What if what makes the European legal order unique is that the open question [who decides who decides] should remain open? (...) the values of the question ‘who decides who decides’ and the lack of an ultimate authority can be linked to the values of constitutionalism as one of its guarantees of limited power; in a multi-level or federal system it is the vertical or federal conception of constitutionalism that requires the issue of who decides who decides to be left unresolved”.¹⁸

But while radical pluralists would stop at that, judicial pluralists strived to reconcile endemic pluralism with the introduction of mechanisms that would reduce or manage “the potential conflicts between legal orders while promoting communication between them”.¹⁹

On the one hand, thus, it should be acknowledged that there is a plurality of equally sound standpoints from which the conflict can be solved. It is not only the case that the correct legal answer to the case at hand could look different from the standpoint of the supranational judges sitting in Luxembourg or the national judges sitting in Rome. Judicial pluralists claim that both claims are equally valid, being a conflict between two perspectives that are constitutional in the same sense, and which should be recognised the same dignity and force.²⁰

¹⁸ M. MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003, pp. 522-523.

¹⁹ *Ibid.*, p. 524.

²⁰ It is important to notice that the assumption of pluralistic federalists was very different, namely, that the sense in which supranational law and national law were constitutional was rather different. Indeed, the normative value of European law depended on not becoming constitutional in the same sense as national law was so.

On the other hand, a solution to each of the specific conflicts was needed to ensure that European law, both supranational and national, remained capable of discharging basic integrative tasks. Two main alternatives were put forward.

Firstly, the conflict could be solved by reference to the “thin” ethical principles that underpin both the supranational and the national legal orders, which would ground a set of rules of conflict thus internal to both systems (the rules may be in conflict, but not the underlying principles; going back to the principles, it would be possible to determine which is the adequate rule).²¹

Secondly, the gap between the supranational and national standpoints could be bridged not through the “monistic” harmonisation of the applicable law, but through the development of a sort of common constitutional culture, through which all judges, both supranational and national, would come to consider how to deal with the case from a standpoint that comprises both standpoints (by means of adapting their “own set of perspectives to the possible contacts and collisions with other systems”).²² This entails redefining the very identity of judges, which would be required by this new constitutional culture to regard themselves as judges not only of the legal order to which they are institutionally affiliated (the legal order that makes them judges), but as judges of the “composite” European legal order (opening themselves to “the “recognition and adjustment [...] of the claims to authority made by other legal orders”,²³ with their rulings “integrating the claims of validity of both national and EU constitutional law”).²⁴ Judges will be urged to interiorise that their mission, according always to the new constitutional culture, is to engage in the “coherent construction of a common legal order”, making their decisions “fitting with previous decisions of other participants”,²⁵ and thus grounded “in a doctrine that could be applied by any other national court in similar situations”.²⁶

II.4. PLURALISTIC PLURALISM OR PLURALISTIC FEDERALISM?

The layered reconstruction of the evolution of pluralistic theories of European law reveals both the continuities and the discontinuities within constitutional pluralism.

“Pioneering” Community law scholarship developed a form of strategic pluralism that not only may be said to keep on informing the theories underpinning the discourse and decisions of the Court of Justice or the European Commission, but which has pro-

²¹ M. KUMM, *Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism*, in M. ABVELJ, J. KOMÁREK (eds) *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart, 2012, p. 54: “a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in particular circumstances”.

²² M. MADURO, *Contrapunctual Law*, cit., p. 525.

²³ *Ibid.*, p. 526.

²⁴ *Ibid.*, p. 524.

²⁵ *Ibid.*, p. 527.

²⁶ *Ibid.*, p. 530.

vided both the conceptual framework and some of the key elements to which all pluralists have subscribed. Even if only for strategic reasons, it was “pioneering” Community law that introduced the image of the “two legal orders” and that emphasised the autonomy of the supranational and national legal orders. Despite the rather conspicuous monistic élan of the concepts of direct effect (and even more clearly) supremacy, pluralists have kept on discussing the relationships between the two legal orders by reference to such concepts (as has European legal scholarship in general).

Pluralistic federalism broke away from the claim to absolute novelty of Community law characteristic of the scholarship that established the discipline (the “sui-generism”) and connected theorising to well-established constitutional (federalism) and jurisprudential (legal pluralism) theories. This was not a form of strategic, but of pluralism *tout court*. That fostered a concern with the preconditions and conditions of stability of a pluralistic practice. While Cappelletti and Weiler emphasised structural institutional and procedural elements, MacCormick and Walker focused on the balance of legal authority claims. Still, the legacy of strategic pluralism was very strong. This reflected in pluralistic federalism taking for granted, without any empirical testing, that the existing institutional and substantive structure of the Communities was conducive to the fostering not only of unity, but also of diversity, even if direct effect and primacy were at the core of their practice.

Judicial pluralism may be regarded as an attempt at operationalising the intuitions of pluralistic federalism, while diluting when not dropping the structural concern of the latter with the political and legal mechanisms needed to ensure the stability of pluralistic legal practice. Judicial pluralists came to assume, not unlike strategic pluralists, the forward march of European integration, while emphasising, contrary to the latter and following MacCormick and Walker, the importance of non-legal sources of integration: thin “ethical” principles and a common constitutional culture. The results were invariably centralising, if not of the law itself, of legal practice and of legal culture.

It can thus be concluded that of the three variants of pluralism, only pluralistic federalism fully and consistently endorsed pluralism as the normative compass of the development of European Union law and considered the conditions under which pluralistic legal practice could be stabilised. Contrariwise, pluralism was only endorsed by strategic and judicial pluralists for tactical reasons. In particular, judicial pluralists put forward guidelines that while formally preserving the autonomy of national orders in full, introduced powerful new integrative forces. Indeed, the thin ethical principles and the common constitutional culture were to be *one* if they were to be of use in solving conflicts. As a result, while judicial pluralism fostered the slowing down of integrative process, no mechanism was built in that could result in pushing integration backwards. Contrary to what is the case with pluralistic federalism, judicial pluralism is by design a one way street.²⁷

²⁷ The merely formally pluralistic character of judicial pluralism is confirmed once we consider what are the material consequences of claiming that it is the very essence of pluralism is that the question of

In the remainder of this *Article*, I focus my analysis on pluralistic federalism as providing both the most consistent and most complete pluralistic theory of European law.

III. THE EMPIRICAL SHOCK: THE SECOND AND THE THIRD EUROPEAN TRANSFORMATIONS

In this section I show why the empirical claim of pluralistic federalism, that European legal practice has come to be pluralistic, no longer holds. Even if highly plausible when it was first formulated in the late seventies and early eighties, the claim was already then being seriously tested by the evolution of European integration. A second European transformation set in motion in the late seventies (sub-section 1) would end up undermining the balance of power, the symmetric intergovernmentalism underpinning supranational institutional structures and decision-making processes, and the very features of Community law at the core of pluralistic legal practice (sub-section 2). The apparently “on the hoof” decisions and improvised structural changes adopted in the name of containing and overcoming the manifold and overlapping crises that have hit the Union since 2007 have resulted in a third European transformation, rendering delusory the characterisation of European legal practice as pluralistic.

III.1. THE SECOND EUROPEAN TRANSFORMATION

As hinted at in the previous section, monetary (1971) and economic crises (1973 and 1979) revealed the extent to which European integration had proceeded far enough to affect the capacity of Member States to govern the crises, but had still fallen short of rendering feasible coherent collective action. The very features of European integration that were regarded by pluralistic federalists as normatively commendable (the federal enmeshing of decision-making, enumerated competences, national veto rights) came to be portrayed as pathologies undermining European integration.²⁸ In short, pluralistic federalism clung to a *fixed image* of European law and practice precisely at the time that such law and practice were being revolutionised. In the mid-eighties, a consensus of sorts emerged on the need of “reviving” integration by means of decoupling economic integration from political integration. Three were to come the key building blocks of

who decides should be left open. In a context in which the new understanding of economic freedoms, sponsored by the European Commission, sanctioned by the Court of Justice, and widened by the Single European Act and the Maastricht Treaty, was reshuffling power in favour of capital owners and entrepreneurs, “keeping open the question of who decides” was tantamount to the furthering neutralisation of public power, which could not but radicalise the implications of the ongoing power shift.

²⁸ Council of the European Communities, *Report on European Institutions presented by the Committee of Three to the European Council (October 1979)*, available at publications.europa.eu. See p. 40 *et seq.*

l'Europe par le marché.²⁹ a) economic and monetary union; b) a new understanding of economic freedoms; c) the introduction of new procedures of supranational decision-making and criteria dividing the decision-making "labour" among them. Each of them would have led to major changes in the socio-economic structure of the Communities and of its Member States. Jointly, as we will see in subsection d), they changed the configuration of the European Union.

a) Economic and monetary union.

The third block of *l'Europe par le marché* was the establishment of an autonomous European monetary order protecting the soundness of money, or what is the same, keeping the store value of money, so that capital could be safely accumulated. Key in that regard was the establishment of the European Exchange Rate Mechanism (ERM), agreed in late 1978 and put in effect in March 1979, then followed by Economic and Monetary Union, agreed in 1992 and implemented in May 1998.³⁰

Both ERM and EMU were premised on the "divorce" of monetary and fiscal policy.³¹ A different set of institutions, procedures and substantive norms should apply to the making and implementation of on the one hand monetary policy and on the other hand economic and fiscal policy.³² Monetary policy was to be steered by national central banks enjoying a reinforced autonomy from political institutions (in ERM), or by a fully independent central bank (in EMU). Fiscal policy was to remain in the hands of national political authorities, but subject to major constrains. In both ERM and EMU, States renounced using the levers through which they controlled the terms according to which they issued debt. In particular, central banks were expected to stop acting as lenders of last resorts of States, while States were expected not to (and in EMU formally forbidden to) impose on financial institutions coerced loans. Under EMU, Eurozone States were also prohibited from extending loans to each other and/or to assume financial responsibilities of other Member States.³³

The architecture of EMU envisaged additional constrains on national fiscal policy.

²⁹ G. GRIN, *The Battle of the Single European Market*, London: Kegan Paul, 2003; N. JABKO, *L'Europe par le marché. Histoire d'une stratégie improbable*, Paris: Presses de Sciences Po, 2009.

³⁰ The date at which the parities between national currencies were "irrevocably" fixed.

³¹ Something regarded at the time as a necessary means to either curb high inflation (ERM) or to ensure a sustained low level of inflation (EMU).

³² In the case of EMU this was explicitly codified into the Treaties. In the case of ERM, it was the result of how the system of "managed currencies" was operated, very especially since the second half of the eighties, in which the combination of *de facto* German monetary hegemony and lack of adjustment to exchange rates created the conditions under which all States were forced to follow German monetary policy and renounce to stabilise the economy through monetary policy. The failure to do that (which was a reasonable failure given the political, social and economic implications of "succeeding") accounts for the *de facto* collapse of ERM in 1992.

³³ The "no-bailout pact" was the reverse image of the explicit reference to the mutual provision of financial assistance in case of acute balance of payments imbalances in the original Treaties.

Firstly, *fiscal rules* were written into the Treaties that established the "limits" of national discretion in the implementation of fiscal policy (60 per cent GDP public debt, 3 per cent public deficit). Such rules were formally supported by sanctions (even if the very content of the sanctions implied that they would only be effective *were they not to be applied*). The Stability and Growth Pact of 1997 fleshed out, both procedurally and substantially, the just referred fiscal rules.

Secondly, the "coordination" of national fiscal policies was to be achieved through informal, experimental procedures, which were soon characterised as "governance procedures", in which "guidelines", "benchmarks" and "targets" ("soft law", not law proper) were to be worked out through "deliberation", "peer review" and the development of "best practices".

b) A new understanding of economic freedoms.

*Cassis de Dijon*³⁴ opened the way to a radically different understanding of free movement of goods. In the ruling in that case, the Court found that the right to free movement of goods would be breached not only if one State treated imported goods differently from nationally produced goods, but also when national law (even if non-discriminatory) placed *obstacles* to the free movement of goods. As a result, free movement of goods was no longer to be understood as the operationalisation of the principle of non-discrimination, but rather as a self-standing, autonomous freedom, ultimately an operationalisation of the right to private property and of entrepreneurial freedom. Free movement of goods thus became a material, and not merely formal, yardstick of review of the validity of national norms.³⁵

The transcendence of this jurisprudential change was multiplied by later decisions of the Court of Justice by means of which the judges assimilated the status of the other three economic freedoms (freedom to provide services, freedom of movement and establishment, and last in time but not last in substance, free movement of capital) to that of free movement of goods,³⁶ despite both the structure and literal tenor of the Treaties.³⁷

³⁴ Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral* (*Cassis de Dijon*).

³⁵ The transcendence of the ruling did not escape the Directorate General Common Market of the European Commission, which had played a key role in the preparation of the intellectual ground on which the ruling was planted. In a Communication that turned out to be very influential, the Commission claimed that the ruling had opened a new path of integration, alternative to unanimous decision-making in the Council. Cf. Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ("Cassis de Dijon").

³⁶ This was not only a problematic move from a political perspective (due to much higher abrasiveness of the other economic freedoms, very especially freedom of establishment and free movement of capital) but also from legal-dogmatic one, given the literal tenor and structure of the Treaties. The fact that we still find today separate chapters dealing with on the one hand free movement of goods and on the other hand the other economic freedoms, physically separated by the chapter on agricultural policy, is the very literal expression of the "embedded liberalism" economic philosophy that underpinned the Treaties. It is hard to conclude that such a philosophy was the same that was relied upon to release economic from political integration in *Cassis* and its progeny.

c) The division of decision-making labour resulting from the partial move to qualified majority voting.

Among the many effects of *Cassis de Dijon* was that of fostering a transformation of supranational decision-making rules. The Single European Act (re)introduced qualified majority voting in the Council. Despite the rather tortuous literal tenor of the amended drafting of the Single European Act, successive rounds of Treaty amendment resulted not only in the widening of the policies regarding which decisions could be taken by qualified majority voting, but also the granting in such cases of “co-decision” powers to the European Parliament (expected to vote in most cases by simple majority).

It should be emphasised that it was not intended in the Single European Act, or for that matter at any later stage, that qualified majority voting would become the standard decision-making rule. There was, and there remains, a set of policies where unanimity in the Council is still required. This entails that alongside qualified majority voting came (implicit) rules dividing law-making and decision-making labour between different decision-making processes. In very broad terms, the “new” decision-making process (qualified majority) were to be applicable when taking decisions concerning the realisation of the “single market” programme (market-making policies). On the other hand, unanimity in the Council was and is still required when “positive” measures rectifying the distributive consequences of the functioning including socio-economic policies that rectified the pattern of distribution of economic burdens and benefits resulting from the operation of markets (market-correcting policies).

III.2. EFFECTS: UNRAVELLING PLURALISM

The second European transformation eroded the very conditions of stability of a pluralistic European legal practice. National power was limited, fragmented and disciplined through the assignment of negative and disciplinary powers to supranational institutions (the real “winners” were the holders of economic freedom). Symmetric intergovernmentalism was first circumvented through the transformation of entrepreneurs and capital owners into agents of economic integration by virtue of the new understanding

³⁷ The socio-economic vision of “embedded liberalism” was reflected in the structure and content of the founding Treaties. There was a neat distinction between on the one hand the right to free movement and on the other hand the other economic freedoms. In between the sections devoted to them, we still find the chapter on agriculture. This pointed to a process of economic integration led by trade in goods. Furthermore, the founding Treaty on Economic Community contained a clear schedule of negative integration regarding free movement of goods, while there was no calendar foreseen for freedom of establishment or free movement of capital (there was an expectation that free movement of workers would be fully effective by the end of the four stages leading to the establishment of the common market, but the original assumption was that any such movement would have to be based on a pre-existing job offer). Moreover, the effectiveness of the other three economic freedoms was to be politically shaped and defined through measures of *positive* integration.

of economic freedoms put forward by the Court of Justice and later through the assignment of monetary powers to a federal but non-representative-by-design central bank – and later restrained with the (re)introduction of qualified majority voting. Finally, the role and nature of Community law as the law of integration mutated, as judge-made law and expert-made law competed with intergovernmentally authored Community law, and as governance came hand in hand with common action norms that were hard to characterise as law.

a) Limiting, fragmenting and disciplining national powers.

Fundamental public powers, very especially on what concerned the shaping of the socio-economic structure, were limited, fragmented or nullified on the road to the single market and economic monetary union.

The loss of national powers was the result of the attribution to or appropriation by supranational institutions of *negative powers*, that is powers to prevent Member States from choosing a certain set of policy options. In other words, States lost positive powers while the Union gained merely negative powers, to the benefit of the holders of economic freedoms, and above all, capital owners and entrepreneurs.³⁸

The new understanding of economic freedoms altered the European power equation in two main ways. Firstly, the Court of Justice assumed the negative constitutional power to determine what uses of national socio-economic powers were in breach of Community law, on account of placing *obstacles* to the exercise of economic freedoms. Secondly, and as a result, many national socio-economic powers were seriously limited when not annulled. The structural and substantive implications of the new understanding of economic freedoms were amplified by the asymmetric division of labour between supranational decision-making. The said division of labour had two effects. The first was splitting decision-making about issues which, despite being so intertwined as to require being regulated simultaneously, became the subject of different supranational decision-making processes. The second was to create the conditions under which it was much easier to expand the breadth and scope of economic freedoms as negative freedoms, than to correct the distributional effects of economic integration. A clear example is provided by the timing of the liberalisation of capital movements and of the measures to avoid that such liberalisation would result in massive avoidance of taxes on capital income. Before the Single European Act, it was assumed that there could be no liberalisation unless agreement was reached on the measures to be taken to avoid creating massive new opportunities for avoidance. However, in 1988, no longer after the entry into effect of the Single European Act, the decision to liberalise capital movements was speedily taken, while the companion measures to avoid tax evasion were only taken (and then in deeply diluted form) in 2002. Why this different timing? Because liberalisa-

³⁸ F. SCHARPF, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999.

tion of capital movements was negotiated under the shadow of qualified majority voting, while the measures to avoid tax evasion were to be decided unanimously.

Furthermore, economic and monetary union resulted in the assignment to the Council of Ministers of new if originally rather undefined powers to monitor and discipline national fiscal policy, as the means of ensuring compliance with the referred fiscal rules.

The establishment of a European monetary infrastructure (ERM and then EMU) was premised on the renunciation of key national fiscal levers, including those that allowed States to control the terms under which they became indebted. As was also pointed, EMU resulted in the enshrinement in the Treaties of “fiscal rules” setting quantitative limits to national discretion when implementing fiscal policy.

In a limited number of cases, positive powers have accrued to supranational institutions. In such cases, however, powers tend to be “programmed” so as to further the framing and the shaping of national policy choices in line with the substantive choices at the core of the single market and economic and monetary union. This is clearly the case of monetary policy. The European Central Bank (ECB) is assigned the power to implement monetary policy, but has to make use of this power with a view to achieving a very specific objective: price stability.³⁹ Quite obviously, such a mandate restricts the discretion of the ECB, but also constrains the margin of manoeuvre that States have to pursue socio-economic objectives. If the ultimate and fundamental objective of monetary policy is price stability, it becomes extremely difficult to implement an economic policy aiming at full employment. At those conjunctures in which a choice might have to be made between sticking to full employment while risking higher inflation or sticking to price stability and risking increased unemployment, the bank would favour the latter, and would take monetary decisions undermining the effectiveness of expansionary fiscal policy. The empirical record of conflicts between the German government and the *Bundesbank* in the seventies provides ample empirical illustration of the point.⁴⁰

The result is a division of competences and powers between the Union and the Member States that not only breaks the balance between unity and diversity, but also is substantively biased in favour of a very specific socio-economic structure, one in which sound money, the right to private property and entrepreneurial freedom are central.

b) The circumvention of symmetric intergovernmentalism.

The second European transformation resulted in the emergence of a number of decision-making procedures alternative to the symmetric intergovernmentalism which have evolved in the first European transformation.

Firstly, the new understanding of economic freedoms turned the holders of economic freedoms into (alternative) agents of economic integration, entitled to ignore na-

³⁹ And only once such objective has been achieved, contribute to the realisation of the overall goals of the Communities.

⁴⁰ F. SCHARPF, *Crisis and Choice in European Social Democracy*, Oxford: Oxford University Press, 1991.

tional norms placing “obstacles” to the exercise of economic freedoms. If Member States would nonetheless insist on applying the norms that economic actors claimed breached their economic freedoms, the conflict was not to be solved by the national or supranational political process, but by national courts, which could seek a preliminary ruling from the Court of Justice. In such a way, the formal supranational decision-making rules were left untouched, but an alternative path of economic and legal integration was *de facto* cleared. Indeed, the Commission, which had been the “intellectual actor” behind the ruling in *Cassis de Dijon*, constructed the decision as opening the way for “mutual recognition” emerging as an alternative to positive (and politically mediated) integration. Instead of States agreeing on common regulatory standards according to which economic freedoms would be realised, it would suffice that States recognised as good enough the regulatory standards of all other Member States.⁴¹

Secondly, at the core of monetary union was the assignment of the power to implement monetary policy to the European System of Central Banks, with the ECB at its apex. This resulted not only in the introduction of a (major) exception to the democratic legitimation of public power (as the German Constitutional Court stressed),⁴² but also to the symmetric intergovernmentalism according to which all supranational decisions had come to be taken. The fact that the discretion of the ECB was framed, as just pointed, by a mandate to preserve price stability did not diminish the implications that the institutional and substantive design of EMU had on supranational decision-making. It was a matter of time that the formally neat distinction between fiscal and monetary policy, and the respective allocation of powers between the epistocratic decision-making of the ECB and the national political decision-making, was challenged by economic developments. As I will briefly discuss, that was indeed the case during the European fiscal crisis of the early 2010s.

Moreover, the second European transformation also resulted in a straightforward challenge to symmetric intergovernmentalism. As was pointed in the previous subsection, supranational majoritarian decision-making processes were (re)introduced in the Single European Act, while the range of issues to which they apply has been expanded in successive Treaty amendments. This results in a key, if not the key, piece of the belt transmitting indirect national democratic legitimacy into supranational law being removed. The “loss” in indirect democratic legitimacy was said to be more than compensated by the emergence of the European Parliament as co-decider. But even if that was so (which can be doubted given the limited social legitimacy of the European Parliament) the move to qualified majority deeply transformed the relationship between European law and Member States, which could previously not be imposed supranational laws that they had re-

⁴¹ The sharpest edges of mutual recognition will be cut by means of “minimal harmonisation” as practised from the mid eighties.

⁴² German Federal Constitutional Court, judgment of 12 October 1993, 2 BvR 2134.

jected.⁴³ This was aggravated by the fact that the division of labour between supranational decision-making processes, as we saw when discussing the impact of the second European transformation on the allocation of power in Europe, resulted in the facilitation of measures reinforcing the new understanding of economic freedoms favoured by the Court, while de facto hampering legislation aiming at reregulating economic activity at the supranational level. Successive enlargements would only amplify this bias.⁴⁴

c) A different law of integration.

The second transformation of Union law resulted in three major changes.

Firstly, it altered the sources of Community law, favouring judicialisation and epistocratisation, thus undermining its democratic legitimacy.

Secondly, the neutrality of Community law was compromised, with the emergence of a structural bias in favour of the maximisation of the freedom enjoyed by property owners and entrepreneurs.

Thirdly, means of integration alternative to law started to be used, most conspicuously the soft law characteristic of “governance” arrangements.

The new understanding of economic freedoms resulted in a marked judicialisation of fundamental socio-economic choices. As was pointed out above, economic freedoms became material standards of review, whose substantive content was to be defined autonomously from national law. Given that the Treaties did not contain a thorough substantive definition of economic freedoms, the material content of the economic freedoms was to be fleshed out *case by case*.⁴⁵ Judge made law became a central (and very dynamic) component of the law of integration. The Court of Justice, together with national courts, developed the contours of economic freedoms in its rulings, many if not most prompted by preliminary references posed by national courts. As a result, national constitutional courts became natural counterweights, setting limits to the structural implications of the jurisprudence of the Court of Justice. But even if doing so may end up protecting the substantive content of the national constitutions, it further fostered judicialisation.

The asymmetric character of economic and monetary union resulted in fiscal “coordination” being ensured through means of integration other than law. Indeed, lack of political agreement on how to render functional the combination of one monetary policy and several national fiscal policies was the midwife of “governance” (which would then be extended to other policy areas, including those where integration was already proceeding through law).

⁴³ J.H.H. WEILER, *The Transformation of Europe*, cit., pp. 68-80; J.H.H. WEILER, *European Democracy and Its Critics: Polity and System*, in J.H.H. WEILER, *The Constitution of Europe*, cit., p. 232.

⁴⁴ The higher the number of Member States, and the more diverse the socio-economic structures of the Member States, the more difficult it has become to take unanimous decisions.

⁴⁵ That had major implications, as the Court tended to reduce fundamental rights positions to subjective rights, to the exclusion of collective rights and collective goods (contrary to what was the case in national constitutional case law).

The law of integration has become biased as a result of the combined effect of the new understanding of economic freedoms and the asymmetric division of labour between decision-making processes. Not only economic freedoms (and through them the right to private property and entrepreneurial freedom) tend to be given higher absolute and concrete weight when in conflict with other rights and collective goods (critically including the rights and goods at the core of the postwar social State)⁴⁶ but it is much easier to approve regulations and directives broadening the scope of economic rights than measures correcting the distributional effects of market-making.

Finally, fiscal rules, together with the sanctions foreseen in case of lack of compliance with them, represented a hybrid medium of integration, presented in the form of law, but which was dubious possessed all the structural features characteristic of the latter, if only because, as already hinted, sanctions were bound to be only effective if they had not to be applied. In realistic terms, the States which would meet the conditions for being sanctioned would be States experiencing a major economic downturn and thus in clear breach of fiscal rules. Sanctioning that State in such circumstances would most likely aggravate its economic, fiscal and/or financial crisis. The effects of such worsening economic condition would be felt not only within the national economy of the sanctioned State, but all across the Eurozone. The bigger the economy of the sanctioned State, the bigger and deeper the risk that the sanctions would result in an economic recession in the Eurozone as a whole. Indeed, the reluctance of the Council of Ministers to sanction France and Germany in 2001 constitutes clear evidence of the extent to which sanctions were almost impossible to apply. That may not only require characterising fiscal rules as "stupid", but throws serious doubts about whether they should qualify as law from a pure analytical perspective.

III.3. ENCORE: THE THIRD EUROPEAN TRANSFORMATION

The actual effects and implications of the second transformation remained muted as the process unfolded. Changes were long in coming. Eighteen years lapsed from the rendering of *Cassis de Dijon* to the actual launching of monetary union, while it took a good decade for the structural weaknesses of monetary union to come to the fore. Moreover, and perhaps more decisively, a good deal of the short-term welfare gains of *l'Europe par le marché* were felt almost immediately by most of the population. The unleashing of economic freedoms came hand in hand (and was in itself part) of a process of economic globalisation that altered the international division of labour. Cheap imported goods seemed to increase the purchasing power of Europeans, at the very same time that new opportunities to get indebted compensated the combined effects of the

⁴⁶ A.J. MENÉNDEZ, *The Guardianship of European Constitutionality: A Structural Critique of European Constitutional Review*, in M. ANDENAS, T. BEKKEDAL, L. PANTALEO (eds), *The Reach of Free Movement*, Dordrecht: Springer, 2017, pp. 173 *et seq.*

shrinking income share of wages and the steady increase of wage and wealth inequality. By the same token, the structural divergences between Eurozone States were cloaked by massive flows of capital that created the illusion of the Eurozone periphery catching up with the Eurozone core. The massive growth of private debt, mostly in the periphery, compensated both the deflationary impact of growing inequality and the erosion of the taxing capacity of Eurozone States (in itself resulting from the new understanding of free movement of capital).⁴⁷ The long-term social, economic and political costs of fragmenting public power were thus postponed.

To quote Wolfgang Streeck, the second European transformation was rendered possible by several policies through which time was bought, or what is the same, through which the full effects of the policies were pushed into the future.⁴⁸ The price to pay will be dear, but will only be paid in the future. And the future, for many purposes, arrived in 2007. Starting then, financial, economic and then fiscal crises hit the European Union and its Member States and revealed the structural tensions at the core of the Europe emerging from the second transformation. As a result, a third transformation was unleashed. At the time of writing, the outcome of this third transformation has been an acceleration and radicalisation of the trends of the second transformation. Public power has been further fragmented and disciplined; the main difference is that this time supranational institutions have acquired sizeable positive powers, through which they have acquired even more leverage to mould national economic and social policies. Supranational decision-making has been further pushed away from symmetric intergovernmentalism with the ascendancy of what has been labelled as “new intergovernmentalism”. The latter development has come hand in hand with the further devaluation of democratic law as a means of integration, and the emergence of hybrid common action norms, supported by law-like coercion but applied in circumstances that remain radically indeterminate (and which has been aptly labelled as *Ersatz law*).

a) Powers.

National power has been further fragmented and limited, at the same time that a considerable range of regulatory and positive powers have been shifted to the European Union level (although, as was already the case during the second European transformation, such powers are densely programmed with a view to further constraining national choices).

A new set of rules has been established with a view to further limiting the power of Member States when designing and implementing fiscal policy.

For one, an emerging constitutional convention forbids Eurozone States from defaulting on their debts. Member States have been encouraged to make constitutional commitments to the absolute priority of the payment of principal and interest of debt

⁴⁷ See S. KEEN, *Can we Avoid Another Financial Crisis?*, London: Polity, 2017.

⁴⁸ W. STREECK, *Buying Time*, London: Verso, 2014.

over any other State expenditure (the pressure has been successful in the case of Spain; see the new tenor of Art. 135 of the Spanish Constitution).

For two, the existing fiscal rules have formally been made more demanding. Not only the fiscal targets to be met by States are tougher, but Member States are now obliged to patriate into their constitutions (or constitutional laws) one of the European fiscal rules, the deficit ceiling (wrongly referred as "golden rule" or "debt brake" in media parlance). Moreover, additional fiscal rules (including the deficit and debt trajectory objectives) have been enshrined into the Stability and Growth Pact.

For three, a set of "macroeconomic indicators" has been established with a view to limiting the discretion of Member States in the overall design of their social and economic policies.

The efficacy of the new fiscal rules is expected to have been increased by the increasing monitoring and disciplinary powers that European institutions have been assigned.

For one, the Commission has seen its powers to monitor and discipline national fiscal and macroeconomic policy strengthened, given the increased authority of its proposals, deemed to be approved if a qualified minority of the Council concurs.

For two, compliance with the obligation to patriate the deficit ceiling has been assigned to the Court of Justice; a review of "European constitutionality" of the actual national reforms (including constitutional reforms) adopted to comply with the obligation could be conducted, and the reform declared in breach of European law.

At the same time, the ECB has been assigned the power to both *monitor and ensure the stability of the financial system as a whole* (macro-prudential supervision, assigned to the Systemic Risk Board, "led" by the ECB) and *to supervise all major financial institutions* (micro-prudential supervision of all major financial institutions of the Eurozone is now in the hands of the newly created supervisory "arm" of the ECB).⁴⁹

Moreover, supranational institutions have been granted positive powers of action, although in most cases such powers are programmed with a view to reinforcing the very objectives to be attained through supranational disciplinary powers.

The Eurozone has acquired the financial means and has set up the decision-making process necessary to provide financial assistance to Member States experiencing fiscal crises. The acceptance of financial assistance is subject to the condition that the assisted State accepts the troika (the ECB, the Commission and the International Monetary Fund (IMF))⁵⁰ conditioning national economic and social policy as a whole.

⁴⁹ And Member States which may decide to transfer such competence to the ECB.

⁵⁰ Quite obviously, the oddest institution out of the three that make up the troika is the IMF, because it is not only independent from the EU as such, but also rather external to it. IMF's involvement was deeply controversial in 2010, even within some national governments (famously including the German one). A full assessment of the actual role of the IMF in Eurozone financial assistance would require access to documents that remain reserved for the time being. But, contrary to what might be expected taking into account the IMF involvement in multilateral financial assistance, there is clear evidence that the Commission and the ECB

The ECB has assumed the role of lender of last resort of Eurozone States, a power that it has pledged to exert by reference to the terms of the financial assistance provided by the Eurozone, and consequently, by reference to their underlying *conditionality*.

Finally, a constitutional convention has emerged according to which the *remit* of monetary policy is to be as wide as necessary to achieve the *goals* of monetary policy, independently of the (narrow) legitimacy basis of the ECB.⁵¹ This implies that the ECB can decide on the shape of its monetary policy independently of whether or not this affects the conduct of national fiscal policies, while the reverse does not hold; or what is the same, it results in monetary policy being acknowledged to trump fiscal policy (what economists characterise as fiscal dominance).

b) Changes to decision-making procedures.

The new competencies attributed to the European Union have all resulted in gains by institutions whose legitimacy is indirectly democratic or are by design non-representative (the ECB) while the competencies and authority of both the European Parliament and of national parliaments (with the rather more formal than substantive exception of some national parliaments, as just indicated) have largely stalled. The clear “institutional” winner is the ECB, an institution that is by design insulated from democratic politics. The same reasoning applies to the Court of Justice, the European Stability Fund, the already created national fiscal authorities, the envisaged European Fiscal Authority and the planned national competitiveness authorities. The “Euro Summit” and the “Eurogroup” have become relevant institutions when it comes to the exercise of a good deal of the (old and new) economic powers in the hands of the European Union. But as was pointed out in the previous section, the way in which the said institutions actually operate has itself been transformed during the crises. What some political scientists call the “new” intergovernmentalism is based not on the equality between Member States, but actually on the (formalised) inequality among States. On the other hand, only with a considerable degree of optimism can be said that representative institutions have merely not gained power. It is indeed telling that while the European Parliament and national parliaments have been assigned mere “debating” powers, an institution external to the EU, the IMF, has been acknowledged, both *de jure* and even more so *de facto*, key powers in the process of granting fi-

have been stronger advocates of policies much more intrusive with national policy autonomy than the IMF itself. Clear evidence of this can be found on the evidence published by the IMF itself on decision-making before the first package of financial assistance to Greece. See IMF’s Independent Evaluation Office, *The IMF and the Crises in Greece, Ireland and Portugal*, 8 July 2016, available at www.ieo-imf.org.

⁵¹ Opinion of AG Cruz Villalón delivered on 14 January 2015, case C-62/14, *Gauweiler*, para. 111: “The ECB must accordingly be afforded a broad discretion for the purpose of framing and implementing the Union’s monetary policy. The Courts, when reviewing the ECB’s activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB’s activity, its mandatory nature aside, must be characterised by a considerable degree of caution”.

nancial assistance to Eurozone States, and monitoring compliance with the economic programmes to which the said assistance is conditioned.

The move from majority to minority voting on what regards the monitoring, and especially, the disciplining, of national fiscal policy results, *de facto*, in empowering creditor/surplus States (a minority within the Eurozone) against debtor/deficit States. Given the interplay of the rules assigning votes in the Council and the national interests at stake, it is not too far-fetched to see that a Commission seeking to sanction a debtor/deficit State (say Greece) will look for the votes of the creditor/surplus States, namely, Germany, Austria, Finland and the Netherlands, which happen to make up a qualified minority. Similarly, while the European Stability Mechanism can only act by unanimous consent when taking important decisions (including the decision to provide financial assistance to one Eurozone State), there is one exception, which allows decisions by 85 per cent of the votes when there is urgency. Votes have been attributed in a rather peculiar fashion (according to democratic standards), as the voting weight of each State depends on the capital of the Mechanism it has subscribed. This means that some, but not all States, have formal *sole* veto power: Germany, France and Italy. Of which perhaps only Germany can effectively make use of it without setting a precedent that may apply in the long run to itself.

c) The shifting character of EU law.

The combined effect of the centralisation of powers and their assignment to non-representative institutions has been to accelerate the transformation of the character of the law of integration.

The assignment to the Court of Justice of the formal power to review the validity of national decisions "patriating" the debt ceiling into national law, preferably constitutional law, assumes that the Fiscal Compact, as interpreted by the Court of Justice, can trump a national constitutional decision, even if such a decision would be taken after a direct consultation with the national people. It could be said that in abstract terms, such a power merely renders explicit what the Court already implied in *Simmenthal*. Leaving aside what is the best interpretation of the said ruling, the assignment of such a competence to the Court of Justice assumes that the authority of European law (even when formally articulated in an international Treaty that is formally much less authoritative than the EU Treaties) can trump even the intense democratic legitimacy of a national constitutional amendment.

The acknowledgment of a vast discretion in the implementation of monetary policy to the ECB, apparently extending to the very decision on the means to attain "monetary objectives", independently of the effect that the means chosen may have on the discretion of Member States to implement the policies of their competence. Under the form of mere "decisions" (or even mere "press releases"), the ECB is thus empowered to produce norms that drastically limit and condition fiscal policy, or even the overall policy of

a Member State. This was indeed the issue at stake in *Gauweiler*,⁵² but more critically, this new vast discretion of the ECB has resulted in massive influence being exerted, without publicity and accountability, on Member States.

The move from qualified majority voting to qualified minority voting (perhaps not by chance formally designated as “reversed qualified majority voting”) when it comes to the taking of decisions concerning the monitoring of the degree of compliance of national fiscal policies with supranational fiscal rules, critically including the decision to sanction Member States. The law of integration becomes not only law produced by non-representative institutions, but also law produced by minorities.

Moreover, the crises revealed the extent to which the fragmentation of power unleashed by the single market and the economic and monetary union left both the Union and the Member States ill equipped to provide a coherent response to the financial, economic and fiscal crises. As a result, a good deal of the punctual decisions and the structural reforms taken to contain and overcome the crises have been adopted in breach of the legal procedures, the legally codified division of competences between the Union and the Member States, and of the substantive standards of European constitutionality. It is important to notice that in many instances there has been a clear attempt to justify the breaches of legality with what formally were legal arguments. For one, both national and European constitutional standards have been avoided by means of the pretense that action was governed by public international law. A search for “empty constitutional spaces” has indeed played legal systems against each other, mimicking the very legal strategies of capital holders seeking to flee from the regulatory and tax powers of nation-states. For two, the many constitutional doubts surrounding the substantive content of the legislative reform of European Economic governance (the Six-Pack) were expected to be dispelled by an ex-post amendment of the Treaties, which was however not formally accomplished, but actually codified in the Fiscal Compact.

Furthermore, the crises has resulted in a structural crisis of law. Even if institutional rhetoric emphasizes the extent to which the “new European economic governance” has transcended “soft law” and “voluntary coordination” in favour of “proper” legal rules and “harder” sanctions, the fact of the matter is that we can observe a weakening of the formal properties characteristic of law. For one, the core concept at the heart of the new European economic governance, “structural deficit”, is totally indeterminate, an empty shell the concretization of which requires the adoption of a decision on the economic model by reference to which the structural deficit is to be calculated, a decision that is fully left in the hands of the Commission. For two, the “economic programmes” are on the one hand extremely comprehensive and exhaustive and on the other hand require “assisted” Member States compliance with norms that are not only ill-defined, but that can be constantly changed, resulting in the obligations that “assisted” States acquire being in the hands of

⁵² Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler*[GC].

the “creditors”. For three, European institutions, including the Court of Justice, have shown an increased tendency to interpret European law in a completely *ad hoc* fashion, relying on eclectic mixes of legal theories and understandings.

IV. RECONSIDERING PLURALISTIC FEDERALISM

In section III I showed why European legal practice is no longer pluralistic. Even if pluralists have tended to associate their empirical and normative claims, their claims about what European Union law is and what it should be, there is no reason why the demise of the empirical claim should invalidate the standing of pluralistic federalism as a normative constitutional theory. It is still relevant to consider that the failure of pluralistic federalists to realise the full implications of the second European transformation was partially due to a series of “blind spots” in the theory itself.

IV.1. A NUANCED POSITIVE ASSESSMENT OF THE IMPACT OF THE SECOND EUROPEAN TRANSFORMATION

Pluralistic federalists failed to realise in full the extent to which the second transformation was bound to undermine the foundations of a pluralistic legal practice.

Weiler cautioned against the possible negative effects of transcending symmetric intergovernmentalism through (re)introducing qualified majority voting, as pointed out above. While the functional rationale of the decision might be commendable, its structural effects on the ultimate balance between unity and diversity could be enormously disruptive.⁵³ At the same time, Weiler expressed his rather mixed feelings regarding *l'Europe par le marché*, which are worth quoting at length:

“A ‘single European market’ is a concept which still has the power to stir. But it is also a ‘single European market’. It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicised choice of ethos, ideology, and political culture: the culture of the ‘market’. It is also a philosophy, at least one version of which – the predominant version – seeks to remove barriers to the free movement of factors of production, and to remove distortion to competition as a means to maximise utility. The above is premised on the formal equality of individuals”.⁵⁴

⁵³ *Ibid.*, para. 75: “Since the SEA does rupture a fundamental feature of the Community in its foundational period, the equilibrium between constitutional and institutional power, it would follow from the analysis of the foundational period that the change should have implications that go beyond simple legislative efficiency”. The same conclusion is emphasised in related publications. See for example *ibid.*, para. 232.

⁵⁴ J.H.H. WEILER, *The Transformation of Europe*, cit., pp. 89-90.

Well known are the admonitions of the author of *The Transformation of Europe* about the dangerous mismatch between the high sounding rhetorics of European citizenship and the meagre reality of what was actually established in the Treaty of Maastricht.⁵⁵

Despite these bold criticisms, pluralistic federalists also saw promise in some of the elements of the second and third transformations.

MacCormick expressed the view that the conception of economic freedoms put forward by the Court of Justice in *Cassis de Dijon* and its progeny constituted a guarantee against excessive centralisation: it was a form of subsidiarity, which he labelled as “market subsidiarity”.⁵⁶ Similarly, Cappelletti, Seccombe and Weiler saw strategic promise in *Cassis de Dijon*. The ruling could create both the demand and supply for further politically mediated integration.⁵⁷ Their view seemed to be that mutual recognition could play the role of a creative shock.⁵⁸ Cappelletti was openly hopeful on economic and monetary union becoming a vehicle of the deepening of pluralistic federalism.⁵⁹ And even if guarded in its assessment, Weiler penned a strong defence of the constitutional *status quo*, which he contrasted with the pitfalls of the constitutionalisation of the Treaties: “And yet the current constitutional architecture, which of course can be improved in many of its specifics, encapsulates one of Europe’s most important constitutional innovations, the Principle of Constitutional Tolerance”.⁶⁰

IV.2. THE BLIND SPOTS

The mixed assessment of the second European transformation on the side of pluralistic federalists was partially caused by the factors that rendered, at least in the short and mid runs, ambivalent the transformations. However, the evolution of the process of European integration revealed some of the blind spots of the pluralistic federalist theories. I consider in this subsection the three outstanding ones: *a)* insufficient attention to the structural political implications of trade and monetary orders; *b)* an ambivalent conception of the relationship between law and democracy; *c)* the downplaying of the

⁵⁵ J.H.H. WEILER, *To Be a European Citizen – Eros and Civilization*, in *Journal of European Public Policy*, 1997, p. 495 *et seq.*

⁵⁶ N. MACCORMICK, *Questioning Sovereignty*, cit., p. 152. The Scottish philosopher added a fundamental proviso, namely, that this would be so provided the scope and legal force of economic freedoms was kept within proper limits. He failed to see that by the late 1990s, it was perhaps already visible that such limits had long be trespassed.

⁵⁷ M. CAPPELLETTI, M. SECCOMBE, J.H.H. WEILER, *Integration Through Law*, cit., p. 31.

⁵⁸ This seems to be confirmed by the assessment the authors made of the “Spinelli” Treaty, and by the emphasis the authors placed on the need of reinforcing the actual capacity of public authorities to implement effective fiscal and macroeconomic policies.

⁵⁹ Cf. M. CAPPELLETTI, *Verso gli Stati Uniti d’Europa*, in M. CAPPELLETTI, *Dimensioni della giustizia nella società contemporanea*, Bologna: Il Mulino, 1994, p. 185 *et seq.*

⁶⁰ J.H.H. WEILER, *In Defence of the Status Quo*, cit., p. 17.

structural implications of the key concepts and principles on which “pioneering” Community law was forged.

a) The politics of *L'Europe par le marché*.

L'Europe par le marché was advocated on the assumption that the single market and economic and monetary union were malleable means of political integration, much as the common market had been in the sixties and seventies. In other words, the deepening of economic integration was regarded as an ecumenical objective, which would not necessarily result in tilting policy in any specific partisan sense.⁶¹ The new “autonomous” understanding of economic freedoms, coupled with the pre-conditions set for joining both the ERM and EMU, would destroy obstacles (mainly in the form of national regulations) on the speedy road to deep economic integration. But it was also expected that as the process unfolded, the demand for reregulation would not only grow, but would be directed to the supranational level of government. The correctness of the assumption seemed to be proved by the experience of the first European transformation.

Unfortunately, not all trade and monetary orders are equally open to be *steered* to achieve a wide range of objectives as defined through the (democratic) political process. Economic servants can indeed turn out to be political masters in disguise, “constraints” forcing the hands of political actors. The point has been made again and again by political economists, including German, French and Italian ordoliberalists that in the wake of the Second World War insisted on the strategic importance of international trade and monetary orders, giving the extent to which they unavoidably conditioned the shape of national socio-economic orders.⁶²

By the same token, the fact that international and transnational economic relations are governed by norms (such as the economic freedoms of the single market or the fiscal rules of monetary union are) does not by itself turn such orders politically malleable. As the fundamental studies of Albert Hirschman⁶³ and Marcello De Cecco⁶⁴ have shown, the norms of international or transnational trade system and monetary order can be a fitting means of cloaking the exercise of (raw) power.⁶⁵ The substantive content of the norms matters, and matters a lot.

⁶¹ J. DELORS, *La dynamique de la construction européenne*, in J. DELORS, *Le nouveau concert européen*, Paris: Odile Jacob, 1992, p. 149 *et seq.*

⁶² W. RÖPKE, *International Economic Disintegration*, London: William Hodge, 1942; G. CARLI, *Cinquant'anni di vita italiana*, Bari: Laterza, 1993.

⁶³ A. HIRSCHMAN, *National Power and the Structure of Foreign Trade*, Berkeley: California University Press, 1945.

⁶⁴ M. DE CECCO, *The International Gold Standard: Money and Empire*, Oxford: Blackwell, 1984. The definitive edition has just been published in Italian: M. DE CECCO, *Moneta e impero. Economia e finanza internazionale dal 1890 al 1914*, Rome: Donzelli, 2017.

⁶⁵ For one, the norms of the game can disproportionately favour one of the parties (eventually undermining the interests of others), reflecting the disparities in power of the parties when negotiating or

Once the assumption of political neutrality of economic integration is set aside, it becomes possible to understand why the first European transformation was a politically malleable means of integration, while the second European transformation not only turned the relationship between economic and political integration on its head, but in the process resulted in the undermining of the very conditions of pluralistic federalism. On the one hand, the first European transformation was not only piloted by the common will of the Member States of the Communities through an intergovernmental institutional structure and decision-making processes that equalised the power of the Member States, but the common market was so designed as to reinforce, not weaken, the capacity of each State to choose socio-economic policies fit to the socio-economic circumstances, historical trajectory and the political preferences of the electorate. On the other hand, the second European transformation was triggered by the enervation and pulverisation of public power, at the same time that the substantive choices at the heart of the single market and asymmetric economic and monetary union were bound to end up forcing the hand of national governments when implementing their remaining socio-economic powers. As was already hinted at in section II, the new understanding of the right to freedom of establishment and of the freedom to move capital dramatically reinforced the position of capital holders, to the (economic) detriment of workers.⁶⁶ By the same token, turning “price stability” into the fundamental objective to be pursued by the ECB when implementing monetary policy rendered structurally impossible to pursue the objective of full employment in any Eurozone State (at the very same time that contributed to the growth of private debt). In sum, the relative weight of socio-economic rights has been weakened, at the same time that fundamental rights have been wrongly characterised as subjective rights, neglecting that collective rights and collective goods are key fundamental rights positions in the postwar democratic constitutional traditions. European law has thus been transformed into a legal weapon against collective identities, collective goods and collective rights.

b) Constitutionalism and democracy.

The second blind spot of pluralistic federalism concerns the understanding of the relationship between law, constitution and democracy.

Pluralistic federalists have sustained that the proper normative assessment of European Union law requires recalibrating the standards of democratic legitimacy forged in the semblance of nation-states to the “non-state” reality of the European Union, as well as the weight to be granted to democratic legitimacy in the overall legitimacy assessment of European legal practice. On such spirit, Neil MacCormick proposed con-

interpreting the norms. For two, formal norms may cloak in plain sight the discretion of one of the parties, turning into arbitrariness that can be exercised to favour its own interests.

⁶⁶ Not by chance, the share of wages in the national product of Eurozone Member States have strongly declined in the last two decades, with the drop being markedly fast in the periphery Eurozone States after 2009.

ceiving the Union as being founded on a "mixed constitution", a concept that provided "a salutary reminder that merely to point to some un- or non-democratic element in a given constitutional setup is not *eo ipso* to damn it. For the issue is one concerning a reasonable balance of elements."⁶⁷ The more so because the Union is not a State, and thus the standards to be applied to it should be different from those characteristically used when dealing with States:

"[T]he idea of a democratic, commonwealth, especially one exhibiting the features of the European Union, being a polyglot, multi-national and trans- or supra- national commonwealth committed both to democracy and to subsidiarity, is a complex, not a simple one. Neither 'rule by the people, for the people', nor 'majority rule', nor 'one person, one vote' nor any other simple concept or slogan will capture it. The different aspects of the value of democracy need to be acknowledged, in their parallelism with different elements or aspects of subsidiarity. An enlightened bureaucracy, provided it is subject to appropriate checks and controls, can also be seen to have an essential utility in a well-constituted order. Market subsidiarity and communal subsidiarity are as important to a democratic commonwealth as rational legislative and comprehensive subsidiarity".⁶⁸

The recalibration of democratic legitimacy standards creates the theoretical space within which it becomes possible to think constitutionalism beyond the State, and in the process, to recharacterise what constitutionalism stands for. This was for example part and parcel of Weiler's characterization of "constitutional tolerance", underpinned by a specific understanding of constitutionalism: "[Our constitutions] are about restricting power, not enlarging it; they protect fundamental rights of the individual; and they define a collective identity which does not make us feel queasy the way some forms of ethnic identity might".⁶⁹

These two premises may well be said to reflect an explicit effort to tackle the unresolved tension between integration and democracy; and in particular, to offer conceptions of democracy and constitutionalism that transcend the attachment of "classical" constitutional theory to an (unrealistic) image of the sovereign nation-state as an autarchic, "closed" sovereign State.

Firstly, the claim that it is necessary to apply different standards of democratic legitimacy when assessing the legitimacy of national law and supranational law is hard to reconcile with the parallel claims that supranational and national law should be recognized equal dignity and force and that the default rule of conflict should be the primacy of Community law. Even if we were to conclude that Union law and national laws are

⁶⁷ N. MACCORMICK, *Questioning Sovereignty*, cit., p. 149.

⁶⁸ *Ibid.*, p. 155.

⁶⁹ J.H.H. WEILER, *In Defence of the Status Quo*, cit., p. 15. This came hand in hand with a very negative assessment of not only the German, but also the Italian post-war constitution, which was "adopted by the morally corrupted" Italian society of the Second World War.

both democratic, albeit in a different sense, this would not suffice to support the automatic conclusion that we should treat a conflict between supranational and national law as a conflict between two legal orders of equal dignity and force. For that conclusion to be reached, it would be necessary to reject in full a basic principle underpinning all national legal orders (and European Union law), according to which the force and ranking of legal norms should be graduated by reference to their democratic pedigree.

Secondly, the argument in favour of the recalibration of the democratic standards to be applied to European Union law has become increasingly implausible as the full impact of the second and third European transformations has become visible. Even if most of the powers that have been transferred to or assumed by the European Union are negative powers, the Union has gained a formidable capacity to condition, limit and constrain the exercise of national positive powers. The Union, in the apt metaphor proposed by Rubio Llorente, has come to resemble the Pope, only its authority extends to economic, not theological, orthodoxy.⁷⁰ It is nevertheless a massive and formidable power, even if exerted by proxy. But that does not detract from the need of this power being democratically legitimated.

Thirdly, pluralistic federalism has failed to provide a clear and stable alternative to the monistic connection between a hierarchically constructed legal order and democracy. Highly hierarchized legal orders can be deeply authoritarian. Still, monistic legal theorists may argue that the regulatory ideal of an ultimate rule of recognition, at the core of the monistic understanding of law, is a necessary even if not sufficient condition for the democratic authorship of the law. For one, the hierarchical ranking of legal norms can be graduated by reference to the strength of their democratic pedigree. For two, a clear cut ranking of laws does not only produce normative knowledge about the substantive content of the law, but renders transparent to citizens which norms should be amended to achieve social and economic change. For three, only a law speaking with one voice can effectively curb the discretion enjoyed by private parties, judges and administrators when applying the law. Bound by several laws, they may well end up being bound by none, as the opportunities to pit one legal system against another would grow exponentially, as empirically proved during the third European transformation.⁷¹

c) The legacy of concepts: primacy.

⁷⁰ F. RUBIO LLORENTE, "Divide et obtempera?": Una reflexión desde España sobre el modelo europeo de convergencia de jurisdicciones en la protección de los Derechos, in *Revista Española de Derecho Constitucional*, 2003, p. 49 et seq.

⁷¹ Furthermore, a monistic and hierarchical understanding of law may be said to play an aggregative role similar to that of the political regulatory ideal of collective will. Democratic law and democratic politics have to move between the plurality of interests and opinions and collective action, only possible if there are institutional structures and procedures that forge unity out of plurality. Otherwise, public power will remain fragmented and pulverised.

As was pointed above, Weiler was of the view that the monistic *élan* underpinning primacy could be checked by the collective democratic authorship of Community law guaranteed by symmetric intergovernmentalism, opening the way to a "pluralistic" understanding of supremacy: "The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within its sphere of competence".⁷²

However, structural rules have actually failed to transform pluralism. The latent homogenising drive of primacy was long reawakened by the new conception of economic freedoms put forward by the Court. From *Cassis de Dijon* onwards, the Court reviews the European constitutionality of national laws by reference to a fully supranational substantive yardstick, given that it understands economic freedoms as realisations of an autonomous understanding of substantive rights (private property and economic freedom), not of the merely formal standard of nondiscrimination. Since then, the monistic genie of supremacy has been let out of the dualistic supranationalism bottle, even if at first in a rather unobtrusive manner, because symmetric intergovernmentalism was circumvented, not formally demised.

V. CONCLUSION: WHICH AND WHOSE CONSTITUTIONAL THEORY OF EUROPEAN INTEGRATION?

What can be learnt from the failure of federalist pluralism, and what can be rescued from such failure? Three conclusions seem to me possible.

Firstly, we need a constitutional theory that is conscious of the deeply political character of constitutional law. The constitution is not a device manufactured by lawyers or political scientists (as has been frequently implied in the actual practice of European legal scholarship), but a set of fundamental norms that have been democratically authored (in "revolutionary" constitutionalism, of which the French and Italian constitutions are examples) or democratically endorsed (in "evolutionary" constitutionalism, as in the British and the German ones). A fundamental implication of the intrinsically political character of the constitution is that the concepts and categories of constitutional law are themselves political categories.⁷³ Thus, what is constitutional and what is not constitutional, what legal force and dignity is to be acknowledged to constitutional norms, are not questions to be decided *through scholarly deliberation*, or by reference to principles elaborated by legal scholars, but are questions to be settled by reference to the democratic legitimacy of the political processes through which the relevant norms were established. In negative terms, we should be alert against the use of "legal-dogmatic" categories that are underpinned by non-democratic understandings of the constitution and constitutionalism. That is not a

⁷² J.H.H. WEILER, *The Transformation of Europe*, cit., p. 21, fn. 26.

⁷³ S. D'ALBERGO, *La Costituzione tra democratizzazione e modernizzazione*, Pisa: ETS, 1996.

moot risk. The quest for the affirmation of the autonomy of Community law resulted in the rejection of the categories not only of international law (mostly by strategic pluralists) but also of national constitutional law (mostly, but not exclusively, by judicial pluralists). In the latter case, the claim was that such categories had been developed too close to the “sovereign State”. Such a move, however, was far too indiscriminate. Even if the story is also complicated, postwar national constitutional law contains key elements of the grammar of democratic constitutional law whose relevance transcends the national character of the setting in which they were developed.⁷⁴

Secondly, we need a constitutional theory that engages with the relationship between economics, politics and law. The structural implications of the second and third European transformations are a powerful reminder of the extent to which the choice of a given socio-economic order can predetermine how public power is organised and exerted. Trade arrangements and monetary orders are not only deeply political, but can be turned into power levers, the more formidable the more they are made of rules that are formally neutral and materially biased. Indeed, the single market and economic and monetary union have proved to be phenomenal “vincoli esterni”. Sticking to a “pure” legal analysis, keeping legal analysis aloof of the politics of economic activity leads into a serious risk of unwillingly or unconsciously endorsing the *status quo*. Instead, constitutional theory should be able not only to subject present practice to critical scrutiny (including its sustainability) but also to document its limits. To render the point very concrete. Debates such as the one concerning the legal framework of a European Parliament for the Eurozone have to follow, not precede, consideration of whether a one-size monetary policy implemented across economies with massive structural differences is compatible with democratic self-government. Similarly, before figuring out the detailed legal regime of Eurozone bonds, it is appropriate to ponder whether democratic choice over fiscal policy is more or less likely if fiscal policy is centralised to render monetary union stable, or if, alternatively, monetary union is cooperatively dismantled. In brief, taking seriously the structure of economic and monetary orders entails that the question cannot be how to shape the law so as to ensure the stability of the *status quo*, but rather how to create and maintain the space for democratic politics, even when this requires radical changes that increase diversity.

Thirdly, we need a constitutional theory that takes the law seriously. European legal scholarship has been very ecumenical regarding the characterisation of common action norms as legal norms. In broad terms, all common action norms that were characterised as legal were deemed to qualify as being law.⁷⁵ But should they be? The point is not

⁷⁴ D. GRIMM, *Constitutionalism*, Oxford: Oxford University Press, 2017.

⁷⁵ Among others, the broad policy guidelines through which fiscal policy is coordinated within the European Union, the soft law of the various open methods of coordination, the Memoranda of Understanding that play such an outstanding role in the provision of financial assistance to Eurozone States, or the press releases of the ECB have come to be regarded as sources of law in one way or the other.

to revert to a purely formal conception of law, even less engage in some form of natural law review of positive law, but rather to keep the analytical coherence of the concept of law, in the footsteps of classical legal positivism.⁷⁶ Otherwise, we would have moved from a jurisprudence that wrongly identified law with State law, to a jurisprudence that conflates all normative orders into law. Such analytical mistake is bound to be the source of major (normative) risks. Including acknowledging the force and dignity of law (including its procedural legitimacy) to all common action norms, independently not only of whether they actually contribute to the production of normative knowledge (think for example about the radically indeterminate concept of structural deficit at the heart of the new “fiscal rules”, a source of arbitrariness) but also of whether they have been produced following the procedure that the law itself establishes, and which is the source of the legitimacy of the resulting norm. To put it differently, does it make sense to characterise a common action norm as law if the action or omission to which it refers is not determined at all – as not infrequently is the case with soft law –, if its determination is subject to constant change – as in the Memoranda of Understanding – or if concretisation can only come through an fully arbitrary decision – as in fiscal rules? By the same token, can a norm be regarded a legal norm if the consequences of its breach are either largely underdetermined or their determination is left at the full discretion of some institutional actor? The way we name common action norms is full of consequences. Characterising soft law, memoranda rules or fiscal rules as law makes them part of the authoritative materials that have to be considered by institutional actors (government, administration, courts) when dealing with specific socio-economic problems, even if such norms have not been produced through the standard procedures of law-making, either because they are part of “governance” arrangements (soft law, Memoranda) or because being rather empty vessels, no substantive decisions was possible when approving the empty legal norm within which they are embedded (fiscal rules). Furthermore, the dividing line between law and other systems of common action norms can also be trespassed if the force of law is acknowledged to norms that have the attributes and properties of law, but which have not been approved through the procedures foreseen for the passing of new legal norms. Consider for example the litigation around the Outright Monetary Transactions (OMT) announced by the ECB in September 2012,⁷⁷ or the “joint statement” made by the EU Heads of State or Government and Turkey in March 2016.⁷⁸ The argument was made in both cases that there was no legal norm to be reviewed or considered, and thus, there was no legal norm the validity or constitutionality of which could be reviewed. In the OMT case, the ECB had circulated

⁷⁶ H. Kelsen, *The Pure Theory of Law*, Berkeley: University of California Press, 1975, pp. 24-27; H. Hart, *The Concept of Law*, Oxford: Clarendon, 1961, pp. 9-13 and chapter 2.

⁷⁷ ECB Press Release of 6 September 2012, *Technical features of Outright Monetary Transactions*, www.ecb.europa.eu.

⁷⁸ EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

a press release after the ECB President had made a declaration and answered some questions posed by journalists. On what regards EU-Turkey action on migration, European institutions claimed again that the joint statement was no legal act, but a mere political declaration. In both cases, however, it is hard to dispute that a formal legal act (an ECB decision, a formal agreement between the EU and Turkey) could have had very similar effects to the press releases. The key difference being that by avoiding the formalisation of the decision, the ECB and the European Council could avoid the *formal procedure* that the law requires to be followed, which in some cases requires participation of other institutions in the decision-making process, but also facilitates in-depth review of the validity of the decision taken.