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# How to Bridge the Gaps between Competing Paradigms for EU Law: An Introduction

by

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## Abstract

For the first time since its creation, the European Union (EU) has been living its probably most significant identity crisis. This crisis has its roots in different critical situations that have hit the EU, have affected its functioning and have fundamentally questioned its legitimacy. The gaps in the EU integration process have been uncovered and the fragmentation of EU policies has become a source of different risks.

On the anniversary of sixty years of the Rome Treaties, this Special Issue aims to reflect on the paradigms for EU law looking beyond their competing accounts of EU integration. The analysis is developed through a series of contributions that challenge the paradigms in different directions. The discussion is articulated on two levels. On the one hand, a group of contributions focuses on the historical and legal analysis of the emergence and transformation of the EU legal order. These contributions delve deeper into the absence of a European identity and go beyond the inherent critique that the EU is a *demoi-*cracy that struggles with a democratic disconnect or even deficit. On the other hand, other contributions debate paradigms and their implementation in important policy domains. These contributions aim to give a more practical perspective on the constitutional and/or administrative character of the European Union, showing its implications and concrete questions.

## Key-words

European Union, EU law, paradigms, crises



## 1. The EU identity in crisis

For the first time since its creation, the European Union (EU) has been living its probably most significant identity crisis. This crisis has its roots in different critical situations that have hit the EU, have affected its functioning and have fundamentally questioned its legitimacy. The gaps in the EU integration process have been uncovered and the fragmentation of EU policies has become a source of different risks.

Firstly, the economic crisis has shown that the existence of a common monetary policy with national fiscal policies may be a boomerang for weak national economies. Austerity measures have induced EU citizens to forget the benefit of sharing an internal market and this produced a domino effect on other critical dimensions, such as the constitutional foundations of the EU, its institutional design, its political identity and its functioning.

Secondly, the fall-back of globalisation and the spread of protectionist sentiments has accompanied the pressure on unstable national economies and promoted anti-European feelings. Immigration has been particularly perceived as a burden on the citizens of the Member States and their unstable national economies. On the one hand, EU immigrants have been perceived as a burden on national welfare systems and as unfair competitors in national labour markets. The British referendum campaign on the withdrawal of the UK membership from the EU has legitimised in the political discourse the critics of free movement and has strongly questioned this fundamental freedom as a constituent element of the EU integration process. On the other hand, the refugee crisis has had a very significant impact on resources of the Member States, which are poorly equipped to face the historical exodus of people from the Middle East and Africa, trying to escape war scenarios, hunger and economic deprivation.

Thirdly, the contemporary spread of ISIS terrorism around Europe also promoted fear and suspicion of immigrants who are originally from Arabic countries but now are second-generation citizens of the EU. In addition, the capability of terrorists to cross national borders without any checks brought about some calls for the limitation of the free movement of people into the Schengen area and has been perceived as a negative externality of integration. In the claim for national security, the EU has been easily blamed for the dangers of free movement and has been weakly identified as a resource in the fight



against terrorism, through effective coordination between national intelligence services and police.

Against this backdrop, the consolidated discussion on the legitimacy of the EU has become a more and more pressing issue. Lacking good performance, the critics of the European projects and the goodness of its achievements have been flourishing. The anniversary of the sixty years of the Treaties offers a pertinent occasion to reconsider the achievements of the EU and to assess its failures. It calls on a rethink of the EU's own identity.

Historically, EU regulation has been characterised by the changeable willingness of Member States towards more or less integrated policies; however, the current coexisting crises have accelerated national second-thoughts about the integration process and potentially put the EU system at a crossroad. The need for more integration is an issue on the EU agenda, but at the same time, Member States are reluctant to further transfer their sovereign decision-making powers to the EU. The investigation on the nature of the EU integration process has therefore become a pressing need to give coherent answers to concrete problems. By shedding light on the reach of the EU legal order, law can effectively contribute to this debate.

## 2. The paradigms for EU law

Since the debate about the possibility of a constitution for the EU and the no *demos* theory (Grimm 1995; Habermas 1995), much has changed: the failure of the Constitutional Treaty has given new arguments to the discontent of EU constitutionalism; at the same time the proclamation, first, and the entry into force as a binding document, then, of the Charter of Fundamental Rights have given new blood to the debate on the constitutionalisation of the EU. Legal scholarship in the area of constitutional law has developed significant theories about the nature of EU constitutionalism and its effects on the functioning of the EU legal order (amongst others, Stein 1981; Weiler 1991, 1996; MacCormick 1993 and 1999; Eriksen, Fossum and Menéndez 2004; Póitres Maduro 2005, 2007 and 2009; Kumm 2005; Avbelj 2008; Menéndez and Fossum 2011; Martinico 2012; Avbelj and Komárek 2012). A growing number of new constitutional theories have emerged and the discussion has gone beyond the no *demos* theory (Weiler 1999; Walker



2002 and 2008; Krisch 2005; Maduro 2007, 2009 and 2010; de Búrca and Weiler 2011). In the line of the political science literature on the regulatory Europe (Majone 2005 and 2014), legal scholarship has also deepened the studies on governance and started to explore the EU as a phenomenon of administrative governance (Joerges 1996, 2001 and 2002; Joerges and Neyer 1997; Joerges and Dehousse 2002; Lindseth 1999 and 2010; Smismans 2004; Hofmann and Türk 2006; Azoulai 2011; Curtin and Mendes 2011; Joerges and Glinski 2014). In this framework, the legal literature has somehow produced two different paradigms for understanding the EU legal order, which gravitate towards a constitutional law approach to EU law and an administrative law one.

The administrative law paradigm aims to explain the EU as a phenomenon of administrative governance beyond the state. Lindseth (2010) has clearly explained this approach by emphasising that the EU has an ‘administrative, not constitutional’ legitimacy. In short, this means that EU institutions are conceived as regulatory powers, which have been delegated by its Member States. The EU therefore benefits from a ‘mediated form of legitimacy’, which stems from its Member States and their citizens. Member States are thus understood as the principals overseeing the EU, the agent. This approach considers EU integration as a functional process that affects sector-specific areas that the Member States have deliberately planned to join.

The constitutional law aims to explain the EU as an experience that contains and shapes the Member States’ constitutional values, with specific reference to fundamental rights in the EU, in its Member States and in the internal market. This idea of constitutional law goes beyond the traditional development of constitutional law in the national contexts. It is not based on the hierarchy of the sources of law and/or on sovereignty; it represents a kind of constitutionalism beyond the state and its institutional dimension, close to the idea of global constitutionalism. It is a common commitment to shared values and objectives. This approach emphasises the structural change in the concept of national sovereignty that the creation of an autonomous constitutional legal order has involved. This emerges with clarity in the discourse of the EU institutions. The way the Court of Justice defines the autonomy of EU law and its legal order is emblematic. Decisions like *Kadi* or the Opinion 2/13 on the access to the European Convention of Human Rights clearly show the strong constitutional discourse of the Court.



If one looks at the constitutional foundations of the EU and its polity, the legitimacy process is led by the recognition of (fundamental/human) rights and it works not only bottom-up (from the States to the EU), but also top-down (from the EU to the States) and with openness to international *fora* (e.g., standardisation process). So far, the same dynamics of legitimation that emerge in the international arena are reflected in the EU. The debate about the constitutionalisation of international organisations, as well as the development of global administrative law has created legal systems which go beyond the traditional functioning and categories of international law. For example, further development of fundamental rights within the EU is legitimised by the CJEU upon both the constitutional traditions of the Member States and international law.

The key difference between the two paradigms is the emphasis they put on specific aspects of the EU integration process: on the one hand, the existence of an uncuttable umbilical cord between the Member States and the EU and, on the other hand, the autonomous existence of the EU as a legal person not only with regard to its Member States, but also in the international arena.

Paradigms have easily been facing each other and have aimed to define themselves as exclusive with the effect of polarising the legal scholarship on two competing sides. The paradigm of *administrative* integration and the one of *constitutional* integration read in competing ways the concept of democratic legitimacy in the EU legal order. They both focus from their perspective on the genuine nature of the EU.

So far, the debate has focused on the apparent differences between these approaches, but possibly they also have a lot in common. This Special Issue aims to move the legal debate forward and reverse the logic of incompatible alternatives between constitutional and administrative integration. The innovative goal of this Special Issue is to reveal the complementarities of these paradigms. The goal is to understand to what extent each paradigm can contribute to the functioning and the identity-building of the EU and to find out how these commonalities affect the nature of the EU integration process.

Reflections from both perspectives on the European identity remain topical and can tell us a lot about the future directions of the European integration process. The European identity dilemma affects the content of EU policies and their legitimacy and is echoed in the political debate in opinions for more or less Europe. By focusing on these different interpretative models, the Special Issue aims to debate the very nature of the EU, its



legitimacy issues and the search for suitable regulatory solutions, with the aim of shedding light on the legal approaches to the EU and enabling them to concur to fill the gaps in the functioning of the EU.

### 3. The content of this Special Issue

On the anniversary of sixty years of the Rome Treaties, this Special Issue aims to reflect on the paradigms for EU law looking beyond their competing accounts of EU integration. The analysis is developed through a series of contributions that challenge the paradigms in different directions. The discussion is articulated on two levels. On the one hand, a group of contributions focuses on the historical and legal analysis of the emergence and transformation of the EU legal order. These contributions delve deeper into the absence of a European identity and go beyond the inherent critique that the EU is a *democracy* that struggles with a democratic disconnect or even deficit. On the other hand, other contributions debate paradigms and their implementation in important policy domains. These contributions aim to give a more practical perspective on the constitutional and/or administrative character of the European Union, showing its implications and concrete questions.

The Special Issue is divided into different Sections that structure the dialogue between the competing paradigms in a range of areas. Thanks to the expertise of well-recognised international scholars, the Special Issue also provides significant insights on different aspects of EU law. In the first section, Lindseth and Dellavalle discuss the paradigms for EU law and theories of EU legal integration. The second section questions paradigms in the justification of the institutional design of the EU (Simoncini) and in the development of the functions of constitutional identity (Belov). The third section analyses the resilience of constitutional pluralism as a paradigm for EU law in times of Euro crisis, and conflicting relationships between national and supranational legal systems, with specific regard to the Central and Eastern European political scenario (Pierdominici), and the challenges to the democratic principle stemming from the economic crisis (Scicluna). Under the fourth section, the discussion goes deeper into substantive law issues and focuses on the implications of paradigms in the construction of significant EU policies, such as the Banking Union (Gigliani) and consumer protection in the internal market (Straetmans and



Howells). The last section aims to discuss the effects of paradigms on the identity of the EU as a global actor: Kuo analyses the implications of the EU's interaction with other legal regimes, whereas Cebulak discusses the CJEU's ambivalent approach to the constitutionalisation of EU external relations.

Although the Special Issue challenges the current framework of EU law in different directions, we sketch three cross-cutting issues that the contributions highlight. Firstly, the dichotomic approach to EU law as either a constitutional or an administrative experience cannot definitively exhaust the comprehension of EU law. The Treaties themselves point to different directions. On the one hand, the European Union is based on the principle of conferral (art 5 (1) TEU). This original transfer of competences from the Member States is the basis whereupon the EU developed its own supranational legal order. On the other hand, article 2 TEU proclaims the respect for human rights, democracy and the rule of law as key values shared between the EU and the Member States. Already in the *Les Verts* case, the Court of Justice (CJEU) characterized the EU as a constitutional level of governance in its own right, with the EU treaties serving as a 'constitutional charter of a Community based on the rule of law'.<sup>1</sup> The implication is that the centralized rulemaking process in the EU is also of a constitutional character, serving as the EU's legislature. How the CJEU further brought human rights into the framework of the European Union need not be repeated. Yet, this case law suggests something else other than the protection of fundamental rights; the statement of the autonomy of the EU legal order and the CJEU's jurisdiction. Ever since its inception in *Van Gend en Loos*, the main goal of the constitutionalisation process has been to establish the autonomy of the EU legal system vis-à-vis its Member States (Halberstam and Stein 2009: 62; Mayer 2010: 20-21). To that end, the CJEU has endeavoured to build the EU legal order into a fully-fledged constitutional value system. The recent *Kadi* saga and the Opinion 1/13 on the EU accession to the European Convention of Human Rights (ECHR) further illustrate the CJEU's attachment to the autonomy of the EU legal order and its monopoly of jurisdiction. The ultimate goal of the CJEU-initiated process of constitutionalisation cannot be fully achieved without extending further to the external dimension of the EU legal order vis-à-vis the international legal system. It follows that the CJEU positions the EU legal order not only vis-à-vis the Member States, but also vis-à-vis the world (see Kuo 2017). The *Kadi* cases fulfill the promise first delivered in *Van Gend and Loos* by substantiating the





Union's constitutional identity (de Búrca 2010: 44; see also Avbelj, Fontanelli, Martinico 2014).

Although the constitutional nature of the European Union is regularly questioned, an important number of scholarly opinions tend to bestow on the EU legal order a constitutional nature. This is particularly due to the CJEU's tendency to understand the EU in autonomously democratic and constitutional terms. Lenaerts, for instance, points out that as a result of the 'constitutionalisation of the Treaties', which transformed the European Union from an international organisation into 'a composite legal order', the CJEU has continuously been called upon to uphold the 'rule of law' as provided for by Article 19 TEU (see Lenaerts 2015, 14-15). He distinguishes three strands in the CJEU's jurisprudence. The Court took a leading role in setting the founding principles of the EU legal order by having recourse to the general principles of law which provide a material constitutional content to the 'law' of the EU (the so-called gap-filling function)<sup>ii</sup>. Secondly, the CJEU aimed to safeguard the core of the European integration set out in the Treaty. Once the constitutional foundations of the EU legal order were put in place and the establishment and functioning of the internal market secured, the CJEU moved onto a new paradigm. As the constitutional court of a more mature legal order, it now sees its role primarily as one of upholding the 'checks and balances' built into the EU constitutional legal order of states and peoples, including the protection of human rights, displaying greater deference to the preferences of the EU legislator or to those of the Member States (Lenaerts 2015, 16).

Simoncini also highlights the significant institutional implications that this judicial interpretation has on the development of EU administration. The judicial evolution of the so-called *Meroni* doctrine concerning the non-delegation of powers to EU agencies unveils how, legally speaking, the enhancement of EU agencies' powers takes place in the autonomous constitutional framework of the EU legal order. Howells and Straetmans note the ways in which the Unfair Contract Terms Directive<sup>iii</sup> and the Unfair Commercial Practices Directive<sup>iv</sup> try to steer a path between imposing a common European standard and allowing national variation. The open textured norms and safeguard clauses in both directives allow room for flexible application. Central to this discussion is the role of courts in developing common norms. As was pointed out above, the primary role of the Court of Justice as the constitutional court of a more mature legal order is according to Lenaerts



(2015, 16) one of upholding the ‘checks and balances’ built into the EU constitutional legal order of states and peoples, displaying greater deference to the preferences of the EU legislator or to those of the Member States. The differentiated role between the Court of Justice as the interpreter of European law and the national courts as the party that applies it, ensures a release valve to prevent any direct clashes and allow a subtle way for national perspectives to be reflected. Although the CJEU has fiercely cracked down on national laws that seem to infringe the scope of the unfair commercial practices directive, Howells and Straetmans see this as a dialogue that allows for gradual convergence.

The constitutionalization process has however been shaped in an original manner. Article 4(3) TEU imposes the loyalty principle or principle of sincere cooperation on Member States but leaves open how much leeway Member States have in setting their own constitutional parameters. Scheppele has characterized Article 4 TEU as a “microcosmos of contradiction” (Scheppele 2017). On the one hand, Article 4(3) TEU commits the Member States to EU loyalty: they should refrain from any measure which could jeopardise the attainment of the Union’s objectives. On the other hand, Article 4 TEU also commits the EU to self-restraint in telling its Member States what specific sorts of constitutional orders they must observe (Scheppele 2017, 446). Article 4(2) TEU indeed sets out the EU’s obligation to respect “the equality of the Member States before the treaties as well as their national identities, inherent in their fundamental structures, political and constitutional”.

Article 7 TEU then emerges as a helpful provision and seeks to enforce the Member States’ commitment to the shared values (Articles 2 and 3 TEU). It allows the introduction of political sanctions against Member States that present ‘a clear risk of a serious breach (...) of the values referred to in Article 2’. Yet, Kochenov has criticized the shortcomings of this enforcement mechanism mainly because the EU values reflected in Article 2 TEU are not part of the so-called *acquis* of the Union, simply because the values have never been delegated to the Union (see Kochenov 2017; compare with Scheppele 2017, who speaks of the Member States’ constitutional coups that the EU was incapable of forestalling and the ‘quarantine mechanism of Article 7 TEU’, 449-458). On top of that, the several issues embedded in the use of this sanction power suggested the use of alternative instruments to ensure the commitment to the shared values. Besselink (2016) identified these alternative instruments in the prevention and prior monitoring powers in the ‘rule of law initiatives’ of the Commission and Council. The cases of Poland and Hungary are emblematic. To face



the systemic threat that the reforms of the judiciary posed to the enforcement of the rule of law in Poland, the Commission adopted two recommendations and then launched an infringement procedure against Poland for breach of EU law. The Commission only launched a formal warning to immediately trigger the Article 7 procedure. The response of the Commission to the constitutional coup in Hungary was different. The Hungarian government suddenly lowered the judicial retirement age for ordinary judges thereby threatening judicial independence (see in more details Scheppele, 459-467). Although commitment to the rule of law is a value protected under Article 2 TFEU, the Commission preferred to charge Hungary with age discrimination which led to a judgement of the CJEU on 2 November 2012<sup>V</sup>. Also, other constitutional changes in Hungary made the European institutions conclude that Hungary was engaged in serious violations of European values, but despite criticizing the constitutional changes, none of these criticisms was effective at stopping the constitutional coup and none of the harsher sanctioning mechanisms that were available to European institutions were used (see Scheppele 2017, 466-467). From this complex background, the constitutional identity and the legitimizing factors for the EU public power may legitimately diverge, navigating between the constitutional and administrative tensions. Pierdominici observes that crises questioned the normative validity, but confirmed the descriptive validity of the constitutional pluralism as a theory accommodating the plurality of constitutional sources and their inherent constitutional conflicts in the absence of a shared hierarchy of values. Discussing EU integration, Simoncini considers that only a wider public law approach can accommodate the composite nature of the EU as a Union of Member States, and justify institutional innovation. Analysing the role of the EU as a global actor, Kuo also defends that the CJEU's pivoting of the idea of constitutional identity on the autonomy of EU law coheres with its continuing effort to establish the autonomous and constitutional character of the EU legal order vis-à-vis national legal orders of the Member States in its case law. Cebulak has also recognised that especially in the domain of EU external relations, the CJEU adopts either the administrative law paradigm based on efficiency considerations or the constitutional paradigm based on human rights protection, according to the specific policy domain and the individual cases, suggesting a lack of a coherent approach to legitimizing the nascent judicial review in EU external relations.



Precisely on this point, Kuo points out that there is more at stake in the case law relating to external relations than this ‘intra-EU law’ distinction. He contends that the CJEU’s take on the Union’s constitutional identity suggests far-reaching implications from the CJEU’s identity-based defence of fundamental rights to the relationship between the Union and the world. In particular, the shortcomings of a purely administrative approach have brought Kuo to that conclusion. Global Administrative Law seeks to resolve inter-jurisdictional conflicts on a pragmatic, case-by-case basis in light of the idea of publicness (Kingsbury, Krisch and Stewart 2005; Krisch and Kingsbury 2006). Thereto the interrelationship between regulatory regimes is steered on the basis of principles such as the limitation of power, the requirement of justification and proportionality, the procedural mechanism for deliberate decision-making, and the protection of human rights in each governance sector etc. On the basis of these principles, the laws of the regulatory regimes are balanced against each other to decide which one to apply in each case (Krisch 2010: 277-278). Kuo objects to this in that the distinction between the constitutional and the administrative approach prevents GAL’ pragmatic answers to global governance from engaging in a value-based debate on the future of the world order.

In this discussion, Belov’s contribution takes a particular place. He attaches primary importance to the concept of constitutional identity, which he counts among the new normative ideologies of the post-Westphalian supranational constitutionalism. Going beyond the concept of sovereignty and hierarchy deeply rooted in state-like constitutionalism, Belov identifies in the constitutional identity a flexible concept that covers the different realities of global, supranational and post-national constitutionalism. Albeit from a completely different angle, Belov approaches like Kochenov and Scheppele the problem of the substantiation of the common values in the European Union, and is convinced that constitutional identity could serve as a mediator, capable of modelling the diversity and plurality of national constitutional orders into the composite constitutional framework of the EU with sufficient deference to national sensitivities. Like article 4 TEU, constitutional identity performs a legitimacy function and allows the transfer of constitutional competences from the Member States to the EU, but at the same time, recognises the limitations to the primacy of EU law.

Another relevant issue that the Special Issue points out is the role of technocracy in the EU, and how this affects the legitimacy of the EU integration process in the management



of crises. Lindseth considers the relationship of the Member States with the EU as a principal-agent relationship, wherein the EU has a functional legitimacy only since its institutions are administrative agents of decisions taken under the oversight of the nation states as principals. In particular, the EU's lack of autonomous legitimate compulsory mobilization powers, human and fiscal, demonstrates the lack of true constitutional foundations. Lindseth points out the risks of the nominal constitutionalism of the European Court of Justice as one of the major problems the EU is struggling with. In proceeding 'as if' the EU possesses a robust form of legitimacy in its own right, the CJEU seems to ignore the historically constructed connection between the people and their institutions.

When analysing the legitimacy of the EU public power in the light of the traditional divide between the justification 'from above' -namely on the basis of superior skills of those who exercise the power (output-oriented legitimacy/government for the people)- and the justification 'from below' -namely the legitimation of the EU public power by the European citizens so as to maintain the highest democratic standards within the EU institutions (input-oriented legitimacy/government by the people)- Dellavalle criticizes the widespread confidence in the competence of the EU institutions, the tacit consent of the EU citizens and their mainly accepting stance towards authority that is presumed to act in the common interest. In his view, the manner in which the EU governed the financial crisis demonstrates that the 'technocratic drift' of public affairs does not (necessarily) achieve better results.

Dellavalle's analysis is shared by Giglioni and Scicluna. When discussing the accountability and legitimacy of the European Banking Union, Giglioni emphasises that in the experimentation of original forms of administrative integration, financial stability has become the predominant factor to which all other (public) interests are subordinated. On the question of whether this evolution is paired with adequate safeguards for democratic control, Giglioni's answer is negative. Although a trend can be detected toward increased connections with parliamentary institutions, these strengthened bonds do not take place with important limitations and exceptions. On top of that, the judicial review of the CJEU seems very limited and in some cases even virtually absent. Hence, publicity and transparency are offered on the altar of confidentiality and secrecy so that the new power



relationships seem to coalesce according to the prevalent interests of certain Member States.

Scicluna's analysis of the EMU and the Greek debt crisis portrays a similar picture of a growing disconnection between formally democratic procedures and substantive choices in the EU. The recent crisis-driven turn to technocracy in the EMU management manifestly illustrates the absence of real, substantive choice in the Eurozone governance. In Scicluna's view, the euro crisis has privileged national executives, with the European Council becoming the Union's preeminent decision-making body, while the European Parliament is side-lined and effective cooperation is paralysed in the sovereignty paradox, which keeps national governments unable to succeed alone because they have already delegated many of their law-making competences, but at the same time are unwilling to give up further powers.

Only the democratic justification of the EU rules out technocratic governance. Dellavalle contends that democratic legitimacy shall not be exclusively understood as based on a social and political community which is assumed to be united by pre-political and pre-legal bonds that can take up the role of a political actor and guarantee ascending legitimacy. No European popular legitimation can be achieved if such historically cemented 'demos' is required. In his view, democratic legitimacy can also be the result of a political community of the people (some ethnic origin of nations) which deliberately decide to be part of a common 'demos' that legitimizes power and to organise themselves in democratic institutions that share 'a common democratic ethos'. European citizens are united by a common aspiration to meet common challenges with shared solutions.

If legitimacy 'from below' is the antidote to the undesired technocratic drift, the way to achieve this goal is not traced. Two opposite strategies may then be followed. We could express a profession of faith in the social and political conditions of nation states or we could opt for the radical democratization of EU institutions. As professed by Lindseth, in one way or another this would 'reconcile Europe and the nation-state', by reducing the 'as if constitutionalism' that the current EU legal order represents to his own eyes. According to Lindseth, this reconciliation could take either form. It can police the boundaries of the competences conferred on the EU with much greater rigour, temper significantly claims to EU law 'autonomy', take a much more demanding approach with regard to the principle of subsidiarity, both in terms of substance and procedure, and most importantly, abandon any



notion of constitutional supremacy, particularly with regard to the relationship between EU law and national constitutional law, and replace it by a principle of strong deference. Or, it can also experience democracy and constitutionalism in supranational terms.

As to the first strategy, it may be objected that nation states also struggle with democratic deficiencies. Scheppele pointed to the constitutional coups of some Member States (449-458) and Scicluna casts serious doubts on the democratic features of some Member States and the democratic content of decision making between the Member States in the Eurozone.

### 3. Bridging the gaps. The way forward

Several contributions to this Special Issue give further guidance on how the EU should proceed in the future. The common thread is the search for coherent developments that should bridge the gaps of both paradigms. It follows from the foregoing that none of the contributors exclusively reasons in terms of ‘the’ constitutional or administrative paradigms. They rather see the EU legal order as a genuine construct that objectionably can be reduced to one or another traditionally defined paradigm. Paradigms are not mutually exclusive and their prevalence depends on the specific angle from which the EU integration process is analysed.

This is not to say that the administrative/constitutional law divide has been redundant. On the contrary, the growing critiques on the predominant constitutional label of the European Union with its shortcomings has fuelled the academic debate and forced scholars to remodel traditional legitimizing concepts to adapt them to the original, unique nature of EU public law. As mentioned, the discussion about underlying paradigms pushed the debate beyond the traditional critiques. The contributions to this issue clearly transcend this stage and aim to provide useful insights for future development of the EU.

Recently Kochenov has defended a rather pessimistic view. He qualifies the CJEU’s attempts to deal with values like human rights and the rule of law as though these were part of the ordinary *acquis* as largely insufficient (Kochenov 2017: 425 and 441). Also Lindseth heavily criticizes the CJEU’s approach ‘as if the EU possesses a robust form of legitimacy in its own right’. Both authors analyzed the EU legal order from completely different angles but (un)surprisingly come to quite similar conclusions. Kochenov, like Lindseth, has



advocated a reform of the European Union. ‘Instead of hiding behind the veil of procedural purity banners of autonomy, supremacy and the like, EU law should embrace the rule of law as an institutional deal, which implies, inter alia, eventual substantial limitations on the *acquis* of the Union, as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating those values above the instrumentalism marking them today’ (Kochenov 2017: 445). In the same vein, Scheppele has pleaded for a systemic infringement procedure whereby the systemic violation of the basic principles of EU law by a Member State (e.g., when national pluralism hits the hard egg of common values) would constitute a violation of Article 4(3) TEU (Scheppele, 477).

Lindseth’s proposals to overcome the EU’s democratic disconnect also point in the same direction: ‘Unless and until Europeans begin to experience democracy and constitutionalism in supranational terms, EU governance will persist as a *gouvernement des juges* and *des experts* lacking in robust legitimacy of its own, at least to the extent commensurate with its increasingly ambitious goals (currency union, Schengen, defence and security cooperation)’. This critique to the EU as *gouvernement des juges* and *des experts* has been voiced in a number of contributions to this issue. It could have pushed the authors to opt for the repatriation of powers to the individual Member States, which could for instance be realised through the legalisation of the political principle of subsidiarity. Furthermore, concerns over the destination of the federalist development and the identity implications of the constitutionalist approach could have invigorated an interest in contemplating purely administrative alternatives to the conceptualization of the EU, such as the proponents of a Global Administrative Law. And yet, none of the contributors to this issue seem to see these alternatives as an effective way forward for the EU. They rather embark on a revitalised and refashioned EU constitutionalism.

The contributions to this Special Issue take the critique from the administrative paradigm proponents on recent developments within the EU seriously, and attempt to reform the constitutional character of the EU legal order in accordance with those critiques. The intensity with which these reforms are proposed evidently varies among the contributors, going from a new world *ordre public*-exception to solve inter-regime conflicts (Kuo) to a fully-fledged democratisation of the institutional architecture of the EU (Dellavalle). Nonetheless, they all seem to have in common the belief that the only way forward for the European Union is a renewed legitimacy ‘from below’. In this process, the





disconnection of central concepts such as sovereignty, constitutional identity and demos from their traditional substance seems key. A new supranational constitutionalism may emerge and bridge the gaps between competing paradigms. On a more concrete level, both the more administrative and more constitutionalist authors invite the political European community to self-reflection with the aim of substantiating the real parameters of its constitutional tradition, its constitutional culture and the core of its transgenerational constitutional project.<sup>VI</sup> Sixty years later, innovation remains the key to the success of the European Union.

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<sup>I</sup> Case 294/83, *Parti écologiste Les Verts v. Parliament*, 1986 E.C.R. 1339, 1365 para. 23.

<sup>II</sup> In its original version, the EC Treaty commanded the Court of Justice to ensure that in the interpretation and application of the Treaties the law is observed, but did not define 'the law'. 'In order to honour that constitutional mandate in a self-referential and, in that sense, autonomous legal order, the ECJ could not limit itself to a formalistic understanding of the rule of law. Accordingly, it had no choice but to complete the constitutional lacunae left by the authors of the Treaties. In so doing, (...) EU law could not break away from the constitutional traditions of the Member States' (Lenaerts 2015, 15).

<sup>III</sup> Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 95/29.

<sup>IV</sup> Directive 2005/29/EC of 2005 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22.

<sup>V</sup> CJEU, 6 November 2012, case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687.

<sup>VI</sup> This invitation is also implied in the recent contributions, both referred to above, of Kochenov who advocates a reform of the EU and Scheppele, more indirectly, with his plea for the introduction of a systemic infringement procedure.

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