

From Economic to Symbiotic Constitutionalism: A Belated Post-Lisbon, Post-Crisis Transformation?

Konstantinos ALEXANDRIS POLOMARKAKIS^{*}

This article departs from the traditional portrayal of the relationship between economic and social constitutionalism as an antagonistic pair in a never-ending struggle. Instead, it propounds a more conciliating thesis in light of the post-Lisbon and ongoing developments at EU level, which have advanced social constitutionalism further. This line of argument is better explained by the concept of symbiotic constitutionalism, which aims at keeping its economic and social components in balance. Symbiotic constitutionalism gives effect to the social market economy paradigm introduced by the Treaty of Lisbon and acknowledges the incremental socialization of the Union, reawakened in the aftermath of the crisis. Finally, it bestows a constitutional telos upon the EU that is not detrimental towards its economic and social components. These are no longer pitted against each other, but understood as a complementary pair.

1 INTRODUCTION

The European Union (EU) has in general the potency to exert its influence over social welfare matters, despite the lack of a clear-cut competence regime in the field. References to the area have gradually been incorporated in the Treaties and the Charter of Fundamental Rights (Charter), legitimizing social policy at EU level. The fact that this legitimization has taken place through the inclusion of social policy in the Union's constituent documents, the Treaties, renders welfare part of the European *acquis* and values. In turn, these act as foundations of the – contested – EU quasi-constitutional order. Suddenly – but not quite surprisingly – the existential debates around the nature of the Union come to surface. These debates range from the broad question on the causality and actuality of a European constitution, which does not form part of this article, to the more specific one, revolving around the nature of that constitution. The latter often delves into the adversarial relationship between the so-

^{*} Lecturer in Socio-Legal Studies at Brunel University London, UK. An earlier version of this article was presented at the 24th International Conference of Europeanists, Glasgow, 12–14 July 2017. I am grateful to Professor Philip Syrpis for comments on an earlier draft. I would also like to thank the anonymous reviewers for their thoughtful and constructive suggestions. All errors remain my own. Email: konstantinos.alexandrispolomarkakis@brunel.ac.uk.

called economic and social constitutions, and examines how this has developed over time.

This article focuses on that relationship, by investigating how social considerations have been embedded in the Union's aims and objectives over time, with particular attention paid to the Treaty of Lisbon and the social market economy it envisages for the EU, as well as to the new initiatives put forward under the aegis of the Pillar of Social Rights. It departs from the traditional portrayal of the relationship between economic and social constitutionalism as an antagonistic pair in a never-ending struggle. Instead, it propounds a more conciliating thesis in light of the ongoing developments. It begins by setting out the bigger picture behind European constitutionalism, a concept the Union is in need of and has plausibly achieved to embed. Then emphasis is placed on the seemingly antagonistic prongs of that constitution, claiming that aspects of social constitutionalism can interact with their economic counterparts, and have done so, though at varying degrees, for a long time.

Social constitutionalism has been – at least normatively – reinforced post-Lisbon through its crystallization in the social market economy paradigm. Both recent and ongoing reforms aim not to overturn but to restrain economic constitutionalism, by causing it to draw level with its social counterpart. This allows for the characterization of the relationship between the economic and social policies of the Union as one of symbiotic constitutionalism, whereby even the *prima facie* liberal Court of Justice of the EU (CJEU/Court) of *Viking* and *Laval* has been metamorphosed to a certain extent.¹ The emergence of symbiotic constitutionalism as the new *modus operandi* of the EU constitutional order, may finally give effect to the social market economy paradigm embedded in the Treaties. It also bestows a constitutional *telos* upon the Union that is not detrimental towards the economic and social constituents of the European project, avoiding the negative consequences for the economy and society the continuation of the antagonistic understanding would have triggered. Symbiotic constitutionalism essentially aims at buttressing a harmonious coexistence of the two.

2 THE IDEA OF THE EUROPEAN CONSTITUTION

European constitutionalism is inextricably linked to the challenging quest for the constitution of the EU,² a quest that has its roots in the concept of that new legal order the then European Communities established, as coined by the CJEU in its

¹ Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779; C-341/05 *Laval un Partneri* [2007] ECR I-11767.

² Weiler argues that the overarching term constitutionalism, in the context of the global and pluralist manifestations of it, is underspecified, and thus open for interpretation, see J. H. H. Weiler, *Prologue:*

two –arguably– most famous judgments of *Van Gend* and *Costa*.³ EU law can be autonomous, with its own constitutional principles and laws, at least according to some.⁴ The CJEU further proclaimed the Treaties as the constitutional pillar of the Union.⁵ Yet the Constitutional Treaty failed to materialize, partly due to the Union’s and Member States’ ‘immaturity’ despite their high ambitions, and partly due to their peoples’ misguided views on its impact.⁶ The fact that the Lisbon reforms incorporated most of the failed Constitutional Treaty’s aspects, save for its more state-like elements, shows that the latter had come a little too early, in the sense that Member States were not prepared for such a symbolic commitment.

Narratives on the European demos accentuate the image of a pluralistic European society.⁷ Nonetheless, seeking to assert a proper pan-European (federal) state formation in classic terms is a challenge.⁸ This crudely shows how difficult it is to legitimize actions on behalf of the EU institutions, even though in abstract terms the Union could be perceived as a *sui generis* form of a state; a peculiar, distinct, post-Westphalian and post-modern kind of the same species.⁹ The absence of an explicit Constitution proves problematic. Grimm, years ago, criticized the oxymoronic situations of EU scholars complaining about the lack of a formal constitution yet simultaneously granting such status to the Treaties.¹⁰ For some international lawyers what has been put forward is nothing but a sophisticated manifestation of public international law, the Treaties encapsulating its norms.¹¹

Nevertheless, the majority of the academic community has come to the conclusion that constitutional traits form part of the European acquis.¹² Furthermore,

Global and Pluralist Constitutionalism – Some Doubts, in *The Worlds of European Constitutionalism* 18 (G. de Burca & J. H. H. Weiler eds, Cambridge University Press 2012).

³ Cases C-26/62 *Van Gen den Loos* [1963] ECR 1 and C-6/64 *Costa v. ENEL* [1964] ECR 585.

⁴ P. Eleftheriadis, K. Nicolaidis & J. H. H. Weiler, *Foreword: The Changing Landscape of European Constitutionalism*, 9(3–4) *Int’l J. Const. L.* 673 (2011).

⁵ Case 294/83, *Les Verts*, [1986] ECR 1339 and Opinion 1/91, *European Economic Area* [1991] ECR I-6079.

⁶ K. Tuori, *The Failure of the EU’s Constitutional Project*, 3 *No Foundations*, *J. Extreme Legal Positivism* 37 (2007).

⁷ K. Nicolaidis, *European Democracy and Its Crisis*, 51(2) *J. Common Mkt. Studies* 351 (2013).

⁸ S. Douglas-Scott, *Constitutional Law of the European Union* 482–83 (Longman 2002); U. Haltern, *On Finality*, in *Principles of European Constitutional Law* 205–33 (A. von Bogdandy & J. Bast eds, Hart Publishing 2009).

⁹ Drawing on the works of S. Weatherill, *Is Constitutional Finality Feasible or Desirable? On the Cases for European Constitutionalism and a European Constitution*, *Constitutionalism Web-Papers (ConWEB)*, University of Manchester, Paper No 7/2002 5 (2002); and N. Walker, *The Idea of Constitutional Pluralism*, 65(3) *Mod. L. Rev.* 317, 320–24 (2002).

¹⁰ D. Grimm, *Does Europe Need a Constitution?*, 1(3) *Eur. L. J.* 282 (1995).

¹¹ O. Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10(4) *Eur. J. Int’l L.* 763 (1999).

¹² B. de Witte, *EU Law: Is It International Law?*, in *European Union Law* 190–91 (C. Barnard & Steve Peers eds, Oxford University Press 2014). That is what Craig coins as the transformation thesis: P. Craig, *Constitutions, Constitutionalism, and the European Union*, 7(2) *Eur. L.J.* 125, 134 (2001).

these traits are embedded in the text of the Treaties, acquiring a distinct meaning, 'better explained with a constitutional vocabulary than with that of international law'.¹³ Precisely, to what extent these have partaken in forging the so-called European constitutional order merely depends on each author.¹⁴ As Snyder puts it, the EU constitution cannot be purely confined by words, but instead it consists of an ongoing process.¹⁵ The idiosyncratic character of the EU setting and of the development of its legal order acted as the variables that resulted in diverse worldviews on the issue, which, in turn, led Maduro to observe that European constitutionalism is under an existential crisis.¹⁶ Shall it be more profound or more deferential towards the Member States? Limited or overarching? These are some of the core dilemmas to consider when calibrating Europe's constitutional compass, that could help determine the overall direction the European project is to take in the future.

3 THE EU'S ECONOMIC AND SOCIAL CONSTITUTIONS

3.1 THE EU'S ECONOMIC AND SOCIAL CONSTITUTIONS

The facets of this existential crisis which are most relevant to this article are those that deal with the notions of economic and social constitutionalism as components of the EU constitutional paradigm. Their relationship is (or, better, can be) rather contentious. The former has its roots mainly in the ordoliberal and functionalist theories that shaped the Union's development since the start, providing it with a defence for its economic and market-based technocratic initiatives and actions, by shielding those 'from the vicissitudes of politics, whether quotidian or millennial'.¹⁷ On the other hand, a complete idea(l) of European constitutionalism shall also take into account its social aspects – at least partly normatively,¹⁸ and it is here where social constitutionalism comes handy, to enrich such connotations and embed them into the Union's aims and objectives.¹⁹

¹³ J. H. H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3(2–3) *Int'l J. Const. L.* 173, 176 (2005).

¹⁴ For an overview of the core approaches see K. Tuori, *European Constitutionalism* (CUP 2015).

¹⁵ F. Snyder, *Editorial: Is the European Constitution Dead?*, 10(3) *Eur. L. J.* 255 (2004).

¹⁶ M. Poiares Maduro, *Europe and the Constitution: What if This Is As Good As It Gets*, in *European Constitutionalism Beyond the State* 77 (J. H. H. Weiler & M. Wind eds, Cambridge University Press 2003).

¹⁷ N. Walker, *Constitutionalism and the Problem of Translation*, in *European Constitutionalism Beyond the State* 44 (J. H. H. Weiler & M. Wind eds, Cambridge University Press 2003).

¹⁸ Drawing parallels with the Sozialstaat principle or the Social State proclamation many EU Constitutions include. C. O'Conneide, *The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review*, in *Reasoning Rights: Comparative Judicial Engagement* 301 (L. Lazarus, C. McCrudden & N. Bowles eds, Hart Publishing 2014).

¹⁹ Francis Snyder, *The Unfinished Constitution of the European Union: Principles, Processes and Culture*, in *European Constitutionalism Beyond the State* 55 (J. H. H. Weiler & M. Wind eds, Cambridge University Press 2003).

The interplay between these two concepts takes the form of an antagonistic relationship. Functionalist and ordoliberal underpinnings are in a stark contrast with most social ones, which have traditionally been overlooked and sidelined in principle. On the other hand, if the Union aspires to be a full-frills federation, and not a merely enhanced economic community, social considerations shall be embedded into its laws and principles of constitutional nature and value. The EU has long been perceived as being ‘a prisoner of its initially economic orientation’,²⁰ giving priority to economic, financial and market considerations over social and political ones. Over time, the popularity of this view decreased, giving room to more pluralistic views of European constitutionalism, which no longer exclusively revolve around the concept of a single internal market, sometimes reinterpreting the latter in a more varied way.²¹ The constitutional discourse and landscape gradually evolved in order to accommodate and adapt to the changes and the areas that the Union has brought under its umbrella, welfare being one of them.

3.2 THE EMERGENCE OF THE SOCIAL CONSTITUTION

The move towards the inclusion of social constitutionalism in the discourse was not random. Neither was the – admittedly incremental – pace through which its elements were incorporated into the relevant discussions random. The Union kicked off as an economic community with limited – if not non-existent – competences in the area of social policy. Even when social policy was affected, most of the time this constituted a derivative outcome of economic integration.²² Social policy was a late bloomer, accompanied by patchy and inconsistent developments in that regard, rendering why it took welfare so long to take part in the constitutionalism debate self-explanatory. Nowadays, the social dimension of Europe is linked to what has been dubbed as the social constitution of the EU, one of the many components of the European constitution; welfare considerations have finally become part of the Union’s objectives.²³

While it can be argued that aspects of social policy are only partially regulated at EU level, the fact that some Europeanization of national functions has occurred, limiting Member State initiatives in such areas, highlights the widening scope of

²⁰ *Ibid.*, at 71.

²¹ J. H. H. Weiler & J. Trachtman, *European Constitutionalism and Its Discontents*, 17(1) *Nw. J. Int’l L. & Bus.* 354, 371 (1997).

²² O. De Schutter, *The Balance Between Economic and Social Objectives in the European Treaties*, 5 *Revue Française des Affaires Sociales* 119 (2006).

²³ K. Tuori & K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* 4 (Cambridge University Press 2013).

the EU's constitutional provisions.²⁴ Even though Member States at first might have been caught off guard by the reach of the Union's powers in an area, they have now overall conceded to its involvement therein. This resembles a quasi-blank cheque given to the EU to act as a normatively higher authority. In other words, it consists of a retroactive ratification of the social contract between the EU and its Member States, bestowing on it the necessary blessing to start crafting an all-around and ever-expanding, though not incontestably, constitution, a constitution where social perspectives are welcomed and embedded within.

Social perspectives inevitably bring into the discussion the paradigm of socially embedded constitutionalism. It is a departure from the paradigm of embedded liberalism the EU had adopted with the Spaak Report and the Treaty of Rome. In socially embedded constitutionalism, social rights are at the forefront in order to reinforce societal integration through the constitution's provisions.²⁵ These entail aims that go beyond the scope of classical human rights, governing labour relations and 'embrac[ing] policy aims going beyond the economic sphere [such as] social inclusion, combating inequality and poverty, diminishing unemployment and environmental and economic sustainability'.²⁶ All these have been labelled by Schiek as foundational milestones, laying the groundwork for a complete multi-level EU social policy.²⁷ Social Europe has become more mainstream, gaining a place in the European constitutional framework and providing a conceptual contribution towards reinforcing Europe's social dimension.²⁸

The social dimension is not only opposed by the economic imperatives of the Union to some extent, as argued *infra*, but also by the Member States themselves sometimes. The latter may not want to see their powers in the area of welfare becoming encroached by an oh-so powerful EU. This was the reason behind social considerations being in the middle of Fitzpatrick's converse pyramid of the EU.²⁹ Yet, as it now stands, EU social policy has been enhanced since the time of his writings, showing a more interventionist – and perhaps integrationist – Europe, with the Court, at times – though far from always, taking a pro-welfare stance

²⁴ M. Poiares Maduro, *How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union*, in *Altneuland: The EU Constitution in a Contextual Perspective* (J. H. H. Weiler & C. Eisgruber eds, Jean Monnet Working Paper 5/04 2004).

²⁵ D. Schiek, *Re-embedding Economic and Social Constitutionalism: Normative Perspectives for the EU*, in *European Economic and Social Constitutionalism After the Treaty of Lisbon* 38 (D. Schiek, U. Liebert & H. Schneider eds, Cambridge University Press 2011). For the embedded liberalism period see S. Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* 29–34 (Cambridge University Press 2009).

²⁶ Schiek, *supra* n. 25, at 41.

²⁷ *Ibid.*

²⁸ J. Shaw, *Introduction*, in *Social Law and Policy in an Evolving European Union* 4 (J. Shaw ed., Hart Publishing 2000).

²⁹ B. Fitzpatrick, *Converse Pyramids and the European Social Constitution*, in *Social Law and Policy in an Evolving European Union* 323 (J. Shaw ed., Hart Publishing 2000).

when attempting to bend Member States' political unwillingness in the area. This leaves the pervasiveness and longevity of economic constitutionalism and its underpinnings as the main hurdles in the quest for social constitutionalism in modern-day Europe. Social Europe's existence in the EU landscape as well as its viability crucially depend on the denouement of their interaction. A prevailing economic constitution would equal a welfare policy subordinated to the market, whereas the emergence and consequent embracing of a self-standing social constitutionalism would allow for it to take its own place in the Union's agenda.

3.3 THE ECONOMIC V. SOCIAL CONSTITUTIONALISM DEBATES

Notwithstanding the above, the debate for the prevailing kind of European constitutionalism is not homogenous. Inasmuch as the notion of the European constitution remains unspecified,³⁰ things follow the same pattern regarding the socio-economic nature of the European constitution. The academic discourse is divided in various streams, the first being one that perceives economic constitutionalism as the primordial paradigm at EU level, which still holds strong, despite the ever-expanding incorporation of social considerations by the European institutions.³¹ Although no uniform position can be found therein, common characteristics of such views are the acknowledgment of its German ordoliberal origins, the embeddedness of a market oriented quasi-(neo)liberal approach, as well as its renewed influence, particularly within the Economic and Monetary Union (EMU), in the course of the crisis.³² Economic, and more specifically market, integration reigns above everything else, social policy included.³³ This worldview had been entrenched into the first Treaties, which were blatantly lacking in embracing political and social constitutional elements initially.³⁴

The lack of incorporating social concerns has been progressively reversed, at least per some authors, with the shift of focus of the EU to encompass and be involved in more and more areas, leading them to express their eulogies towards the economic constitution.³⁵ Yet others contend that nothing has substantially changed and the neoliberal policies entrenched in the economic constitution actively restrict any pro-welfare initiative.³⁶ Even the initiatives adopted under the Lisbon strategy, namely the

³⁰ Weiler, *supra* n. 2.

³¹ G. Majone, *The European Community Between Social Policy and Social Regulation*, 31(2) J. Common Mkt. Studies 153 (1993).

³² T. Prosser, *The Economic Constitution* 11–14 (Oxford University Press 2014).

³³ W. Sauter & H. Schepel, *State and Market in European Union Law* 12 (Cambridge University Press 2009).

³⁴ W. Sauter, *The Economic Constitution of the European Union*, 4 C. J. Eur. L. 27 (1998).

³⁵ C. Joerges, *What Is Left of the European Economic Constitution? A Melancholic Eulogy*, 30 Eur. L. Rev. 461 (2005).

³⁶ R. Pye & O. Parker, *The Unfulfilled Promise of Social Rights in Crisis EU*, SPERI Paper No. 26, 12 (2016).

Open Method of Coordination (OMC), seem in a way to conceal economic rationales; behind a social façade and a shift from harmonization to a new regulatory framework, the ulterior market-oriented goal for performance optimization remains.³⁷ Triggered by the Laval Quartet, some observed a shift of political economies, with the one of neoclassicism surfacing, advancing deregulation of labour laws and social policies.³⁸ Nevertheless, not all share the same – pessimistic – view. Instead, a few scholars claim that the constitutionalization of the market that took place actually imposed limits on how far economic imperative can go, necessitating regulators to assimilate non-economic values therein; for them economic constitutionalism could act as a safety net.³⁹

The emergence of the notion of Social Europe in the late 1980s turned the spotlight into narratives that focused on the existence of a social dimension in the constitutionalism debate, something that was reinforced by the subsequent Treaty amendments, which included various provisions making reference to areas of social policy. Despite these changes, some authors, while acknowledging the new tension, cannot help but perceive it as unviable in the long run. The stand-alone welfare-related provisions are patchy for them, and their underpinning rationale is rather weak to support a distinct constitutional model.⁴⁰ In contrast with those affirming the existence of a pure economic constitutional paradigm, scholars of that category tend to concede that traces of social constitutionalism do indeed exist.⁴¹

However, the fact that Member States still enjoy a plethora of powers in social policy led them to note the subordination of the social to the economic constitution. Social constitutionalism is an ‘eternal loser’ or a ‘constitutional underdog’, found trapped in an uneven relationship with its economic counterpart.⁴² This is contrary to what happens at level of the Member States, whose constitutions ‘accord economic and social considerations equal constitutional status in political discourse and decision-making’.⁴³

Scharpf’s fundamental asymmetry’s roots are found herein. The asymmetry involves the highly harmonized aspects of the economic constitution versus

³⁷ W. Walters & J. Henrik-Haahr, *Governing Europe: Discourse Governmentality and European Integration* 120 (Routledge 2005).

³⁸ S. Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe’s ‘Social Market Economy’*, in *The Lisbon Treaty and Social Europe* 29–31 (N. Bruun, K. Loercher & I. Schoemann eds, Hart Publishing 2012).

³⁹ N. N. Shuibhne, *The Resilience of EU Market Citizenship*, 47 *Common Mkt. L. Rev.* 1597, 1608 (2011); F. de Cecco, *State Aid and the European Economic Constitution* 17 (Hart Publishing 2013).

⁴⁰ K. Tuori, *European Social Constitution: Between Solidarity and Access Justice*, in *Varieties of European Economic Law and Regulation; Liber Amicorum for Hans Micklitz* 371–73 (K. Purnhagen & P. Rott eds, Springer 2013).

⁴¹ K. Tuori, *European Constitutionalism* 229 (Cambridge University Press 2015).

⁴² K. Tuori & K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* 231–32 (Cambridge University Press 2014).

⁴³ *Ibid.*, at 233.

those of the social, which are predominantly rooted at national level. The social could never reach the 'glory' of the economic as only minimum harmonization can take place for national and political, but also structural, reasons.⁴⁴ For him, as well as for the rest of the scholars of this stream, a constitutionalized European social policy is doomed to remain atrophic, despite recent efforts to grant it a more important place in the Union's constitutional discourse. According to their views, social constitutionalism is like a sandcastle, slowly destroyed by the rising tide of economic imperatives; its footprint might remain, but it is almost impossible for it to fully resist free market forces.⁴⁵ All is not lost though; integrating theories of multilevel constitutionalism in this cluster paints a less dystopic image of the future. Member States' constitutional guarantees for welfare could safeguard its existence in transnational settings.⁴⁶

Regardless of the above, there's another strand in the literature, according to which social constitutionalism's development is sophisticated enough to provide welfare with its own distinct constitutional legitimization, not appreciably subjected to the economic one. Market-making and regulating through negative integration resulted in a series of harmonizing measures, affecting areas of social policy such as equality and working conditions.⁴⁷ At the same time, this allows Member States to adopt policies depending on the prevailing circumstances, not necessarily contravening welfare expansion within the remits of the Union.⁴⁸

The entry into force of the Lisbon Treaty saw social market economy put forward as the envisaged paradigm for the development of the European Social Model. While some of its themes might be limiting as to the approach the Union and its Member States shall adopt towards welfare, in that they prescribe a particular type of social constitutionalism for the EU, the significance of social market economy cannot be overlooked. Its introduction is a milestone for a more symmetrical constitutionalization of the Sozialstaat in Europe, vis-à-vis the already established economic one.⁴⁹ Despite the failed Constitutional Treaty, the inclusion

⁴⁴ F. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, MPIfG Working Paper, No. 02/8 (2002); F. Scharpf, *The Double Asymmetry of European Integration; Or: Why the EU Cannot Be a Social Market Economy*, MPIfG Working Paper, No. 09/12 (2009).

⁴⁵ S. Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* 259–63 (Cambridge University Press 2006).

⁴⁶ N. Walker, *Multilevel Constitutionalism: Looking Beyond the German Debate*, LEQS Paper No. 08/2009 (2009).

⁴⁷ J. Shaw, J. Hunt & C. Wallace, *Economic and Social Law of the European Union* 344 (Palgrave Macmillan 2007). Although this might lead to a race to the bottom according to C. Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?* 25 *Eur. L. Rev.* 57 (2000).

⁴⁸ C. Joerges & F. Roedel, 'Social Market Economy' as Europe's Social Model?, in *A European Social Citizenship? Preconditions for Future Policies from a Historical Perspective* 127 (L. Magnusson & B. Strath eds, Peter Lang 2004).

⁴⁹ *Ibid.*, at 137–40.

of social rights in the Charter of Fundamental Rights, and the latter's Treaty-like status with the Lisbon reforms further planted a solid ground for a coherent and distinct European Social Model.⁵⁰

Constitutionalized social rights may create a strong impetus for more cohesive and all-around welfare initiatives at EU level.⁵¹ Nevertheless, policy change should not be attributed solely to recent developments. Schiek, for example, asserts the existence of humane socio-economic amalgamations since the beginning of the European project, drawing on its foundational declarations and the key philosophical underpinnings that influenced its creation, which have now been embodied in various Treaty provisions.⁵² While she acknowledged the hiatus from those values especially during the 2008 crisis, but also in the period right before the eruption of the crisis with the Court being a liberalizing actor therein, she observes that the rift is not irreparable. The social seeds of the Union can still be found in its constitution, the Treaties and the Charter, which, coupled with a gradually more pro-welfare stance by the CJEU in some areas,⁵³ highlight that an autonomous social constitution might already be a reality.⁵⁴

4 A MORE SOCIAL VIEW OF EUROPE

The more social view of the European constitution that emerged in the last couple of decades should not strike as odd. It was triggered by the changes that occurred in the EU landscape at a legal and political level. Politically, the emergence of social democratic, third way and in general, pro-welfare parties right before the new millennium gave rise to a change of narratives, with audible voices promulgating a less neoliberal and more social Europe.⁵⁵ The initiatives adopted during that time exemplified the will of those policy-makers to leave their pro-welfare mark. The OMC, the inclusion of social rights in the Charter, the Lisbon Strategy and, later on, Europe 2020 all enhanced the Union's involvement in the field and

⁵⁰ Giubboni, *supra* n. 45, at 272–73. Although sometimes with limited effects as seen in Case C-176/12 AMS [2014] ECLI:EU:C:2014:2 for example.

⁵¹ A. Lo Faro, *Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order* 147 (Hart 2000); S. Sciarra, *Collective Agreements in the Hierarchy of European Community Sources*, in *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* 211 (P. Davies, A. Lyon-Caen, S. Sciarra, & S. Simitis eds, Clarendon Press 1997).

⁵² D. Schiek, *A Constitution for Social Governance in the European Union*, in *The Human Face of the European Union. Are EU Law and Policy Humane Enough?* (D. Kostakopoulou & N. Ferreira eds, Cambridge University Press 2016).

⁵³ Case C-115/14 RegioPost [2016] ECLI:EU:C:2015:760.

⁵⁴ Schiek, *supra* n. 52.

⁵⁵ D. Castiglione, *From the Charter to the Constitution of Europe? Notes on the Constitutionalisation Process in the EU*, Queen's Papers on Europeanisation, No. 5/2002 4 (2002).

were amongst the most comprehensive, if not overdue, efforts to render the EU more social.⁵⁶

These initiatives were further concretized at constitutional level by the failed Constitutional Treaty and the subsequent Lisbon reforms, whereby the Charter became binding, the social competence of the EU were expanded and systemized, with the horizontal social clause of Article 9 TFEU serving as the guardian of welfare, by 'plac[ing] several emblematic social policy areas safely beyond the reach of economic law'.⁵⁷ Finally, a safe haven was found for social policy to feature more prominently in what was a disproportionately economic Union. The Lisbon Treaty did not instigate change solely at the more policy-specific level of specialized chapters touching on particular policy areas. The rather symbolic notion of social market economy, another remnant of the unsuccessful Constitutional Treaty, found its place in Article 3(3) TEU, replacing the 'open market economy with free competition' of the former Article 4 (1) TEC. This, at least *prima facie*, was seen as heralding a new era for welfare in Europe, an era where the social constitution was gaining more and more momentum in the European constitutionalism debate, leading to some of the discussions presented *supra*.

Before digging deeper into the contribution of the concept to the development of Social Europe, it is important to give expression to it, as it is not defined in the Treaties. Joerges has written extensively on the issue. For him, social market economy carries positive characteristics that can be traced back to its German roots, where it represented a primitive form of third way politics, balancing (neo)-liberal urges with depictions of pure socialism.⁵⁸ It is easy to see why politics of that new form of social democracy, of the modern third way movement, were inspired by their predecessors. Problem is, according to the same author that the EU powers are not so widespread as to enable this objective to materialize.⁵⁹ The Lisbon reforms have helped to tighten the strings of the Union's competences and forge the necessary impetus, but further measures need to be adopted to allow the EU institutions to regulate welfare to the same extent as economic integration.

So why is mentioning the concept of social market economy important if it is, at least for the time being, unachievable? Lianos expresses a modest view, that of careful transition from social market economy as a key Union objective under the

⁵⁶ Tuori & Tuori, *supra* n. 45, at 152–57.

⁵⁷ P. Vielle, *The Horizontal Social Clause*, in *The Lisbon Treaty and Social Europe* 121 (N. Bruun, K. Loercher & I. Schoemann eds, Hart Publishing 2012).

⁵⁸ C. Joerges, *Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 9 *Comp. Soc.* 65, 73–74 (2010).

⁵⁹ *Ibid.*

Constitutional Treaty to it being ‘a means for the completion of other objectives’ under the current Treaty provision.⁶⁰ It may be a sign of self-awareness by the drafters that even though things at that time –and perhaps still– were not mature enough for it to herald a new era, social market economy could act as a driver and bring that era a step closer. To be the Trojan horse for its social policy elements to invade the Hayekian stronghold of European integration, and to try to break the dividing wall of supranationalizing welfare through diminishing social standards, the preferred route paved through the principally decentralized taxation and redistribution regimes among the Member States.⁶¹

These hurdles that the constitutionalization of the social has to overcome risk creating a dead-end, drawing parallels with the streams of discourse advancing the uncontested authority of economic constitutionalism or the subordination to it of its social peer. The embeddedness and longevity of economic considerations into the EU model of governance has turned them into structural components of it. It is this fact which buttresses Scharpf’s socio-economic asymmetry of EU law, which acts as an impasse for the realization of a well-rounded European Social Model.⁶² Because of the structural embeddedness of the economic, any change to its surrounding circumstances, be it institutional or political, can only have little or no impact on it. Employing a similar line of reasoning, Roedl suggests that the foundations of the compromise between welfare and labour on the one hand, and market and capital on the other, have been eroded, although not irreparably.⁶³

There are still chances for this social compromise to be reinstated, at the EU level this time, for Social Europe to emerge as an equal counterpart to market-enforcing Europe. The inclusion of the term social market economy in the Treaties has the potential to do just that, which is quintessential for ‘the social acceptance of the Union as a legitimate order’.⁶⁴ This would have even higher chances of happening, if those advocating for the more socially just model could look beyond the confines of the traditional welfare-cum-nation state example and adopt a ‘new post-national approach to Social Europe’.⁶⁵ Thus, by advancing the concept of social market economy, the paradigm of Social Europe could be pushed

⁶⁰ I. Lianos, *Competition Law in the European Union After the Treaty of Lisbon*, in *The European Union After the Treaty of Lisbon* 260–61 (D. Ashiagbor, N. Countouris & I. Lianos eds, Cambridge University Press 2012).

⁶¹ M. Hoepner & A. Schaefer, *Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting*, 66(3) *Int’l Org.* 429 (2012).

⁶² F. Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot Be a ‘Social Market Economy’*, 8 *Socio-Economic Rev.* 243 (2010).

⁶³ F. Roedl, *The Labour Constitution*, in *Principles of European Constitution Law* 624–25 (A. von Bogdandy & J. Bast eds, Hart Publishing 2009).

⁶⁴ *Ibid.*, at 625.

⁶⁵ B. Bugarcic, *Europe Against the Left? On Legal Limits to Progressive Politics*, LSE ‘Europe in Question’, Discussion Paper Series LEQS Paper No. 61/2013 5 (2013).

forward as well, together with the legitimacy of the EU and the latter's unabridged constitutional aspirations. All is not lost – yet – or so it seems to be the case.

Fortunately, there is, as has been set out just above, a counterweight to the rather gloomy deterministic theories in regards to the future of Social Europe and the contribution that the inclusion of social market economy in the text of the Treaties has made in that regard. This counterweight is found in views asserting that the change introduced thereafter was not superficial, but had the potential to become significant instead. Social market economy brought a *telos* to the idea of a European social policy and social constitutionalism more than ever before. The notion was incorporated in the Treaties to act above all as a constitutional principle for the Union, equilibrating economic constitutionalism; or so was the plan by its drafters.⁶⁶

The argument can be further strengthened if one looks at how Article 3(3) TEU and social market economy interact with other concepts also reinforced during the Lisbon reforms such as solidarity, social equality and the Charter, distinguishing the envisaged idea(l) of Social Europe from its American counterparts.⁶⁷ This cumulative approach has been embraced even by scholars that see little meaning in the – anachronistic per their view – idea of social market economy, since it can be perceived as a statement on behalf of the EU for a more serious commitment towards social integration.⁶⁸

Notwithstanding that, there is a danger lurking in that Member States might lose the largest chunk of their authority on social policy. This takes politics out of the equation and assumes that the EU is capable to deal with the matter on its own.⁶⁹ Such a scenario recalls the criticisms towards a politically delegitimized Union, which risks becoming deadlocked due to the structurally embedded asymmetries discussed earlier. These create inherent biases towards the role welfare plays in the internal market, which can easily distort and, potentially stall the objectives behind the inclusion of social market economy in the Treaties.⁷⁰ Stalling those objectives would equal stalling the development of the social prong of the European constitution.

⁶⁶ Tuori & Tuori, *supra* n. 42, at 137.

⁶⁷ A. von Bogdandy, *Founding Principles*, in *Principles of European Constitution Law* 53 (A. von Bogdandy & J. Bast eds, Hart Publishing 2009).

⁶⁸ Deakin, *supra* n. 38, at 38–39. Contrast this with the view that social market economy differs significantly from ordoliberalism in: W. Devroe & P. Van Cleynenbreugel, *Observations on Economic Governance and the Search for a European Economic Constitution*, in *European Economic and Social Constitutionalism After the Treaty of Lisbon* 99–100 (D. Schiek, U. Liebert & H. Schneider eds, Cambridge University Press 2011).

⁶⁹ Vielle, *supra* n. 57.

⁷⁰ F. de Witte, *The Architecture of a 'Social Market Economy'*, LSE Law, Society and Economy Working Papers No. 13/2015 18–22 (2015).

5 THE ROLE OF THE CJEU

The impetus for a more profound social constitutional component that was stimulated by the recent reforms can be jeopardized by the jurisprudence of the CJEU, according to some. For Scharpf that judge-made law promoting negative integration is, and has always been, destructive for social considerations, prompting a race to the bottom, which affected the most pro-welfare of the Member States.⁷¹ The Court, for him, mainly disregarded the change in the Treaties, representing a liberal Leviathan that can shatter the social market economy chimera.

The number of academics pointing towards that direction has substantially increased in the aftermath of the Laval Quartet, wherein the CJEU was seen as a fierce supporter of the laws of the market and free competition, heavily undermining pro-welfare principles found in industrial relations and labour rights, to the point of rendering their reconciliation almost impossible.⁷² Not only that, but through its case law, as the judicial actor of the EU, the Court could negatively impact a potential reorientation of the relationship between the social and the economic, thus going against the social market objectives now entrenched in the Treaties. Such an approach would risk showing an EU ‘committed not to a social, but to a strictly neo-liberal, market economy’, where social rights are subordinate to the economic freedoms.⁷³ This scenario might be a bit far-fetched, considering the absence of an explicit constitutional court’s status and mandate accorded to the CJEU. That notwithstanding, the Court’s normative function should have been to correct through its case law the ‘democracy failures’ of the Member States, and not to undertake a value comparison between the social and economic spheres of the Union, as it did in the Laval Quartet.⁷⁴ The CJEU can therefore become the party crasher that came to draw an end to a short-lived social euphoria.

While it is difficult to disregard the negative consequences for social policy of past CJEU rulings, there are areas where the CJEU actually enhanced social integration, such as through its non-discrimination case law.⁷⁵ This proves that further socialization

⁷¹ F. Scharpf, *The Socio-Economic Asymmetries of European Integration or Why the EU Cannot Be a ‘Social Market Economy’*, 10 Eur. Pol’y Analysis 1 (2010). For a more extensive account also see fn. 44.

⁷² C. Kilpatrick, *Laval’s Regulatory Conundrum: Collective Standard-Setting and the Court’s New Approach to Posted Workers*, 34(6) Eur. L. Rev. 844 (2009); A. Jacobs, *The Social Janus Head of the European Union: The Social Market Economy Versus Ultraliberal Policies*, in *European Constitutionalism Beyond Lisbon* 111–27 (J. Wouters, L. Verhey & P. Kiiver eds, Intersentia 2009); R. Zimmer, *The Right to Take Collective Action: Prospects of Change in European Court of Justice Case Law in Light of European Court of Human Rights Decisions*, in *Research Handbook on Transnational Labour Law* 196–97 (A. Blackett & A. Trebilcock eds, Edward Elgar 2015).

⁷³ Joerges, *supra* n. 58, at 75.

⁷⁴ C. Joerges & F. Roedel, *Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval*, 15(1) Eur. L.J. 18 (2009).

⁷⁵ Although the impact of its case law could be converse and lead to retrenchment due to the absence of so-called social duties or obligations. For more see Hoepner & Schaefer, *supra* n. 61, at 445–48.

of the EU project can become a reality. Nonetheless the lack of homogeneous political imperatives at EU level hinders deeper integration and harmonization in areas other than the pure-market related ones.⁷⁶ The convoluted structure of social competences at EU level is a manifestation of that, in combination with the stark divergence among the various welfare regimes of the Member States.

This potential pitfall has not detracted others from expressing a different reflection on the Court's role in regards to social constitutionalism. Caporaso and Tarrow attempted to reinvent the CJEU's contribution to labour mobility by employing the theories of Polanyi, Ruggie and their followers. They found that their work can be applied in the EU setting, leading to a Court that re-embeds rather than dis-embeds the social integration process.⁷⁷ By looking at different case law of the Court, it was easier for them to come to that conclusion, showing that the CJEU can exhibit different tendencies at different – or even the same – time(s). They assume that conflicts between the market and welfare are bound to be omnipresent, yet without implying that the judges' stance would be linear.⁷⁸ Instead, the CJEU has changed from a predominantly neoliberal institution to a more welfare-conscious one, taking into account social considerations, and, thence, blurring the line between market and social policy, reflecting the changes in the Treaties.⁷⁹ Yet this is not always the case, with its judicial decision-making going back and forth between the economic and the social depending on the area of the case at issue.⁸⁰ It is a Court that somewhat adapts to the changes of its environment, albeit at a slower, and rather temperamental and piecemeal, pace.

The Court, according to Everson, started to adapt even before the entry into force of the Lisbon Treaty and the concept of social market economy. The deepening market integration resulted to conflicts between EU law and national welfare – among other – measures. Conflicts that reached the doors of the CJEU expected from it 'to subdue political and social pluralism within the internal market, but [notwithstanding that it is] lacking a firm (pre-political) normative basis from which it might reduce legitimacy for its actions'.⁸¹ For her, the fact that the Court has the capacity to decide on the social orientation of the European constitution is the result of a self-made, autopoietic process. Nevertheless, this

⁷⁶ *Ibid.*

⁷⁷ J. Caporaso & S. Tarrow, *Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets*, 63(4) *Int'l Org.* 593 (2009).

⁷⁸ *Ibid.*, at 598.

⁷⁹ *Ibid.*, at 613–14. Started primarily from the Advocate Generals, first with AG Villalon's opinion in C-515/08 Santos Palhota and Others [2010] ECR I-9133. Also reflected in some of its recent case law such as: C-115/14 RegioPost [2015] ECLI:EU:C:2015:760.

⁸⁰ D. Schiek, *Towards More Resilience for a Social EU – The Constitutionally Conditioned Internal Market*, 13 (4) *Eur. Const. L. Rev.* 611 (2017).

⁸¹ M. Everson, *Social Pluralism and the European Court of Justice: A Court Between a Rock and a Hard Place*, 8 (4) *J. Legis. Stud.* 98, 100 (2002).

process may be flawed from a legitimacy perspective, as the constitutional responsibility undertaken by an institution such as the CJEU is lacking in political and democratic justifications, demoting constitutional matters to being merely regulatory ones.⁸²

Yet on the basis of what has been mentioned above regarding its gradual accommodation of social developments, the Court, though lacking direct accountability, might not be as apolitical as at first glance it appears to be. Because of that, and bearing in mind that key social policy disputes are likely to reach the Court, the latter, in view of the absence of an imminent political coming-together, might be an apt actor to promote social constitutionalism in the short term.⁸³ It can do so by trying to conform to the new social objectives, amalgamated in the Treaties, the social chapter of the Charter and the proposals that came with the Pillar of Social Rights. After all, it was the CJEU through its jurisprudence that proclaimed the autonomy of the EU legal order, taking on the role of its constitutional Messiah.⁸⁴

6 THE IDEA OF SYMBIOTIC CONSTITUTIONALISM

It is true that there might be a discrepancy between the embracing of both the economic and social aspects of the European constitution, but the two are not irreconcilable, especially when taking into account the ongoing developments surrounding in particular the social prong of the European project. The EU might be a long way from ensuring total parity between economic and social integration, yet it has also come a long way in that regard. The initiatives taken in the 1980s and 1990s set the foundations for a more serious debate on the nature of social constitutionalism at EU level, exemplified by the inclusion of social market economy and other welfare-related principles in the Treaties post-Lisbon. The changes did not stop there, and throughout the crisis a renewed interest emerged on how those worse-off could be protected, how the EMU can be reformed and how certain inequalities could be addressed.

The consultations on and the unveiling and subsequent proclamation of the European Pillar of Social Rights is the freshest and most comprehensive example of that, showing a face of a more welfare-concerned Europe, trying to ensure ‘a future-proof European social model’,⁸⁵ and to achieve a ‘social triple-A’ in parallel to its

⁸² De Witte, *supra* n. 70, at 19; A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011); M. Roennmar, *Labour and Equality Law*, in *European Union Law* 604–09 (C. Barnard & S. Peers eds, Oxford University Press 2014).

⁸³ D. Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law* 242–43 (Edward Elgar 2012).

⁸⁴ In a rather Delphic way as per: B. de Witte, *The European Union as an International Legal Experiment*, in *The Worlds of European Constitutionalism* 38–42 (G. de Burca & J. H. H. Weiler eds, Cambridge University Press 2012).

⁸⁵ M. Thyssen, *First Outline of the European Pillar of Social Rights and Reform of the Posting of Workers Directive* (Speech delivered in Brussels, 8 Mar. 2016), http://europa.eu/rapid/press-release_SPEECH-

economic one.⁸⁶ Alongside the Pillar, a Reflection Paper specifically focusing on the social dimension of Europe was published in 2017, presenting three scenarios on the future of Social Europe, out of which the most positively portrayed one was that pushing forward for further social integration, whilst also clarifying that the ‘centre of gravity for action in the social field should and will always remain with national and local authorities and their social partners’.⁸⁷ Presented alongside the Reflection Paper were some initiatives accompanying the Pillar. These included legal initiatives such as the proposal for a work-life balance Directive for parents and carers to repeal Council Directive 2010/18/EU on parental leave,⁸⁸ and consultation documents on addressing the challenges of access to social protection for people in all forms of employment and on revising the Written Statement Directive, later combined to form a proposal for a Directive on transparent and predictable working conditions.⁸⁹ The proposed Directives were formally enacted in June 2019,⁹⁰ together with the regulation establishing the European Labour Authority.⁹¹

The Pillar was initially conceived as an instrument to address the concerns that arose from the, authoritarian according to some, governance of the EMU during the crisis.⁹² It was drafted at the outset as applicable to the Euro area, but open to any other Member State wishing to be part of it. Upon its proclamation though, its reach was extended through preamble 13 thereof, which declared that the Pillar was addressed to all Member States. It is now a set of rights and principles that apply throughout the Union, aiming to bolster its commitment to welfare. The fact that it was proclaimed shortly after its introduction, is a sign of the EU institutions being serious and committed about it. In fact, new power dynamics emerged from the legislative proposals that accompanied the Pillar, which were

16–682_en.htm (accessed 11 Mar. 2018). For more see European Commission, *Launching a Consultation on a European Pillar of Social Rights*, COM (2016) 127 final.

⁸⁶ J.-C. Juncker, *Time for Action – Statement in the European Parliament Plenary Session Ahead of the Vote on the College* (Strasbourg, European Parliament plenary session), http://europa.eu/rapid/press-release_SPEECH-14-1525_en.htm (accessed 3 Jan. 2018).

⁸⁷ European Commission, *Reflection Paper on the Social Dimension of Europe*, COM (2017) 206, 30.

⁸⁸ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU*, COM (2017) 253 final.

⁸⁹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union*, COM (2017) 797 final.

⁹⁰ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (OJ 2019, L 186, at 105) and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ 2019, L 188, at 79).

⁹¹ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland) (OJ 2019, L 186, at 21).

⁹² M. Wilkinson, *Authoritarian Liberalism: The Conjunction Behind the Crisis*, LSE Law, Society and Economy Working Papers 5/2018 (2018).

introduced without having previously taken the form of a Framework Agreement between the social partners, as was the case in the past. This is because employers' representatives opposed the proposals, leaving the Commission with no other choice than to exercise its legislative initiative. The Commission's stance here is a far cry from that of a liberalizing actor that has been traditionally perceived to be, suggesting a change of heart towards a more balanced approach between the social and the economic constitutions in the course of European Integration.⁹³ Following the European Parliament elections in May 2019 a new Commission took over, whose intentions are not yet known.

Although the Pillar does not represent a tectonic shift in the promotion of the social constitution, it still is a significant development nonetheless. Whilst it is a predominantly soft-law mechanism that risks ending up sidelined in a similar way that the OMC did, its quick proclamation might mean that, so long as the resurgent interest continues, the Pillar could end up becoming legally binding in a few years' time, much like the Charter did. The legislative measures which it anchored, moreover, show that soft law may be able to gradually induce binding reforms in the right context. The fact that the first preamble to the Pillar refers to social market economy and Article 3 TEU, shows that the quest for a balanced socio-economic constitution is embedded therein. It galvanizes and normatively enables social constitutionalism to draw level with its economic counterpart. This confirms the assumption that traces of social constitutionalism have become more prominent and more diffused in the European legal order compared to hitherto. Although not part of the analysis in this article, the looming Brexit, involving the departure of a strong opponent of Social Europe, might facilitate that.⁹⁴

Of course, transformation cannot occur overnight. Path-dependence is strong in the area and path-departure takes time, particularly when political consensus is absent. Scharpf's asymmetry has been diffused in the European constitution. Be it as it may, the Lisbon Treaty reforms, and particularly the introduction of Article 3(3) TEU is still the elephant in the room for some. It represents a constitutional change, although in text only so far. Abandoning free market economy for social market economy needs to be acknowledged as a reconciliatory paradigmatic swift. After all, nothing in the Treaties prescribes a particular economic policy to be followed. Social market economy pinpoints only to a general direction as to the nature of policy-making. Indeed, alongside indicators of economic development, one could find social objectives, such as full employment and adequate social protection, as well as a commitment to protect fundamental rights, which now include social rights

⁹³ N. Jabko, *Playing the Market. A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press 2006).

⁹⁴ K. Alexandris Polomarkakis, *The UK out, Social Europe in? Rethinking EU social integration in the wake of Brexit*, 69(3) *Northern Ireland Legal Quarterly* 291 (2018).

according to the Charter. The text of the Treaties is no longer asymmetrical, but can easily accommodate economic policies that do not exclusively promote the free market. After all, the free market is not dictated by a divine power; rather, it represents a political choice.⁹⁵ Moving away from a paradigm exclusively focused on that is possible, especially now that the ground has been laid at constitutional level and the EU policy makers have committed themselves to a change through the Pillar.

Change has been initiated by the various EU institutions, as shown above, complemented by a more socially conscious CJEU, taking its gradually reshaped environment into account. The Court has backed down from its liberal stance in the Laval Quartet, and now experiments on how it can syncretize the two – anti-thetic for many – faces of the European constitution.⁹⁶ The scale of the aforementioned structural asymmetries that impede an amalgamated model to emerge have started to tip, with all actors involved attempting to strike a compromise going beyond their own red lines. This has been allowed, if not endorsed, by the social market economy paradigm, which at normative level has shaken off the shackles of liberalism, by displacing the realization of a free market with that of a social market as the leading driver of European integration.

That is not to say that everything has now been remedied. The Treaties might have been amended and new policy directions unveiled, but the governance of the EMU remains a serious obstacle that has not been fully addressed. The socialization of the European Semester was an effort taken in the wake of the crisis, with the introduction of social benchmarking, strengthening of the social OMC, and enhanced country specific recommendations. Whilst the success of their actual impact has been contested, with some calling for more ambitious and substantial reforms,⁹⁷ others comment on the significance of the socialization of processes that have for long been interwoven solely with economic policy-making.⁹⁸ A similar discourse can be applied vis-à-vis the Pillar, which despite its initial conception for the EMU, does not include any concrete measures capable of changing its structure dramatically. In terms of narrative though, it reinforces that attempt for social reorientation, which could come via additional accompanying measures to be unveiled in the near future. For example, the actual details of the – planned but still pending – European Social Security Number, might be able to help bolster not

⁹⁵ K. Polanyi, *The Great Transformation* (Beacon Press 1944).

⁹⁶ The case C-201/15 *AGET Iraklis* [2016] ECLI:EU:C:2016:972 is a good example of that experimentation, despite its unsuccessful outcome. For more see K. Alexandris Polomarkakis, *A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General drifting apart in Case C-201/15 AGET Iraklis*, 24(3) Maastricht J. Eur. & Comp. L. 424 (2017).

⁹⁷ A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* 83 (Oxford University Press 2015).

⁹⁸ J. Zeitlin & B. Vanhercke, *Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond*, 25(2) J. Eur. Pub. Pol'y 149, 167–68 (2018).

only an idea of EU social citizenship, but of a commitment to ensuring adequate social security and maintaining full employment.

The current climate, framed primarily by the Treaty reforms and the Pillar, might help this reconciliation to materialize. The crisis struck most of the Member States, which, in turn chose in most cases the solution of retrenchment.⁹⁹ This has led to certain degrees of convergence amongst them, at least insofar as the orientation of their social policies is concerned.¹⁰⁰ In turn, convergent welfare systems would be more easily prone to come together when following EU rules. Having national social policies moving downwards and, accordingly, EU-wide ones upwards can certainly aid in generating that middle ground among national political authorities and EU institutions necessary to advance social integration, and consequently the European social constitution, not against but in order to come into balance with the economic one.

At this stage, it becomes clear that the discourses putting emphasis on the sharp and irreparable distinction between the terms economic and social, and assuming the subordination of the latter to the former, are in need of an overhaul, at least at the normative level of constitutionalism's discursive realm. Both the latest Treaty reforms, as well as the recent actions of EU institutions, together with the CJEU, have put forward the seeds for a symbolic – at least – reorientation of the Union's values and rationales. This indicates that it is anachronistic to still carry on using narratives emphasizing the archetypical divide between the economic and the social, and that it would be more constructive instead to reconsider the narratives used to describe Europe's constitutional pursuits. That is not to say that the economic and the social are outdated terms; to the contrary, they are still rather pertinent and useful for any analysis. More specifically, it is the conceptualization of their interaction that requires redefinition in order to mirror the idea of symbiosis that the new state of play promotes. To a considerable extent the present-day developments seem to move toward that direction.

The redefinition of the constitutionalism discourse can be given expression by the notion of symbiotic constitutionalism. It is a term better positioned to reflect the multidimensional and rather pluralistic on-going processes the EU is currently experiencing, processes that endeavour to reconcile welfare considerations with the demands of a free market. Symbiotic constitutionalism's meaning is already rooted in aspects of

⁹⁹ For various accounts of the impact of the crisis on welfare see *The Times They Are Changing? Crisis and the Welfare State* (B. Greve ed., Wiley-Blackwell 2012). Although some disagree with this view: B. Vis, K. van Kersbergen & T. Hylands, *To What Extend Did the Financial Crisis Intensify the Pressure to Reform the Welfare State?*, 45(4) Soc. Pol'y & Administration 338 (2011).

¹⁰⁰ C. Hay & D. Wincott, *The Political Economy of European Welfare Capitalism* (Palgrave Macmillan 2012); C. Herman, *Structural Adjustment and Neoliberal Convergence in Labour Markets and Welfare: The Impact of the Crisis and Austerity Measures on European Economic and Social Models*, 18(2) Competition & Change 111 (2014).

European policy-making, exemplified by the triad of Directives aiming at approximating Member States' laws for workers' protection in the event of collective redundancies, the employer's insolvency and transfer of undertaking, introduced in the late 1970s and underpinned by a balanced view between the Union's economic and social components. As with every ongoing experiment, pitfalls are likely to occur. The development of this new quasi-grundnorm is unlikely to be linear and unproblematic; after all economic imperatives retained the upper hand for too long. It is therefore almost natural that conflicts would arise, whereby the past would revive in flashbacks of 'ruthless' capitalism, on whose altar social policy may be sacrificed.¹⁰¹ Such occurrences can happen in the course of any integrationist rationale, even a pro-social one, but the new norms embedded at constitutional level should be enough of a compass for things to stabilize over time, in order to bear witness of the aforementioned path-departure.¹⁰²

Equally it does not mean that this form of constitutionalism would miraculously bestow an ideal regime on the EU; that could only happen in a utopia, as compromises are inevitably going to be part of the deal.¹⁰³ Yet, coining this new era of European constitutionalism is important, first and foremost because it heralds a change of discourse, in which positive connotations underpin the debate and, subsequently, the relevant stakeholders' actions. Otherwise, falling into a continuum of the economic v social constitutionalism debate, and persisting with the acceptance of a relationship premised on subordination from the outset would only perpetuate the status quo. Semantics are important in the constitutional debate. They become even more important when a ruthless free market economic paradigm is not prescribed by the Treaties, but, given the symbiotic relationship, reconciling policies are being called for therein. These reconciling policies are stipulated not only by the overarching provision of social market economy, but also through the more tangible ones of the Pillar and its accompanying initiatives.

The reforms that are underway could be further bolstered, once the social renaissance sought by the Commission bears fruits, and Member States' attitudes towards it become more accommodating. A plausible –although unrelated to thirst for further European integration– driver for the latter is the positive impact of the reforms on the local electorate, which Member States' governments may wish to reap politically. Symbiotic constitutionalism, based on the premise of social market

¹⁰¹ P. Syrpis, *EU Intervention in Domestic Labour Law* 74–75 (Oxford University Press 2007); C. Barnard, *EC 'Social' Policy*, in *The Evolution of EU Law* 501 (P. Craig & G. De Burca eds, Oxford University Press 1999); S. Fredman, *Transformation or Dilution: Fundamental Rights in the EU Social Space*, 12 *Eur. L. J.* 41, 46 (2006).

¹⁰² For the agnostic nature of the integrationist rationale see P. Syrpis, *The Integrationist Rationale for European Social Policy*, in *Social Law and Policy in an Evolving European Union*, 17–30 (J. Shaw ed., Hart Publishing 2000).

¹⁰³ For example in Case C-299/14 *García-Nieto* [2016] ECLI:EU:C:2016:114.

economy, does not seek to radically overturn economic traditions. Its contribution is found in the introduction or reinforcement of a series of protective measures that could easily maintain high levels of social welfare in times of need. Building on the recently introduced European Labour Authority further in order to ensure adequate standards of work and social protection through conditionality-based practices, for example, can be beneficial and will certainly not disgruntle EU citizens, unlike the financial incentives granted to Member States for pursuing retrenchment and deregulation during the crisis. The Treaty regime, even at its current form, can support more interventionist policies, which can be at a supervisory and coordinating level with the necessary carrots and sticks. There is no Treaty-imposed ban on such things; to the contrary an adopted symbiotic constitutionalism policy discourse is capable of ensuring that economic and social prosperity are on par, giving effect to social market economy.

As Polanyi noted, economic capitalism might seek to canonise free market, but the then dislocated society would demand social protection and welfare.¹⁰⁴ Symbiotic constitutionalism as a term seeks to bridge this antithesis. It may be that the European constitution is a *sui generis* form of one, due to its participatory deficiencies, yet its normative changes with Lisbon might give enough of a push into the creation of binding norms, 'to shape the political, social and economic direction of the [EU] polity'.¹⁰⁵ The notions and objectives associated with welfare have already been gradually normatively and ideologically enhanced, turning themselves into tools to instigate a transformation. The embeddedness of the social market economy together with the transformation of the policy debate through the Pillar reforms and package has laid the groundwork for the realization of that ideal. If ideas change, then practice is likely to follow suit, at least according to my – potentially optimistic – view, that considers symbiotic constitutionalism as a positive self-fulfilling prophecy. Only time will tell.

7 CONCLUSION

This article set out and reflected upon the viability of a more profound social constitution for the EU as an equal counterpart to the economic one, by introducing the concept of symbiotic constitutionalism. The analysis began by assuming that the terms constitution and EU can be compatible, forming a post-modern, supranational, *sui generis* community boasting its own distinct norms and values.¹⁰⁶ It then focused on presenting the key manifestations of the core discourses on European socio-economic

¹⁰⁴ Polanyi, *supra* n. 95.

¹⁰⁵ Weiler & Trachtman, *supra* n. 21, at 375.

¹⁰⁶ As Douglas-Scott poignantly noted: 'To characterise the EU as an administrative community is to misrepresent its nature'. Douglas-Scott, *supra* n. 8, at 53.

constitutionalism and delving further into their interaction. Economic constitutionalism has been perceived by many to be synonymous with the story of an evolving Europe; fundamental freedoms, free competition and market harmonization being its pinnacles, found at the forefront of most EU developments. Yet gradually, integration efforts sought to go beyond the confines of economic imperatives as the EU was setting out to become a quasi-federal entity.

Progressively, social considerations were embraced, and measures tackling welfare-related issues at EU level emerged. Alongside those initiatives, a new wave of scholarship surfaced dealing with the social aspects – and aspirations – of the EU, or, in other words, with the idea of social constitutionalism. Social constitutionalism was some sort of a late bloomer, coming forth while its economic counterpart was already rather mature. This led many scholars to investigate the relationship between the two. There was no consensus among their writings. Some proclaimed that economic constitutionalism was so sophisticated and entrenched to the integration process, that it would dominate over any (re-)socializing efforts. Others put forward a more optimistic account, where social constitutionalism could stand on its feet and complement, to various degrees, its economic peer. For most though, it was dubious that economic and social constitutionalism would ever become equals. Contrasting narratives of progress, on the one hand, and scepticism, on the other, seem to co-exist, blurring the lines of Europe's quest for its constitutional identity.¹⁰⁷

The new millennium brought the failed Constitutional Treaty with the concept of social market economy as a new objective for the Union, a concept that was retained, albeit under different context, in the Lisbon reforms. This refuelled the interest on Europe's social aspirations, although, once again, lacking in homogeneous views. It was modestly welcomed at best, with some perspectives emphasizing the structural asymmetries of integration that would continue to allow economic concerns to overshadow the social ones. It is important to bear in mind that during the same period the Court handed its judgments in a series of cases known as the Laval Quartet, resulting in the outcry of its downright (neo)liberal stance by the academic community and fuelling the afore-mentioned deterministic accounts. This obviously detracted attention from other relevant institutional developments in the field, highlighting the crucial role of the Court in giving directions in regards to the EU's welfare orientation.

In the absence of an enhanced political integration, it was left to the EU institutions, the Court being a prominent component of them, to set the Union's constitutional priorities.¹⁰⁸ Inasmuch as the Court plays a significant part therein,

¹⁰⁷ Haltern, *supra* n. 8, at 206–09.

¹⁰⁸ Stephan Leibfried, *Social Policy: Left to the Judges and the Markets?*, in *Policy-Making in the European Union* 262–92 (H. Wallace, M. Pollack & A. Young eds, Oxford University Press 2015).

its predominantly anti-welfare stance did not last long, and was not as uniform as initially suggested. More recent case law has shown that the Court does not adopt a very consistent approach, meaning that at times it may show a much more pro-welfare attitude, probably taking into account the societal, institutional and Treaty changes that arose. In that sense, the constitutional significance of the Lisbon changes was somewhat overlooked and underappreciated. It remains to be seen whether the Pillar and its associated initiatives would give the required push for the Court, and the Union as a whole, to further socialize its vocabulary. At theoretical level though, moving forward, the adoption of the concept of symbiotic constitutionalism represents a useful analytical and explanatory tool, best positioned to describe the current regime. As such, it needs to be embedded in the relevant narratives and discussions. The Promethean vision of Social Europe advanced by Freedland and Countouris, has already made its first steps post-Lisbon, and it is time, as they rightly note, to leave pessimism, as well as claims about social constitutionalism's unresponsiveness, behind and acknowledge that a change of direction might be about to happen.¹⁰⁹ Strong path-dependence exists, but the first signs of a path-departure have emerged at EU level, based on a – best defined as – symbiotic relationship between the notions of economic and social constitutionalism.

¹⁰⁹ N. Countouris & Mark Freedland, *The Myths and Realities of 'Social Europe'*, in *Resocialising Europe in a Time of Crisis* 6–7 (N. Countouris & M. Freedland eds, Cambridge University Press 2013).