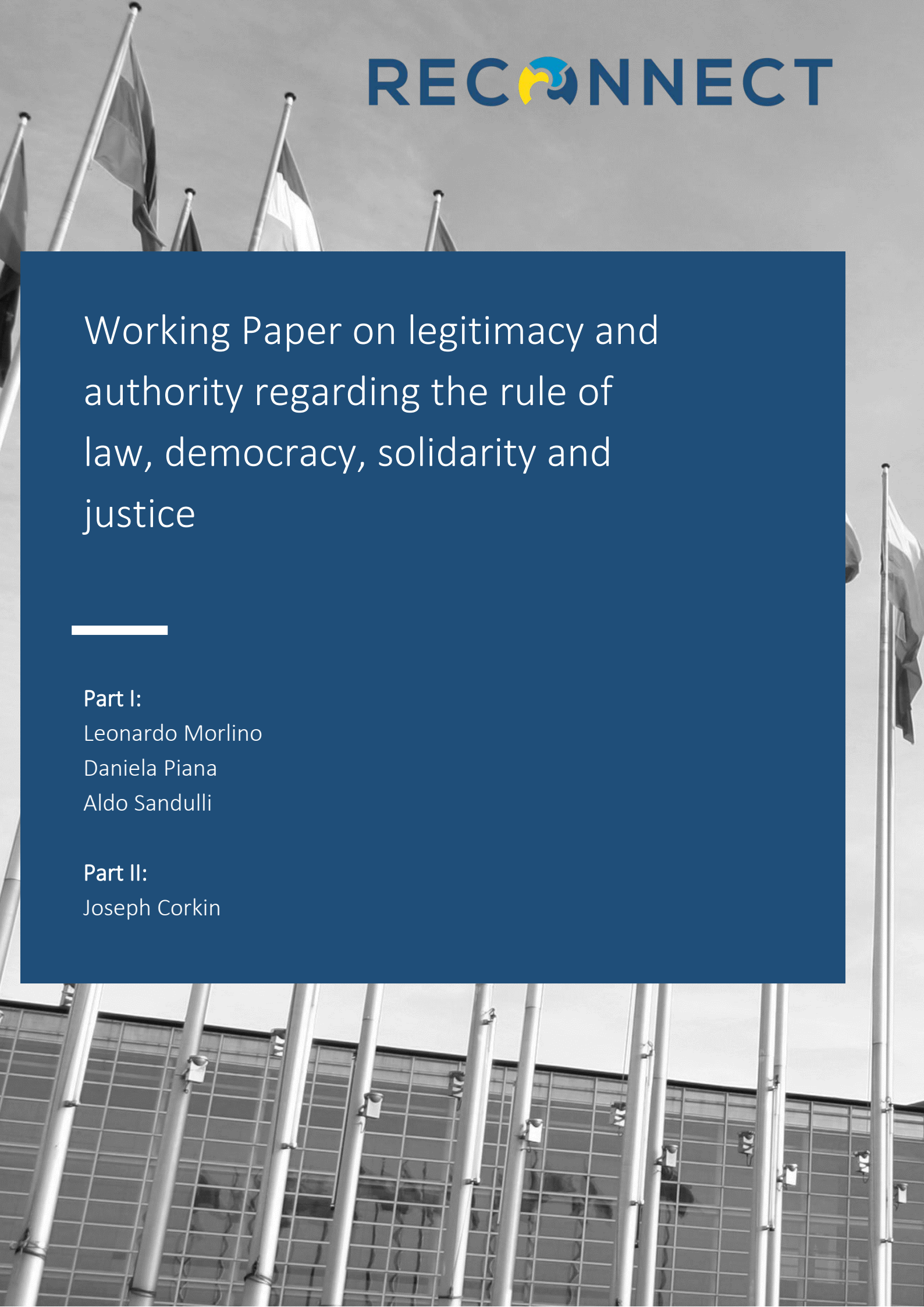

RECONNECT

Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice

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Introductory remarks

This Working Paper aims to map out the key concepts of the RECONNECT project and how they relate to different approaches to European integration. In this way, the authors aim to clarify the notions of legitimacy and authority with regard to the rule of law, democracy, solidarity and justice. The Working Paper presents a literature review of the major currents of scholarship dealing with legitimacy and authority in a national and supranational context, with a view to understand the features of institutional constructions which cause them to be accepted as worthy to govern a polity.

In a first part, Morlino et al. provide an extensive mapping of the core concepts of RECONNECT – democracy, legitimacy, rule of law, solidarity and justice – providing different conceptions (thin versus thick, minimalist versus comprehensive, etc.) and their interrelation.

In a second part, Corkin examines how these core concepts, with a specific focus on democracy and rule of law, play out in relation to the European project. It is argued that any examination of the rule of law and democracy in the context of a project concerned with (re)connecting the EU and its citizens must grapple with the tensions between these concepts and how they play out in three visions of European (dis)integration – nationalist, federalist and confederalist. Corkin aims to distill the different implications in three visions of Europe: (1) the EU as a threat to the nation state; (2) the EU as a federal United States of Europe in the making; and (3) the EU as a confederation of nation states.

Part I: Introduction and Assessment of Core Concepts

Leonardo Morlino, Daniela Piana, Aldo Sandulli

Foreword

Deliverable 1 focused on the history of the concepts at the core of this research. This deliverable makes the subsequent natural step of providing an analytical discussion of these concepts, together with a theoretical background from the political and legal perspectives, and some initial suggestions for making them operational in Deliverable 4, in the wake of same task being carried out for another key concept – sovereignty – in Deliverable 3.

This document will be divided in three sections, each one devoted to the concept/s suggested by the sub-titles. Section 1 provides a historical background to the concepts, with particular emphasis on the development of the notions that feed into the broad principle of the rule of law, alongside the process of developing and consolidating the modern form of power within the State. This offers a historical anchoring of the concepts presented, notably in relation to the democracy/rule of law matrix. Section 2 develops the notion of democracy, disentangles its components, and elaborates the interdependence between the key dimensions of democracy and the processes of trans-nationalisation of law and politics. In this section, notions of democracy are analysed in terms of their semantic dimensions as well as their normative foundations. These are discussed in strict relation to the mechanisms of legitimisation that are expected, or assumed to be, at the basis of every one of them. By casting light on the genuine link that binds the democratic processes unfolding at the domestic level and the transformation and restructuring processes impinging on the institutions that take place in a relationship with the rise of supranational, transnational, and cross-national policy making, institutional design, and a rule enforcement setting, the first section opens up to the arguments developed in section 3, which touches on the overarching role and the dimensional function played in this framework by the notion of rule of law. Section 4 clarifies the privileged relationship between the rule of law democracy, namely through the principle and inspiring value of equality. Equality, in fact, does not represent a simple pre-condition of democratic processes.

The configuration of a democratic rule of law functioning across different levels of governance and beyond State level is the topic of section 3. Section 4 addresses the notions of justice and solidarity 'in context', i.e. resulting from the interplay between the dimensions of democracy and the domestic/transnational patterns of interaction. The analytical added value of this section is the elaboration of a range of notions pointing to the types of patterns and the subsequent effects spilling over across the EU onto its citizens and socioeconomic actors (stakeholders). Section 5 brings together a set of points that, taken together, contribute to the bridging role of equality in the relationship between the procedural dimensions of democracy and responsiveness. This is so because equalities – more precisely their reduction to inequalities of opportunity – impact both deeply and widely on the satisfaction and trust citizens have in relation to the institutions, whereby they not only guarantee equality of access but that the inequalities of results will be redressed.

Acknowledgement

This paper is the result of collaboration involving colleagues from different disciplines and drawing inspiration from a vast range of research and scholarship. Specifically, the first section elaborates on *Il ruolo del diritto in Europa*, by Aldo Sandulli (Milan, 2018); section 3 is inspired by *Changes for Democracy*, by Leonardo Morlino (Oxford, 2011); and sections 4 and 5 draw on *Freedom, Equality and Democracy* (co-authored by Leonardo Morlino with Francesco Raniolo, Daniela Piana, Cecilia Sottilotta and Claudius Wageman) forthcoming with Oxford University Press. The authors are grateful for their contribution to Alessandro Nato (specifically on section 4) and Giovanni Piccirilli (specifically on section 3).

1. Anchoring concepts to history

It is a given that the mediaeval pluralistic societal organisation in continental Europe was replaced in the modern State by the *auctoritas* of the sovereign, the result of native and absolute power. In this context, legality constituted the source of the legitimacy of the State in the wake of the harrowing overthrow of natural law principles brought by the French Revolution, which, in effect, translated the theorisations of the Age of Enlightenment into concrete action. The consubstantiation of reason and State, taking the place of the reicentric and theocratic worldview of the time, being the outcome of the secularisation process regarding power and law, gave substantial legitimacy to the political and legal authority of the State through the law itself. The legitimisation of the exercise of political power could in fact only come from the act of law-making performed by the representative assemblies. Through the law, Parliament drew up the new legal order and was, at the same time, the institution that allowed the establishment of the authoritative power of the State and the capacity for individual self-determination. The social model of the modern State was built on foundations that expressed the two distinct but interconnected wills of the State and the individual, which profoundly modified the social structures that had become consolidated over the centuries. All this came about by means of the law, an instrument capable of radical novation.

The nineteenth century saw the emergence of the liberal State under the rule of law, which, through the authoritative power and legal certainty of which the law is the bearer, expressed the sovereign power of a social class, the bourgeoisie, which reduced administration to the role of mere executor and the judge to *bouche de la loi*.

In the evolution of the late nineteenth-century *Rechtsstaat*, this led to the absorption of the people and the law into the 'State person', as it was possible to find the legitimacy of State power, through the law, directly in the will of the people. The absolutism of the political and juridical power of the sovereign State gave rise to two bloody world wars.

The evolution of the rule of law in England was radically different from the continental *Rechtsstaat*. Reduced to bare essentials, this would become a means of limiting the power of the sovereign by subjecting it to compliance with rules. Thus, the law ran the risk of becoming an instrument of authority in as much as the holder of power can use the law as an infrastructure to legitimise the exercise of authoritative power. From this narrow perspective, the rule of law might represent pure form, an external casing subject to changing contents.

For this reason, a more complex and substantial ideal of the rule of law took hold in England, starting from Dicey's well-known definition in which this concept is objectified, in contrast with the subjective continental notion of the *Rechtsstaat*. The rule of law ideal is thus built on two pillars: on the one hand, the sovereignty of parliament and the government policies of the executive aiming to achieve the common good and, on the other, the role of the judge as independent and impartial interpreter, together with the other oversight bodies, which allows the law to underpin the coherence of the system. These two core values of the rule of law must coexist in constant balance.

The evolution of the rule of law has led to the autonomous establishment of the law and rights, especially in the constitutional and welfare States of the third quarter of the 20th century, following the transition from the modern to the post-modern age, grounded in constitutional pluralism. In the major Western European States, a rule of law was developed and put into practice with the characteristic feature not only of political representation but of legal certainty, prohibition of arbitrary executive powers, procedural democracy, equality before the law, solidarity, equitable justice, access to an independent and impartial court, and effective judicial review including respect for fundamental rights.

Thus, as the totalitarianism that arose in the first half of the twentieth century waned, with the catalogue of rights and freedoms enshrined in democratic Constitutions being translated into concrete terms by the interpretative work of Constitutional Courts, an important turning point regarding the role of law also occurred in continental Europe: on the one hand, States were no longer identified as mere holders of sovereign power; they were also required to implement policies to guarantee the substantial equality of their citizens by safeguarding social rights among other things. On the other hand, precisely in relation to balancing freedom and equality, the idea of the multi-class State began to take hold, reflecting a wish for autonomy and the organised forces arising from civil society. Moreover, in order to control the power of legislators, the constitutions of democratic States introduced a series of instruments to oversee and balance powers with a view to forging a pluralistic balance between them within the legal system.

From this evolutionary substratum of the parabola of the modern State, briefly outlined here, grew the fundaments of the legal system of the European Economic Community in the second half of the twentieth century. It is within the conceptual boundaries drawn above that the rise of the notion of a democratic rule of law overcoming the national barriers established by antagonistic sovereigns began to gain importance in the European sphere. Furthermore, it is within this range of differential traditions – both legal and political – that the endeavour of a transnational space ruled by common principles embedding the core of the rule of law but respectful of the variety of meanings that the institutional designs of the States embodying it took place. And if the modern State was clearly constructed on the exercise of sovereign and absolute power within a closed and native system, the story of the European system is much more complex and intricate.

In fact, a new European rule of law has taken root in the Community system, anchored in its genetically hybrid and dual nature: 'its legitimacy comes not only from *auctoritas* (formally valid 'statutory' law), but also – and above all – from the *ratio* (the substantial and procedural rights and principles of justice)' (Vogliotti, 2013, 410). There was a fundamental shift from the *Rechtsstaat* to the community of law, founded on the rule of law and represented by the Court

of Justice, which, by means of integration through law, indicates, when necessary, the direction to be followed on the basis of the blend deriving from the Treaties and European legislation as well as the general principles of the legal order, as inferred by the courts. The exercise of power and its legitimacy are set out in a profoundly different way compared with past configurations in terms of institutional structure, the sources for the creation of law, and the ways in which powers are attributed and exercised.

From the institutional point of view, the exercise of power is amply spread out, being distributed among a variety of actors in multiple procedural combinations: the Commission, the Council, the European Parliament, and the European Court of Justice. These supranational institutions, exercising broadly-distributed and multilevel governance, enter into dialogue and negotiate with the national executive and administrative levels as in a public arena. Thus, there no longer exists a sovereign, a holder of absolute power, authoritatively exercising power as in the past. Underlying that of the production of law, we no longer find the primacy of a source such as the law of the State: in the first place, the European institutions operate through a variety of instruments, not only of hard but also of soft law, of a contractual nature. Secondly, as far as hard law is concerned, they favour acts that leave room for transposition by the Member States, respecting the general principles of the Union, including those of subsidiarity and proportionality. Thirdly, since the European Court of Justice plays a fundamental interpretative role among the producers of law at European level, and, being increasingly oriented towards a widespread evaluation of constitutionality, it binds European law to respect fundamental rights as they are inferred from common constitutional traditions.

As regards the allocation of powers, in accordance with the principles of subsidiarity and proportionality, the Union may act only within the limits of the powers conferred on it by the Treaties and the Member States. The result is an asymmetric system in which some competences are the direct responsibility of the European institutions, while others are shared, and yet others are the responsibility of the individual Member States. This multi-level structure naturally affects the *auctoritas* of both the European institutions and the Member States, diluting it among all these actors.

From the point of view of the exercise of power, at the European institutional level a series of competences fall to subjects who do not reflect the expression of political power in the traditional sense of representative democracy but of technical-scientific expertise. This means that the democratic deficit, in terms of the expression of a decision by the majority of the electorate, must necessarily be compensated in other ways, namely through procedural democracy and the distribution of power among a variety of subjects, in relationships constituting checks and balances in a 'Madisonian' model of power particularly suited to complex and pluralistic societies such as those found in the European system.

The European system, born from an original conformation of the rule of law, is a system that has been defined as a *Rechtsgemeinschaft*, one in which its institutions must answer, at the same time, to the regulatory system stemming from the Treaties and the general principles of law, as represented by the interpretations of the European Court of Justice (and the national constitutional Courts).

The European rule of law is therefore diluted, not only in terms of the subjective legitimacy of the exercise of power but also in terms of the quantitative distribution of authority among the

three traditional powers: legislative, administrative, and judicial. The *Moloch* legality of the modern State is complex and fragmented, necessarily translating into the continuous search for the equilibration, balance, and proportionality of the modes of establishment and protection of the archipelago (plural, changing, and flexible) of general principles within the European legal order.

The multidimensional nature of the notion of the democratic rule of law that seems to have gain in importance within the empirical understanding of the European Union is rooted in its history. The European rule of law – hybrid, composite and pluralistic – is a wholly original expression of past social and legal models, not only by virtue of its specific governance structure, but also for another historical and evolutionary reason, evoking the distinct genetic heritage of the European supranational order rather than that of the modern State.

The modern State came into being with a legal and philosophical genetic heritage of its own, considering that by the seventeenth and eighteenth centuries, law, like philosophy, was an ancient and established social science. Thus, the economic, political, and social development of continental Europe from the 17th to the 20th century was essentially driven by the law. The legal method can thus be said to have underpinned the development of the modern State, particularly in the latter part of the nineteenth and the first half of the twentieth centuries.

When the European legal system came into being, however, other social sciences, such as economics, sociology, political science, and statistics, were already well-established disciplines alongside law[1]. The concepts needed to understand the European Union empirically have to accommodate the pluralistic and composite nature of its historical roots.

2. Democracy and legitimacy

The variety of institutional designs that embed the democratic principle and coexist within the EU must be considered in the light of how the concept of democracy is defined and its components are spelled out.

First, it is necessary to spell out the core definition of democracy. This is especially important given that this kind of regime has become 'the only game in town' and is no longer challenged as such. The procedural definitions, so important in a different historical period as the most empirically solid point of reference within the liberal tradition, have to be complemented by other definitions referring to substantive aspects relevant to empirical research. *Second*, a minimalist definition is essential for understanding when, in a transitional process, a regime turns into a democracy, or is close to doing so. Such a definition should also be able to capture the complexities of a transitional period when a regime may already be democratic in some respects but continues to remain authoritarian in others. *Third*, if there are so many democracies, an empirical analysis of the actual implementation of the main democratic values or tenets, or better an analysis of the quality/qualities of democracy, seems obvious.[2] This, however, implies some standard or a sort of maximum definition of democracy as a frame of reference in the development of quality. These three sets of definitions still leave open the definition of all striking cases of uncertainty and ambiguity; those labelled by Freedom House

[1] More widely in A. Sandulli, 2018.
[2] See Part Three.

as 'partially free' make up about one third of all existing independent regimes and cover all areas of the world. This important new phenomenon will be addressed in the next chapter.

The first conundrum is characterized by the long and heated debate in past decades about democracy as 'form' and 'substance'. It began with the critique of nineteenth-century liberal doctrine by socialist thinkers and politicians, and acquired fresh momentum during and after World War Two, when 'democracies' were considered by people and scholars to be the Western political regimes, but the same label was also applied to the so-called 'real socialisms' or 'people's democracies' of the USSR and the other Eastern European countries. The prevailing conclusion of that debate in democratic theory was to regard the definition of democracy as form or, better, procedure, as preferable to democracy as substance (see below).

The notion of *procedural democracy* was the most important attempt to give a solid theoretical ground to the definition. Such a conclusion was based on the so-called non-reversible relationships between freedom, understood as civil and political rights, and equality. In the light of the experiences of Western Europe vis-à-vis Eastern Europe, the key point to emerge was that no kind of equality can be achieved if there is no actual guarantee of civil and political rights as a pre-requisite (see Sartori 1987). The consequence of this has been not only growing attention to substantive aspects in research – our fields mirrored by enormous developments in policy studies, including welfare rights – but also to political equality as suggested by Dahl (2006) and to political justice as developed by a series of authors, from Rawls (1974) to Sen (2009), and to the ways of complementing equality and freedom by giving democracy important substantive content, as in Ringen (2007).[3]

The procedural definition, however, has remained salient and deserves a closer look. It was initially proposed by Schumpeter (1942, 269 and 1964, 257), to whom several other authors began to refer: 'The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.' A few years earlier and, again, basically in the same period, Kelsen (see now 1981, 190-1, and 1988)[4] had stated that, 'as method or procedure, democracy is a form. In fact, the procedure through which a social order is devised and implemented is considered formal, to distinguish it from the content of the order, which is a material or substantive element'. He goes on to say: 'If democracy is above all else a form of State or governance, it must be remembered that the antagonism between form and substance or between form and content is only *relative*, and that the same thing may appear to be form from one point of view and content or substance from another […] There is therefore no better way of impeding the movement towards democracy […] than discrediting the definition of democracy as procedure, using the argument that it is formalistic.' What is involved then are 'forms' that permit and guarantee the possibility that certain 'substances' or decisions will be taken in compliance with the procedures envisaged by those very same 'forms'. This is what has been called constitutional democracy, within the forms and limits of the rule of law and constitution.

Laying emphasis on the 'procedural' aspect of a democratic regime leads on to another, related, aspect. It is incorrect to suppose that any decision whatsoever, any decision-making 'content'

[3] A good, up-to-date review of notions of democracy is found in Bernhagen (2009, 24-40).
[4] The very first edition of *Vom Wesen und Wert Demokratie* (Tubingen, J.C.B. Mohr) appeared in 1929, and the 'Foundations of Democracy' (*Ethics*, 56, 1) was published in 1955.

can be taken on board as a result of these formalized rules. Above all, such procedures exclude decisions 'that might in some way contribute to overcome one or more of the rules of the game' (Bobbio 1983, 316). Nor is it right to claim that, in a democratic regime, there is a real institutionalization of 'uncertainty' with regard to the substance of the decisions that can be made. When excessive stress is placed on the procedural dimension or one talks in terms of absolute uncertainty – by which it is understood that within defined and certain democratic procedures, any decision, even, for example, that of abolishing the market and private property, may be taken – there is a change in the level of analysis, a shift towards the normative dimension and away from the empirical one. On the empirical, historical plane, in fact, mass liberal democracy was based on the maintenance of certain socio-economic conditions, principally associated with private property. These conditions have never been denied or modified, and their modificability – abstractly in certain situations, but not impossible – would need to be demonstrated in the future, if there was ever the opportunity to do so. Moreover, it should be also be pointed out that there is consistent literature relating to the so-called prerequisites of democracy: among them, the rule of law, equality, wealth distribution, market democracy, culture, freedom of speech and access to school, and so on.

If we stay with the analytical level of our argument, it can justifiably be argued that: *a*) a democratic regime is one that permits the greatest degree of indeterminacy with regard to the concrete content of the decisions that can be taken by elected or electorally accountable bodies: this uncertainty is always *relative* and cannot exceed certain boundaries defined by the safeguarding of private property; *b*) these boundaries are, furthermore, fixed by the fact that the democratic system is underpinned by a compromise agreement that recognizes the collectively accepted rules for the peaceful resolution of conflicts between social, politically represented and significant parties; *c*) the limits are exceeded not only when an attempt is made to take decisions that contravene those rules, as Bobbio suggests, but also when decisions are taken that impinge on interests perceived to be vital by social actors involved in the political compromise agreement. In an industrialised liberal democracy, for instance, such actors would range from business associations to unionised workers' groups.

Such a procedural definition was still very salient in the 1970s and later, as shown by Bobbio and, very effectively, by Dahl (1970), who considers democracies all regimes characterised by a genuine guarantee of broad, inclusive political participation on the part of the adult male and female population, and by the possibility of dissent and opposition. Dahl developed his notion by identifying five criteria as key elements of a democracy: effective participation, voting equality, enlightened understanding, i.e. citizens have adequate and equal opportunities to learn about policy alternatives, control of the agenda, i.e. citizens have the opportunity to decide which matters are placed on the public agenda, and inclusion of adult residents who enjoy citizenship rights (Dahl 1989, especially pp. 108-14).

Dahl's definition is simpler and more straightforward than Sartori's, to which it may be compared for a better understanding of how the procedural definition developed. According to Sartori [1969, 105], democracy is 'an ethical-political system in which the influence of the majority is entrusted to the power of competing minorities, which secure it' through the electoral mechanism. Or, referring to a subsequent and more elaborate formulation, democracy is 'the mechanism that (a) generates an open polyarchy whose competition in the electoral market attributes (b) power to the people, and (c) specifically enforces the responsiveness of the leaders to the led' (Sartori 1987, 156). This more complex definition not

only includes participation and dissent, as envisaged by Dahl, but also lays emphasis on liberal and democratic values such as the competition and pluralism of the polyarchic system itself,[5] reference to electoral mechanisms, and the underlining of the relationship between elected and electors, which envisages the 'responsiveness' of the former as a collateral effect of competition.

These two definitions, while still being largely procedural, contain a substantive difference, underlying which are two different research perspectives. Dahl is interested in producing an entirely empirically definition, an indispensable step for anyone wanting to conduct empirical research in this area, as he does. Sartori acknowledges, and indeed values, the connection between empirical and normative elements, and regards it as inevitable that such a link will be maintained in a political theoretical perspective. Whilst Sartori's more complex definition is important and quite legitimate when the focus is democratic ideals, and consequently, in our perspective, when dealing with the qualities of democracy, Dahl's definition has the merit of being a more appropriate empirical description of democratic regimes and is to be preferred when pursuing empirical research on transition and consolidation. In fact, while both participation and dissent are essential features of mass liberal democracies, competition and responsiveness are key characteristics of a normative definition. In other words, Sartori may be right in arguing indirectly that some degree of competition and responsiveness, however minimal, are indispensable for a real democracy. In other words, if competition and responsiveness are almost non-existent, but rights and freedoms are concretely guaranteed, thereby enabling participation and the real possibility of dissent, would it not be fair to say that we are in the presence of a democratic regime? Considering nations usually regarded as democratic, such as Italy or Sweden, the former characterised by limited responsiveness (however this difficult notion is measured)[6] and the latter by decades of political dominance by the Social Democrats, it is difficult to argue that such characteristics are constitutive, essential components of a real democratic regime.

An additional step towards considering elements other than procedural aspects but still important in a democracy comes from a proposal by Schmitter and Karl, when they state: 'political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives' (Schmitter and Karl 1991, 76). Their definition includes not only the notion of competition but also that of cooperation, thus emphasising the importance of the collective adhesion to values, rules and institutions within which actors compete but also collaborate. Without denying the relevance of this aspect, it should be stressed that once again it appears to be of central importance for the better functioning of democracy, and therefore also for an ideal democracy, but is marginal from a strictly empirical point of view. However, the concept of cooperation should not be ignored, because it may also lead to an underlining of the initial, 'genetic' foundations of a democracy.

To make this preliminary empirical definition more concrete, it is necessary to decide which rules and institutions distinguish a democratic regime. Expanding the suggestions by Dahl (1989, 221), at least the following should be included: the set of formal rules and procedures regarding universal suffrage; free, fair, competitive and recurrent elections; a decision-making

[5] For more on this term, see 5.1.

[6] Responsiveness and related problems of definitions and measures are discussed in Part Three.

and governing body elected with the above-mentioned norms, usually corresponding to a parliamentary assembly; a prime minister and a government that are answerable to parliament or are the result of direct election by the electorate; a set of intermediary structures represented by political parties and interest groups; apart from all the bureaucratic structures (public administration, magistracy, armed forces, police, etc.) that constantly interact with the directly elected democratic structures. These institutions and norms presuppose, albeit to different degrees, a genuine guarantee of political rights and liberty, such as freedom of expression, union and association, and alternative sources of information and therefore also the existence of other norms, and a bureaucratic apparatus that guarantees such rights. According to Schmitter and Karl (1993, 45-46), it is also important that these institutions (and, one might add, these rights) not be subject to or conditioned by 'non-elected parties' or exponents of other external regimes. In the first case, one example might be the desire of the armed forces to influence democratic decision-making processes or the overall functioning of a democracy. In the second, the conditioning might come from an external power that undermines the independence and sovereignty of the democracy in question. The former scenario would lie outside the bounds of the democratic *genus* in a non-democratic or ambiguously democratic institutional arrangement. In the second scenario, there may be democracy within the country, but not independence and sovereignty, namely sovereignty may be consciously surrendered to achieve other important goals, as is happening in the case of the European Union. This latter type of situation is what is to be considered for the subsequent development of the research.

Democratic theories and the empirical understanding of conceptual notions deployed into them also point to a *genetic definition* of democracy as a set of norms and procedures that stem from a compromise agreement for the peaceful resolution of conflicts between politically significant social actors and other institutional actors present in the political arena (see Przeworski and Wallerstein 1982; Przeworski 1991, 26-34; see also Weingast 1997, 245-63). In this regard, a distinction should be made between 'the will of the People' and the legal framework through which it has to be conducted, as well as the constitutional boundaries to democratic power, such as fundamental rights and constitutional guarantees, like the independence of the judiciary.

Moreover, this definition differs from those mentioned earlier, not only because it lays more stress on the genetic aspect – how a democratic regime comes into being and its forms – but because it indirectly refers to certain basic socio-economic conditions. The genetic definition also helps us to gain a better grasp of a fundamental, but often neglected or underestimated, feature of any democratic regime: a democracy is a regime concretely characterised by rules and institutions that moderate or offset different aspects. As the procedural definition makes clear (see above), democracy requires the existence of some basic consensus on the rules and at the same time must accept dissent and conflict regarding the content. It must accept the uncertainty of decisional results, but *does* require certainty regarding the rules, so that the uncertainty is relative and limited. It cannot, for example, abolish the right to private property. It must apply the principle of majority rule, the main decision-making rule to ensure the effective functioning of its decisional organs but must protect the rights of minorities. In some cases, therefore, it is necessary to obtain broader majorities or even unanimity. There must be the broadest possible representation of interests and identities in the appropriate government bodies, such as parliament and regional or local assemblies, but at the same time, a democracy

relies on some degree of decisional efficacy and functionality, which are much harder if not impossible to obtain when seeking to achieve the representative presence of all the components of fragmented and complex societies. Lastly, and paradoxically, the stronger the consensus on democracy, the more conflict it can sustain; the smaller and more integrated the minorities, the more government institutions can resort to the majority principle; the less complex the political structures, the greater the decision-making efficacy.

This discussion helps to establish the bases for developing the definitions best suited to our research. In fact, we need a narrow empirical definition, described by numerous authors as 'minimalist' in order to better analyse cases of transition, consolidation, and crisis, but we also need a 'maximalist' or rather a normative definition, which is necessary for the analysis of the qualities of democracy, namely in the processes of deepening and worsening of qualities. We endorse a vision where, functionally speaking, all democracies need to be observed and understood through the lens of a multidimensional grid accommodating the wide range of experiences of democracies that co-exist within the EU and in any other possible regional integrated space.

2.1. Minimalist notions

Having examined the procedural and genetic definitions, it is now possible to return to the first of the two issues raised by the initial definition. In order to conduct an empirical analysis of the establishment of, and transitions within, democracies, it is important to arrive at a *minimalist* definition specifying a limited number of features that are more immediately controllable and essential at an empirical level, thereby permitting the establishment of a *threshold* beneath which a regime cannot be considered democratic.

There are three reasons why such a minimalist definition is empirically helpful, and they can be more explicitly stated as follows:

1. it is essential in understanding when, in a transitional process, a regime turns into a minimalist democracy, or is close to doing so;

2. it helps to capture the complexities of a transitional period when a regime may already be democratic in some respects but continues to remain authoritarian in others;

3. if properly expressed, it helps to trace the existence of a democracy in a country with greater immediacy

The best minimalist definition is still the one inspired by Dahl several years ago (1971, esp. ch.1): a regime should be considered democratic if it has at least the following: *a*) universal male and female suffrage; *b*) free, competitive, periodic and fair elections; *c*) more than one political party; *d*) different and alternative sources of information. Such a minimalist empirical definition has been considered procedural (see, e.g., Whitehead 2002, 10).[7]

[7] On these definitions of democracy see also Diamond (esp. 1999, 7-17). A minimalist empirical definition, such as the one discussed in the text and those suggested by Diamond, are different from the 'minimalist' theoretical conception 'defended' by Przeworski (see 1999, 23-55).

However, it must be noted that ultimately it considers essential the genuine respect of at least civil and political rights, assuming that these rights exist if there is effective universal suffrage, the quintessential expression of political rights, that is, if the right to vote extends to the whole adult *demos*. If, as a consequence, there are free, fair, and regular elections, there is an expression of the effective existence of freedom of speech and thought. If there is more than one genuinely competing political party, then there is a manifestation of the existence of a real and practiced right of association, and if there are different sources of media information with different proprietors, there is evidence of the existence of the above-mentioned freedoms.[8] In other words, in this definition strictly procedural aspects such as competition and participation are actually complemented by an effective guarantee of freedoms where the substantive elements are also present (see section 3 below). Furthermore, the forecast of this framework is ancient: it should be taken into account that Article 16 of the 1789 *Declaration* stated at least the separation of powers and protection of individual rights as necessary to recognise the existence of a Constitution.

> *One important aspect of such a definition is that if just one of these features is absent, subverted, or ceases to exist, the regime concerned would no longer be a democracy but some other political-institutional arrangement, possibly an intermediate one characterised by differing degrees of uncertainty and ambiguity.*

Lastly, it is again useful to stress that the minimalist definition must focus on the characteristic institutions of democracy – elections, competing political parties (at least potentially), and media pluralism – thereby tying in with the definitions given above, such as those of Dahl and Schumpeter, and shifting the level of abstraction of those two definitions onto the more immediately empirical plane of the institutions that are indispensable for a democratic regime.

An important addition was made to this definition by Schmitter and Karl (1993, 45-46), who stress that democratic institutions, existing rights, and the decision-making process should *not* be constrained by either non-elected elites or external powers. When considered jointly, all six of the required characteristics are clearly demanding, and the four adjectives attached to elections are particularly onerous. It is not easy to have 'recurring, free, competitive and fair' elections: indeed in some democracies that have been consolidated for decades there are charges of corruption even today. Moreover, as Diamond (2002, 28) recalls, 'often particularly difficult are judgments about whether elections have been free and fair, both in the ability of opposition parties and candidates to campaign and in the casting and counting of the votes. In other cases, the element of 'more than one source of information' is difficult to meet if we only make reference to TV broadcasts. Or in yet other countries a decision-making process not constrained by an army, which ironically can be formed by democratic officers – see the Turkish case – is difficult to achieve'.

This same discussion shows how important it is to be conscious of the problem addressed by Collier and Adcock (1999) with regard to the two possible paths to take when dealing

[8] As the assessment of elections is a key element in this minimalist definition, the proposal by Munck (see 2009, especially chapter 5) might well be taken into account and followed.

with research concerning democracy: dichotomy and gradation. Although they affirm (1999, 561-562) that 'research that focuses on democratization as a well-bounded event and on classical subtypes of democracy favours dichotomies', actual research in the field suggests how a graded approach can be more appropriate in the empirical analysis of transitions to democracy. The key point seems to be that in this kind of research, measurement is not always possible: analysis necessarily has to be qualitative. Consequently, recourse to non-dichotomous classifications and typologies as substitutes for quantitative measures is the only possible and feasible path. However, this is a non-dichotomous path and sometimes it is essential to trace the processes of transition in its various dimensions, such as that concerning elections, the building of government institutions (decisional and representative bodies, judiciary, bureaucracy, army and police) with or without a constitutional sub-process, the establishment of a party system and/or the development of interests.

A graded approach to democracy is also useful in at least two additional domains of research. The first was, again, pointed out by Collier in an article written with Levitsky (1997), where they show that adjectives may serve to cancel out part of the meaning of democracy. Therefore, we have 'diminished subtypes': 'The subtype thus expresses the idea of a gradation away from democracy. The use of diminished subtypes presents an interesting alternative to employing an ordinal scale' (Collier and Adcock 1999, 560). A second important domain of research concerns the analysis of the quality/qualities of democracy (see part three). In this, whenever possible, the use of gradation is essential to understand the extent to which the quality under scrutiny is present in a democracy. Here again the key problem is the actual possibility of adopting measurement or, if this not possible, classifications, i.e. 'nominal scales'.

The minimalist definition would logically imply that there is also a *maximum* definition. Bearing in mind that democracy is at the same time a descriptive and a prescriptive term, a maximum definition must necessarily start with ideals or principles, rather than with concrete institutions, as the minimalist definition does. If well formulated, a definition of this kind would be particularly useful for the present analysis, which regard to the deepening of democratic qualities as a further phase in the democratisation process. Lastly, a definition rendered suitably applicable in empirical terms could help to gauge the distance separating real democracies from the maximal, and also the degree of democratization of regimes that have crossed the minimum threshold outlined above.

However, a maximum definition does not exist as such. In fact, it is neither possible nor appropriate to establish a point or points of arrival for principles and ideals that are constantly evolving. In a more limited sense, also with a view to pursuing the objectives mentioned above, it might be possible to devise one or more definitions that indicate possible directions for the development of contemporary democracies, bearing in mind the principles or ideals that inform them in the relatively more advanced realisation of the 'power of the people'. To quote Sartori (1987, 71), the problem of the maximisation of real democracies is rather that of 'optimisation', once the ideals and the directions of development have been established and efforts are made to achieve them gradually.

2.2. Normative theories and empirical dimensions of legitimacy [9]

For the purposes of singling out a definition of what might better be called an *ideal* or *normative* democracy, there seems little point in attempting to classify and measure real, existing democracies as various authors have done (see, for example, Freedom House, various years; Bollen 1990; Gurr et al. 1990, Vanhanen 1990). This approach yields a whole series of realised or 'perfect' democracies, normally corresponding to the countries of Western European and the English-speaking world, which obtain the maximum score but fail to reveal the problems of limited and scarce 'democraticness' or the areas of possible growth in democratic quality (see part III) precisely in those and other countries. Alternatively, one point of departure may simply be the main normative definitions of democracy developed in previous decades. Those definitions include at least the following: 1. liberal, representative democracy; 2. responsive democracy; 3. participatory democracy; 4. deliberative democracy; 5. associative democracy; 6. egalitarian or social democracy; 7. good governance, and 8. good democracy.[10] They may partially overlap or be a development of one another, as in the case of participatory and deliberative democracy. There are also other additional normative notions that involve a blend of the previous ones. In fact, there is an extensive literature for all the notions that cannot be summed up here, as it covers most of contemporary political philosophy. What can be done however is to discuss briefly the main normative notions in our perspective, which is to assess how such notions can become an object of empirical research, that is to say, how they can be translated empirically.[11]

Normative notions of democracy are intimately related to the variety of normative visions endorsed as to the *quid* legitimising the democratic processes and the exercise of power that takes place throughout them. The above-depicted composition of the qualities of a democracy provides a promising avenue in the direction of a conceptual clarification of what the '*quid*' might be. At the highest level of abstraction, democracy is legitimised either by compliance with the procedures or by the ability to deliver the whole set of 'substances', namely freedoms and equalities.

In the most classic normative notion of *liberal democracy*, as developed by Mill (1861) and, more recently, Schumpeter (1942), Dahl (1956 and 1970), Sartori (1957 and 1987) and several other authors (Held 2006, including chapter 3), the key features are those relating to procedure. Accountability and competition are at the core of that conception. But effective freedoms (see also Berlin 1958), namely content value, complement them. The attainment of those values helps to establish the autonomy of an individual, which, according to other authors (e.g. Held 1989, especially chapter 9), is the key element in an ideal liberal democracy. This is

[9] This is inspired by Morlino, 2008, ch. 1 and 2.

[10] Among the normative notions of democracy, I have not included 'self-definition', that is, the democratic conception proposed, and in some instances developed, by specific political or social movements, groups, leaders in a given moment in a given country. There are two obvious reasons for this. Firstly, it would involve an enormous amount of empirical research in several countries, where the specifics of every situation would emerge as being important, if not predominant features, which is not the purpose of this study. Secondly, the non-specific aspects would in all likelihood overlap with the notions mentioned and discussed in the text. For more on self-definitions of democracy see, for example, Koelble and Lipuma (2008). A common characteristic of all the definitions mentioned in the text is the implicit but strong reference to the national level. However, not only can we imagine a supranational democracy, but a kind of experiment in one is actually underway, despite all the hesitations, stops, and steps backwards, namely that represented by the European Union.

[11] A classic work outlining the principal normative notions of democracy is Held (1987 and 2006).

the easiest normative conception to translate empirically, like the already cited procedural dimensions – such as, following Dahl (1971), participation and competition. Yet, as mentioned above, electoral accountability and institutional accountability,[12] which are characterised by the division of powers meant to check one another, are further empirical dimensions that need to be examined. Finally, the rule of law has often been considered a key component of a democracy. Consequently, when the task is to find out how to detect if some aspect of that normative notion has been translated into reality, reference must necessarily be made to this dimension too.

In reality, a legitimated democracy is a set of decision-making processes that unfold within the boundaries and according to the norms set up by the liberal rules. The ex-ante stance of the legitimising mechanisms draws its justification from a political theory that interprets the rules as devices bounding legitimated spaces of actions and constituting legitimated actions (Searle, 1990; Ferejohn, 1998). Still, this view of the legitimacy falls short in offering a satisfying understanding of real democracies.

In the proposals by Dahl (1970) and May (1978, see also Kuper 2004), the key feature of a *responsive democracy* lies in the results of decisions that mirror the preferences of the governed. But according to this notion, procedural and content aspects are important as well. From this perspective, there is a democracy if there is a 'necessary correspondence between acts of governance and the wishes with respect to those acts of the persons who are affected' (May 1978, 1); or, in a partially different version, democracy has to be characterised by the 'continued responsiveness of the government to the preferences of its citizens, considered as political equals' (Dahl 1970, 1). This definition postulates that citizens always have clear ideas about their preferences, taking it as read that they are all educated, informed and aware. Moreover, it is worth bearing in mind because it serves to emphasise an important point: whatever the intermediate principles and guaranteed rights might be, freedom and equality – if they are to be effectively promoted –require active citizens who are willing to interact within different collectivities, to inform themselves and to participate, perhaps because they subscribe to and are prompted by notions of public ethics. In an empirical perspective it is not easy to assess the responsiveness of a political regime because of the difficulties in detecting empirically the 'preferences' of citizens in relation to the increasingly complex issues of a modern democracy. However, due to its salience it has to be achieved in some way, even with the (poor) help of proxies.

The imbalance between procedures and substances is accordingly reshaped in favour of a more ex-post oriented vision of the legitimising mechanism. In a responsive democracy, it is the quantum of matching the degree between citizens' expectations and the delivery of democratic that is at stake in terms of the assessment of democratic legitimacy.

However, the conceptual richness of the scholarship has not left unrecognised the variety of development among democratic innovations targeting participation as one of the pivotal procedural qualities. If, from a liberal point of view, political participation is channelled through the electoral processes, a more value-oriented and discourse-shaped notion of participation comes to the fore.

[12] For definitions, indicators, and measures of accountabilities, see Part 3.

As regards the more recent conceptions of *participatory democracy*, mainly but not exclusively procedural, like for example those developed by MacPherson (1977), Pateman (1970) and several others authors, participation and freedom are the key empirical aspects to take into account. To assess the prospects of translating such a notion – already complemented by an abundance of classic political science literature on participation – empirically, the 'ladder of participation' by Arnstein (1969) may be brought to mind. In her view, the goal and result of citizen participation *must* be the redistribution of power in favour of citizens (namely economic resources, information, the possibility of having a genuine say in the definition of policies). If participation does not lead to the redistribution of resources, to significant reforms benefiting the 'have-nots', and the status quo is maintained, participation is an empty ritual and a mere exercise in political rhetoric. In this respect, participation should promote change from the bottom up and in endogenous forms. Thus, the ladder of 'participation' has three basic levels. The bottom level is that of *non-participation*, which can basically be summed up by the notion of 'cure', and consists of two rungs or steps (*manipulation*, *therapy*). It applies to actions undertaken by the State for the explicit purpose of 'educating' and 'curing' the disadvantaged. These have inhibitory effects on the empowerment of individuals and local communities. The next level, *tokenism*,[13] essentially relates to ways in which citizens are given a chance to hear and be heard. The three rungs here are *informing*, *consultation* and *placation*, and are still the most common forms of participation today, albeit with a different degree of political and social awareness. The highest level is *citizen power*, where citizens have a genuine influence in decision-making processes, and is divided into *partnership*, *delegated power* and, at the top, *citizen control*. On these rungs, there is effective parity between participants, and the divide between 'powerholders' and the 'have-nots' is closed.[14]

In Pateman's contribution to the debate on participatory democracy (1970) and Bachrach and Baratz's analysis of the 'mobilization of bias' and 'nondecision' (1970), it is possible to find many parallels with the analysis proposed by Arnstein.[15] According to Pateman, there is a close tie between institutions fundamental for a society, the relations of subordination stemming from them, and democracy.[16] The bonds are based on dyadic relationships. Strong and concrete inequalities are created within these institutions. In their research, Bachrach and Baratz affirm that citizen participation is a form of political action that influences the allocation of values. Participatory processes tend to redistribute power, authority, and influence in favour of participants. In anti-poverty programmes, the involvement of disadvantaged citizens is incentivised in order to arouse their political interest and, in this way, to strengthen their ability to pursue their own interests. In the view of the two authors, well-structured and guided

[13] The term is used to refer to the 'practice or policy of making no more than a minimal effort to offer minorities equal opportunities to those enjoyed by the majority' (Webster Dictionary). According to Arnstein, the demands of minorities and weaker sections of society are managed through powerfully mediated forms of listening designed to put a damper on conflicts in the interest of social order, but which are not followed by any real measures to solve problems or significant changes in the way decisions are made.

[14] I would like to thank Francesca Gelli for calling my attention to this author.

[15] The theoretical hypothesis in question had already been formulated by Bachrach and Baratz in two articles published many years earlier in the *American Political Science Review*, entitled 'Two Faces of Power' (1962) and 'Decisions and Non Decisions: An Analytical Framework' (1963) respectively.

[16] Pateman examines the institution of marriage in relation to the subordination of women and in the sphere of work and employment. It creates bonds and relations of subordination particularly for women and the young. These institutions are viewed not so much in terms of relations between individuals but as social institutions – codes and conventions that take root in society and become cognitive structures as well as mechanisms of power.

participatory initiatives offer a means of anticipating and dealing with conflicts. In this sense, it has been observed that participatory practices can be viewed as technologies instrumental to the process of government. Such a perspective is effective if building and maintaining consensus is considered a priority for the stability of democratic systems. There is no doubt that empirically participatory phenomena change considerably according to the level focused on by research, be it at State-National or local government levels. In the former, specific representative institutions and political participation in the circuits of representative democracy remain absolutely central. Moreover, the solid tradition of research into participation does not create unsurmountable problems in the empirical assessment of this normative notion, albeit in one of the different conceptions that are present in the literature, and which we briefly comment on here.

Deliberative democracy, as proposed by Habermas (1996), Cohen (1989), Dryzek (1990, 2000), Bohman (1996) and others, is grounded on public discussion among free and equal individuals and entails a procedural dimension (participation) and a content one (freedom). Accordingly, such a normative notion is a development of the previous one and like the other it is grounded on an explicit or implicit criticism of representative democracy as opposed to a much more effective direct democracy. By reaffirming the importance of basic democratic principles, including equality and freedom, from which it draws its legitimacy, deliberative democracy is characterised by its strongly normative impulse; it seeks a different way of being democratic without supporting forms of representative democracy, considered to be in crisis. More precisely, deliberative democracy is inspired by the search for satisfactory ways of combining preferences and aggregating them in contexts of pluralistic coexistence of the kind found in contemporary societies. Through discussion, and individual and collective thought, views and preferences mature and become more clearly delineated. One possible outcome of deliberative processes is that the preferences of participants may be redefined through interaction and may change quite significantly. The path taken to reach collective decisions and build consensus and agreement about a choice is very different to the procedures and mechanisms of representative democracy. On the one hand, deliberative democracy is based on a set of principles that tend to be expressed in universalistic terms, especially in Habermas' interpretation of public democracy as a rediscovery of 'government through discussion' and in the work of other North European, Anglo-Saxon and American scholars.[17] On the other hand, in contrast to the wave of participation that took place in the 60s and 70s, deliberative democracy grants little or no space to spontaneous impulses, to the forms of protest and the claims of movements in the form of 'bottom up' participation. Even in the model proposed by Habermas, the organisational networks of civil society converge in the public sphere in a structured way, institutionalising a kind of ideal communicative community through practices of public deliberation. These are the presuppositions of the current of thought that adopts a radical interpretation of deliberative thought, defined as a 'process based on public discussion between free and equal individuals'.[18]

[17] The universalistic and normative tendencies are emphasized here in order to avoid misunderstandings, as critics are prone to describe deliberative democracy and its theoretical premises as 'soft'.

[18] The importance of dialogue lies in the comparison of views by the various parties involved through discussion backed up by rational argumentation. This means not merely asserting one's point of view but publicly explaining the reasons for them in a situation where everyone enjoys equality and freedom of opinion.

Moreover, from Elster's (1993, 1998) different perspective, another theoretical line of deliberative democracy emerges, which stresses the 'strategic' interweaving of argumentation and negotiation in deliberative processes and presupposes a strategic result-oriented rationality. But this vision of deliberative democracy weakens the role of dialogue as a 'neutral' discursive practice animated by universalistic ideals and offers space for differences in the expression of vested interests and reaching agreements based on an instrumental adjustment of preferences rather than a profound change in points of view where values would be affected. Comparatively, the Habermasian perspective is more radical in affirming the desire of participants to reach agreement and the power of the best argument, and in the capacity to go beyond the instrumental agreement, developing a genuine sharing of views between the parties involved, and hence consensus, against a background of communication inspired by a faith in dialogic rationality. The empirical translation of such a notion, already attempted by a number of scholars (see e.g. Bächtiger, A., Spörndli, M., Steenbergen, M., Steiner, J. 2005), partially overlaps with the previous normative notion, and its main difference lies in the more specific aspects of participation, especially in the decision-making process, which should be analysed to detect how much and with what characteristics some deliberative features have been implemented in the reality of certain democracies. In fact, Steiner and his associates, who translated the notion of Habermas, pointed to the working of parliaments.[19]

In *associative democracy*, as theorised by Hirst (1997) and others, accountability, participation and freedom are key elements, that is, there is a mix of procedural and content features. Unlike the previous proposals, where participation or deliberative decisions are promoted by public institutions, especially by the government (at various levels, from the supranational to the subnational), a different scale of participation regards forms of self-management by groups with a deep-rooted social base and different forms of organisation and action (committees, local associations, movements). Groups participate by joining together in protest (based on their shared values), or by converging around the definition of proposals and projects with a view to bringing about change. Associative experiences of 'organised civil society' incorporate participatory and deliberative practices designed to solve collective problems and satisfy social needs in subsidiary or remedial action with respect to the state intervention; sometimes the interests pursued are autonomous and independent of the more or less explicitly stated ones of the political-administrative system. Such forms reflect the social nature of human beings and their need for associative life (Walzer, 1992, p. 97). 'Democratic civil society' is an environment in which it is possible to perform a responsible role of participation and choice, albeit for 'minor' decisions, and to gain direct experience in the 'exercise of authority'.[20] According to the

[19] On deliberative democracy especially, there is a plethora of mixed conceptions. Among them, those on 'liberal deliberative democracy' and 'participatory deliberative democracy', which Della Porta (2011, esp. sect. 3) singled out in her analysis of the connections between these notions and social movements, may be recalled.

[20] In the 'associative network' of civil society, people make decisions that may be minor, but are capable nonetheless of reducing the distance that otherwise forms between citizens and the State, and even the iniquitous outcomes of the market can be limited in this way (Walzer, 1992, p. 99). The conclusion reached by Walzer is that the State cannot last long if it is alienated from civil society, which at the same time cannot be viewed as an alternative to the State (governance does not exclude government). There are at least two fundamental reasons for this. Firstly, because the organisations belonging to 'civil society' rely on the help of the State in various ways (specific programmes and services, financial resources, tax reductions and exemptions, protection and, above all, the State performing a regulatory function, acting as a guarantor) in order to realise their projects. Secondly, because mechanical procedures and rigid bureaucratic apparatuses can also take over in 'civil society', leading to radically unequal power relations and reproducing conditions of injustice (Walzer, 1992, 104).

reconstruction of associative democracy by Hirst (1989, 1993, 1994), which draws on and develops ideas from the Anglo-Saxon school of political pluralism and the corporative socialism of the 20s, associationalism has a dual quality in that it allows both for cooperation and the market. The social solidarity action of self-run, voluntary associations, and active citizenship networks, can contribute to individual growth, social well-being and the sustainability of economic development by attending to the production and reproduction of common goods, carrying out an often subsidiary function in relation to that of governments. Hirst also stresses the elements of spontaneous activation in associationalism, the quality of self-governance and the voluntary nature of actions, particularly at the local level. Associative democracy can strengthen representative institutions and help to provide society with a framework of basic laws to guide social actors, oversee forms of public service provision, hold public officials accountable, and protect the rights and interests of citizens (Hirst 1997, 18). Underlying Hirst's argument is observation of the crisis in the associative capacity of political parties, the fragmentation of their hinterland, and the progressive nationalisation of society brought about as a consequence of the rationale and means of producing public goods introduced with the advent of the welfare state, all of which have gradually reduced society's capacity and scope for taking steps to solve social problems.[21] The acknowledgement of pluralism and the valuing of the self-organisational components of informal social networks and intermediate associative bodies has encouraged a profound transformation of the State, starting with a redefinition of its tasks. The State is called upon to act as an arbitrator and guarantor, giving civil society organisations opportunities to act directly and perform an overseeing function, at the same time regulating that very associative pluralism. This perspective of political and social action reopens the debate on the procedural dimension of democracy, suggesting original and differentiated regulatory solutions and also poses the question of how the procedural component can be integrated with the participatory ones and the welfare state. From our perspective, it is interesting to stress once more how political thinkers have been striving to find alternatives to representative democracy by developing different modes of participation at different levels and in different forms.

In *egalitarian* or *social democracy*, equality is one of the two key empirically relevant dimensions and is complemented by freedom. In relation to this normative notion, the most influential conception of all is that developed by Rawls (1971), who also uses the expression ''property-owning' democracy'. More recently, Ringen (2007) has focused once again on the interrelatedness, rather than the conflict, between the implementation of freedom and that of equality – both key values of democracy. If we briefly focus on Rawls' contribution, his two principles of 'justice as fairness' are: 1) each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar scheme of liberties for all; and 2. social and economic inequalities must satisfy two conditions: they must be attached to offices and positions open to all under conditions of fair equality of opportunity, and they must be to the greatest benefit of the least advantaged members of society. The freedoms that those principles entail are freedom of thought and liberty of conscience, political liberties and

[21] In the scheme proposed by Hirst (1997), associative democracy is a system for organising political and social life that encourages self-governance through voluntary associations. This helps, in his view, to tackle three fundamental issues: 1) to guarantee the responsibility of representative democracies; 2) to deal with increasingly pluralist societies with diverging values; 3) to enable those who are successful to make use of services that have all the advantages of being collective without losing their flexibility, and maintaining care for disadvantaged individuals.

freedom of association, as well as the freedoms specified by the liberty and integrity of the person, and lastly, the rights and liberties covered by the rule of law (see especially Rawls 1993). Rawls also argues that a virtually permanent feature of modern democracies is the existence of a wide variety of divergent and incompatible conceptions of the good, namely a plurality of opposing but reasonable comprehensive doctrines that require the existence of capitalist firms, or the existence of worker-managed firms or the existence of completely different forms of ownership rights according to some unique communitarian conception of the good. A 'property-owning' democracy that permits the existence of a wider variety of ownership rights, including socialist forms of ownership, should be favoured in modern democratic conditions. From our perspective, the conception of Rawls and similar ones by other authors, such as Ringen, can quite readily be empirically translated into the set of civil, political and social rights that cover both freedoms and equalities.

3. Democratic rule of law

Good governance and good democracy are notions profoundly influenced by the recurring waves of international policies aiming at transferring, promoting, strengthening, or protecting democracy worldwide (Piana, 2011). Concepts worked out through these policies and entrenched in subsequent political discourse mostly focus on the notion of the rule of law as the most intimate and necessary dimension in a democracy.

In order to remain functional to the research aims of RECONNECT, this paper cannot focus in depth on the existing conceptions of the rule of law that still uncouple it from any democratic dimension. In particular, it is impossible to target the form in which the law in any case rules in authoritarian regimes, as it may still be possible to find its extremely narrower form labelled as 'rule *by* law', in which the law is a mere instrument of dominance but nevertheless matches some of the more subtle definitions found in literature (see already Goodhart 1958 and Ginsburg and Moustafa, 2008). Hence, in developing democracies, the relationship between rule of law and democracy can be seen once more as instrumental but now aiming to pursue, create, and consolidate democratic institutions, as testified since its definition by the Venice Commission (precisely: 'European Commission for Democracy *through* Law', emphasis added). The specific aim of the paper is to tackle the relationship between the rule of law and freedom as the key empirical elements of *good governance,* bearing a clear sign of the influence exercised by a liberal view of democracy (see section 1).

To better clarify this point, it should immediately be added that, within a very lively and rich debate, the notion of governance has usually been grounded on empirical studies (see, for example, Pierre and Peters 2000). It refers to a complex set of structures and processes, both public and private, that are not synonymous with 'government' (see Weiss 2000) and can be effectively conceptualised as the 'capacity of public sector to steer, alone or in cooperation with other actors, economy and society' (Peters, 2008).[22] An excellent reconstruction is offered

[22] Other definitions of governance are: minimal State (Rhodes 1996); corporate governance (Rhodes 1996; World Bank); new public management (see Mathiasen, 1996; Lynn, 1998; Terry, 1998; Peters and Pierre, 1998; Pierre 2000); a socio-cybernetic system (see Kooiman 1993, Rhodes 1996); networks (Rodhes 1996; Peters 2008); multi-level governance (Hooge & Marks 2001); democratic governance (Franck, 1992; and others), and global governance (Carin *et. al.* 2007). Some of them (minimal State, corporate governance, new public management, good governance, a socio-cybernetic system, self-organising networks) were also discussed by Rhodes (1996).

by Rhodes (1996), who stresses how with this notion there is no 'crisis' or the 'disappearance' of government and the State, but a redefinition and repositioning of its role and function in a pluralised context of actors taking part in public decision-making processes. If anything, it marks the end of the paradigm of government as a centralised, coercive, and hierarchical form of power through a redefinition of the form of political regulation in the interaction with social and economic regulations. Hooghe and Marks (2003) classify forms of governance on the basis of the prevalent definitions found in studies of the European Union, international relations, federalism, local government, and public policies. From our perspective, the key feature they highlight is the need to analyse different levels of government, even when considering normative conceptions of democracy. The discussion could continue, and doubts remain about what is the most effective definition of this notion and the level most appropriate for close analysis. But we are still within the domain of an empirical debate.

Thus, the normative element intervenes when the adjective 'good' is added. From this perspective, one of the most original definitions (and analyses) of 'good governance' is that of Rothstein and Teorell (2008, 165-90), who consider this notion synonymous with 'quality of government' and strongly argue that a key aspect of good governance is 'impartiality in the exercise of public authority' (p.166) as a 'moral principle' for civil servants (p.176), with democracy as a necessary condition, and impartiality implying rule of law as well as enhancing efficiency/effectiveness (pp.178-83). The World Bank prefers a broader definition where 'good governance is 'an efficient public service, and independent judicial system and legal framework to enforce contracts; the accountable administration of public funds; an independent public auditor, responsible to a representative legislature; respect for the law and human rights at all levels of government; a pluralistic institutional structure, and a free press' (World Bank, 1992). Or, in other words, once again those of the World Bank, there is a 'predictable, open and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law' (World Bank, 1994: vii). The notion has also been adopted by other international organisations, and the most recurrent empirical dimensions mentioned in different documents have been the rule of law, government effectiveness, legitimacy and voice, political stability and absence of violence, transparency, accountability, participation, responsiveness, and so on.[23] This means that

[23] In addition to the World Bank, the other international organisations that have adopted the notion of 'good governance' include the United Nations Development Programme (*UNDP*), the United Nations Economic and Social Commission for Asia and the Pacific (*UNESCAP*), the International Governance Office (*IGO*), the Canadian International Development Agency (*CIDA*), and the Austrian Development Cooperation and Cooperation with Eastern Europe (ADC). I am not going to discuss why these organisations adopted the notion. I just wish to mention briefly that it has been considered a way of not appearing to interfere in the domestic affairs of the countries where they intervene in different ways. A similar notion has been adopted by the European Union, which defines 'good governance' in terms of five principles: '[…] openness, participation, accountability, effectiveness and coherence […] Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local' (European Commission, White Paper on Governance, 2001, 10). Further on, the notion of 'democratic governance' is also proposed more explicitly: it 'spans a broad range of issues, such as respect and promotion of human rights and fundamental freedoms, democratisation and citizens' involvement in the political process, the rule of law and access to justice, gender equality, human security, access to information, management of migration flows, access to basic public services, effective, transparent, responsive and accountable State institutions, sustainable management of resources and promotion of sustainable economic growth and social cohesion' (European Commission, 2009, 3-4).

ultimately we are not far away from other normative notions when the empirical translation was made.

Other international organisations pursue a narrower meaning of rule of law, almost uncoupling it from any kind of democratic implication. In its yearly report entitled *Government at a Glance*, the OECD embraces a minimal definition of rule of law, referring to accountability to law of officials, stability, and publicity of legal commands, fair trial and promptness of justice delivery. It is evident that no attention whatsoever has been paid to democracy or human rights.

The UN has made a significant effort to foster a more robust understanding of the principle with the Report by Secretary General Kofi Annan in 2004[24]. Even though (understandably) it did not mention democracy as an integral part of the rule of law, it mentioned human rights, becoming extremely significant in the aftermath of September 11 and the global reaction to terrorist attacks.

A different normative approach is to examine the main values that a contemporary democracy is supposed to implement through its policies. As already mentioned above, for several authors these are mainly freedom and equality/solidarity. This can lead to a definition of a *'good' democracy* as 'the set of institutions that create the best opportunities to carry out freedom and equality' or, in a more complete way, 'a stable institutional structure that realizes the liberty and equality of citizens through the legitimate and correct functioning of its institutions and mechanisms'. Thus, a good democracy is a broadly legitimated regime that satisfies its citizens.[25] When institutions have the full backing of civil society, they can pursue democratic values. If, by contrast, institutions have to postpone their objectives and expend energy and resources on consolidating and maintaining their legitimacy, crossing even the minimum threshold for democracy becomes a remarkable feat. Second, in a good democracy, the citizens themselves have the power to check and evaluate whether the government is pursuing the objectives of liberty and equality according to the rule of law. They can monitor the efficiency of the application of the laws in force, the efficacy of the decisions made by government, and the political responsibility and accountability of elected officials in relation to the demands expressed by civil society. All this implies that the different levels of government – local, regional, national, and supranational (especially for European countries) – cannot be overlooked (see also Morlino 2004).

Tailoring the analytical understanding of democracy within the European Union and the process of European integration entails stressing two preliminary points. The first is that empirical, especially minimalist, notions of democracy are essential compasses in empirical research, and normative notions of democracy may be empirically translated to assess their actual presence in the different countries or political situations. However, when we switch from ideal discourse to empirical analysis, the enormous wealth of different conceptualisations of democracy can only be translated into few recurrent, empirical, features that we can explore. These include rule of law, electoral accountability, institutional accountability, participation (the most

[24] UN Doc. S/2004/616 4: 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'.
[25] Of course, such a definition overlooks a few classic issues relating to individual satisfaction, as in the case when individuals have incompatible desires. I thank Daniela Piana, who called my attention to this, although I cannot develop the theme here.

common of the normative notions), competition, freedom, equality/solidarity, and responsiveness.

The second point is that the European integration process and its subsequent transformations within the domestic systems put a spell on the 'intra-European' coexistence of a range of democratic models. The consequence of this is the need for a notion of democracy that combines the analytical focus to grasp common dimensions and the semantic structure of a multi-dimensional concept to detect the different weights each dimension bring to each realisation of democracy (i.e. member States and their historical developments as liberal constitutional democracies).

In the aftermath of WWII, the interplay between form and substance within the varieties of democratic models that have arisen from the institutional erosion and political crisis that hit all Western democracies in the 1930s led both scholars and political elites to give serious consideration to the potential subversive power of mass liberal democracies if deprived of the strength and legitimacy of counter-majoritarian institutions. This is one of the leitmotivs that plays a dominant role in the construction of the European model – ahead of governance and later than democracy in the strict sense (Dehousse, 1990; Stone Sweet, 2000).

A comparative view would appear to be the most proficuous for the purpose of this analysis. A survey of the models that coexist in Europe reveals a spectacular variety of institutional solutions. Each solution combines a formal organisational design of counter-majoritarian institutions with informal practices and ways of working and organisational and legal cultures, differing from one country to country (Nelken 2004; Cotterrell 2007). This is the main reason why the European Union represents an extraordinary empirical repertoire of practices relating to the implementation of rule of law and inter-institutional accountability mechanisms, all coexisting within an overarching set of common guarantees of freedoms and equalities.

To have an overview of these different models it would be wise to focus on the role attributed to the courts as strongholds and champions safeguarding freedoms and equality at the domestic level. The first country where courts played a role as a mechanism of power constraint was England. By ensuring the impartiality of the Common law courts, the British system also guaranteed the implementation of the rule of law. In the English system, legal norms took the form of jurisprudential decisions, through which ordinary judges paved the way for modern English law (Bell 2006). In continental Europe, given the more direct importance of the Sovereign State, it is possible to identify two ideal-types: the Neo-Latin and the continental (Guarnieri and Pederzoli 2002). The neo-Latin model, which spread across Southern Europe and Belgium along with the establishment of Napoleonic rule, underwent a process of radical change after the end of the Second World War (Guarnieri and Pederzoli 2002). In France, the constitution adopted in 1946 established a Conseil Supérieur de la Magistrature (Renoux 2000), the organ of judicial self-government. Subsequently, a pure model of self-government was adopted by Southern European countries in the process of their transitions to democracy. After the fall of pre-war authoritarian regimes, High Judicial Councils were introduced in Italy, Spain, Portugal and Greece in order to insulate judges from the influence of the executive (Toharia 1975). Scholars refer to this as a neo-Latin model of judicial governance (Piana, 2015; Bobek, 2012).

The role attributed to the courts, and their interplay with the other branches of the State is a distinctive mark of a particular vision of democracy and, at the same time, the significance the majoritarian institutions may have in such a reality. Thus, in refining the concept of rule of law, one significant indicator will point to the scope of action, strength, and rules regulating access to the justice system by individual citizens, collective stakeholders, and political institutions (Piana, 2011).

In Europe, this notion has been reinforced by the Council of Europe. Interestingly, the rule of law was mentioned in the preambles both of the 1949 Statute of the Council and the 1950 Convention but with no clear definition. In the versions of the two documents in various languages it was not even translated as *Rechtsstaat*, *État de droit* or *Stato di diritto*, preferring more descriptive (and less evocative) periphrasis such as 'Herrschaft des Rechts', 'prééminence du droit' and 'preminenza del diritto', so as not to imply a reference to the different legal traditions of the individual legal systems. Hence, the distinction (in the sense of the lack of mutual permeation) between rule of law and democracy seems to be confirmed even by the 2011 report on the rule of law by the Venice Commission[26]: the two principles are always mentioned in juxtaposition (never implying that only one of the two necessarily encompasses the other); they are listed, together with human rights, as the pillars underpinning the Council of Europe. In sum, democracy and the rule of law are obviously connected, but they still stand independently of each other.

In addition, the Council of Europe conceives the rule of law also as deriving from a set of policies promoting it, such as quality of justice, fighting against corruption, fighting money laundering, and promoting minority protection – and from a parallel and somehow interplaying vision of the European Union.

The relationship between the European Union and the rule of law is more complex. Explicit mention of it came only with the Treaty of Maastricht (Konstadinides 2009), although the Court of Justice had already started working on it with *Les Verts*, in 1986). It is in any case evident how promotion of the rule of law in the European Communities increased in view of extension towards Central Eastern Europe, influencing the strategy of conditionality. The European Commission endorsed the same approach, and, as part of the pre-access strategy design to fill the institutional gap found in the countries applying for membership from 1995 to 2007, promoted an enormous range of policies, all of them pivoting on the key idea that a strong judicial branch may be more effective in coming to terms with totalitarian or post-totalitarian rule in the Central Eastern European countries. More recently, the Commission has launched the so-called Rule of Law framework[27] in order to link the parameters required at the moment of accession to monitoring during membership.

Essentially, the development of a notion of democratic rule of law encompassing the entire range of patterns of inter-institutional accountabilities and methods of law-making and law-enforcement under conditions of judicial independence (which falls within the scope of inter-institutional accountabilities) reveals a focus on main-streaming involving the injection of

[26] CDL-AD(2011)003rev, *On the rule of law*.

[27] Begun with the *Communiqué* from the Commission to the European Parliament and the Council entitled 'A new EU Framework to strengthen the Rule of Law' of 11.3.2014, COM(2014) 158, later revisited with the *Communiqué* from the Commission to the European Parliament, the European Council and the Council, 'Further strengthening the Rule of Law within the Union. State of play and possible next steps' (COM/2019/163 final).

strong guarantees of rule of law in order to make democracy possible, if not stable, and to create favourable conditions for the rule of law in action (as opposed to 'rule of law in the book'). Moreover, from the point of view of legal history, it should be taken into account that well before the institutionalisation of an independent judiciary, Parliament was the first implementation of the rule of law at work in the formation States, the very first step towards the legal limitation of sovereign powers.

3.1. Beyond the State

Over the centuries, the development of modern States and the practices of Western liberal institutions have given birth to two different, but related, formal mechanisms to limit the power of the sovereign (and broadly speaking to limit the power of the executive branch): first, its subjection to the law, in an early stage to natural law, and subsequently to parliament; second, the separation of powers, based on the assumption that the three branches of government (legislative, executive and judicial) handle three different kinds of power. It then recommends that these branches perform their functions under the control of mechanisms of inter-institutional (inter-branch) accountability, which ensure that no branch prevaricates and overrules the others. Independently of the way power has been limited, judicial institutions have always been placed in a critical position in relation to implementing the constitutional principle. On the one hand, courts are of paramount importance in keeping public officials accountable to the law. On the other, the judicial branch is crucial in implementing the principle of the separation of powers (Bellamy 2005). Rule of law and inter-institutional accountabilities are in this respect pivotal. Their scope of implementation and functioning is the State. Therefore, the 'State' is unquestionably the front stage actor of the last five centuries, theoretically and empirically speaking. It is a winner, because no other institution has managed to dominate to the same extent as the State in all sectors of human life. It is also a loser, because the fate of such a visible protagonist (also subject to total exposure) is overall criticism.

The empirical evidence that the EU is not a State does not, nonetheless, lead to the assumption that constitutional democracies organised in the form of a nation State and the EU cannot be evaluated – from the point of view of their democratic functional components – using shared criteria. We would argue that there is a level at which this puzzle can be approached using abstract analytical tools that stem from a functional understanding of a system of governance, featuring a cluster of necessary components – even though these latter naturally assume different forms and are structured in different ways (Morlino, 2011). These tools refer, firstly, to the ability to accommodate legacies of the past and, second, the ability to cope with future innovations, which means that constitutional provisions have to be so designed that they take the historical legacies embedded in the institutions as a legitimate basis and where the constitution is to be implemented, also taking seriously the need to adapt to new needs and new situations. Framed in these terms, the question of democracy is closely related to the learning capacity of formal and informal institutions and the potential capacity of the norms that derive from the on-going interpretation and use of the formal constitutional provisions to be modified. Differences may be seen as either a strong point or a barrier to the rule of law at the EU level. If, in fact, the European space is expected to be homogenous in terms of equality and non-discrimination under the law, accordingly, the differences in the way the State is unbounded in the various member States may eventually undermine this homogeneity. The cross-level circuit of the democratic rule of law and institutional mechanisms for the definition, entrenchment, and enforcement of rights must become an empirical source of analytical inspiration through

which to redraw our categories accordingly. From the empirical point of view, this project aims to investigate three levels of institutional reality:

1. The trends emerging in the domestic case law in relation to the definition of the legal standard of the right to a fair trial. Cases considered will be limited to those where migrants or citizens transferred from one MS to other(s) MS are involved. The sources of data will be the data set of the Supreme Court (the Court of Cassation and Constitutional Court). The results will be compared with the trends in EU case law built up step by step by the ECtHR of Strasbourg.
2. The type of professionalism that emerges in the law-making process at the domestic level. Who contributes to the law crafting process? Which professionals have a say in it? And, even more importantly, to what extent does organised civil society manage to influence the law-making process? Do the MSs still favour a generalist approach? Or does specialisation emerge in public law enforcement? To what extent do 'professionals of numbers' – economists, statisticians, etc. – have a say (or a dominant say) in defining the standards and the minimum level of rights and services that a State ought to ensure for all its citizens? Here, the analysis will be on the individual level, considering their professional background, career paths, etc.
3. The type of participation (in terms of model transfer or model imitation) that Member States have in transnational arenas such as judicial networks, health care system peer reviewing groups, agencies granted with full responsibilities in standard setting, as well as monitoring and evaluating public services and public goods.

These points are of the utmost overall importance in completing the analysis from the dynamic/evolutionary perspective of the democratic rule of law (see next section), especially when empirical fields such as the post-communist countries are considered in the aftermath of the fall of the Berlin wall. The fall of the communist regimes and the enlargement of the European Union have provided good reason to talk about democracy once more, now from the point of view of the democratic institutional setting best suited to cope with Eastern and Central European countries' needs and from the point of view of the European understanding of democracy. The main direction taken by the debate on European democracy has been marked by the defeat of the old democratic rule of law in its ability to grasp the essential logic of the constitutional problem arising in the new Europe. Even if it is not a question of a specific concern about the democratic rule of law as such, it is nonetheless worth mentioning the main argument endorsed in this debate. Generally speaking, the main theme, apart from the different positions held in the debate, is the matter of the legitimacy of the translation of the 'statehood paradigm' into a post-statehood – or still post-modern and post-sovereignty – reality, as in the case of the EU. Different reasons have been put forward in favour of the specific nature of the European democratic rule of law. These reasons are both analytical and empirical. From the analytical point of view, three main differences from the constitutionalisation of national States have been stressed. The first is the absence of the 'so-called *demos'*, which can constitute a legal authority and a political entity. The second is the absence of a social contract defining common goals. The third refers to participation in European decision-making. There appears to be an intrinsic lack of representativeness and participation by citizens in the EU public sphere, so the decisions taken within it are barely legitimate. The main shortcoming of this argument is the assumption that the legitimacy of the constitution can be reduced, on the one hand, to the genesis of the political entity and, on the

other, to the capacity of any political system – as has been legitimately constituted – to work as a classical constitutional democracy. Only if this assumption is held to be true could it be possible to transfer the same mechanisms to take legitimate decisions proper to a national State at the collective level to a new kind of political system, the EU. One consideration might be the legitimate expectations of the common citizen about the outcomes of good government. Besides the question of how democratic it may be, are those expectations fulfilled, or are they somehow betrayed by the new institutional system?

3.2. Democratic rule of law

The overarching role played by the democratic rule of law, in the context of its historical roots as depicted above, must be assessed against a more general framework. *Prima inter pares* among the dimensions of democratic quality is the Rule of Law (O'Donnell 1998; Bratton and Chang 2006; Thier 2007). As Linz and Stepan's seminal work on democratic consolidation indicates, the degree to which the Rule of Law exists in a given polity reflects the entire democratic quality of that regime (Linz and Stepan 1996). Indeed, the Rule of Law may be understood as the foundation upon which every other dimension of democratic quality ultimately rests (Diamond and Morlino 2005). Hence, the study of rule-of-law reform dynamics reflects deeper and broader processes of domestic democratic development, and an inquiry into the influence of international actors on changes in the quality of the rule of law moves the research agenda beyond the procedural, macro-democracy nexus of inquiry found in the vast majority of the literature promoting democracy.

Anyone concerned with upholding the rule of law at home or with promoting it abroad, however, is confronted with the *a priori* challenge of conceptualising the term. Conceptualisation involves identifying the attributes that constitute the concept under consideration. Producing such a definition is a critical task, since specifying the meaning of the concept is at the epicentre around which all subsequent decisions regarding theory, data collection, and analysis will be taken. Accordingly, the attributes that constitute the concept under consideration have to be defined carefully, meaning neither minimally nor with such overburdened detail as to make the concept synonymous with 'all things bright and beautiful', thus rendering it of little analytical use.[28]

Yet, to a degree perhaps unparalleled in social science phraseology, the term Rule-of-Law is vulnerable to overreaching and abuse, even more so than the term 'democracy'– which itself has gained hegemonic international endorsement – the ideal of the rule of law is advocated almost universally and, just as importantly, never seriously rejected. Amidst a host of deep cleavages – between East and West, North and South, Islamic and non-Islamic, liberal and non-liberal societies – as Tamanaha observes: 'there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the 'rule of law' is good for everyone.' (Tamanaha 2004, 1; similarly Zagrebelsky 2008, 117). Notwithstanding its pervasiveness as an ideal, however, the term suffers from an extraordinary divergence of

[28] The identification of the attributes of the rule of law has always been a contested issue. Indeed, because the conceptualization of the rule of law is inherently linked with the theory of the rule of law (itself an open, evolving concept) there is no point in arguing about 'the correct' definition. We therefore follow the sage advice of Gerardo Munck and Jay Verkuilen not to insist that there exists one correct definition of a concept, but to avoid the extremes of including too little or too much in a definition regarding our theoretical goals (see Munck and Verkuilen 2002, 7-9).

understandings. Often, it seems 'there are almost as many conceptions of the rule of law as there are people defending it' (Taiwo 1999, 152) up to the point of including within it 'just about every political ideal which has found support in any part of the globe' (Raz 1979, 210).

Does this mean, as some theorists would have it, that the concept of the rule of law has been rendered meaningless by 'ideological abuse and general over-use'? (Shklar 1987, 1). We submit that it does not. But neither does it mean that anything goes, or that any given definition is as good as another. Rather, because conceptualisation is both intimately connected with theory and is a legitimately open-ended, evolving activity that is ultimately assessed in terms of the usefulness of the theory it helps to formulate, scholars are at liberty to determine what attributes must be included in a definition of the rule of law, while observing the methodological sensibility of avoiding the extremes of including too little, or too much, relative to their theoretical goals (Kaplan 1964, 51-53).[29]

In contemporary use, as Kleinfeld (2006) observes, the phrase is commonly brandished by politicians, practitioners and scholars to imply at least five meanings that are in fact distinct, but seldom clearly differentiated by those who invoke the term: (1) government bound by law; (2) equality before the law; (3) law and order; (4) predictable, efficient justice, and (5) public power respectful of fundamental rights. The definitional challenge is further compounded by the deep disconnection between the different communities now making use of the phrase, and the intellectual contexts from within which they operate.

Taking a step back from this confusion, we can divide conceptions of the rule of law into two broad types: thin and thick (Rijpkema 2013). This basic typology corresponds roughly to what Craig (1997) calls 'formal' and 'substantive' (see also Peerenboom 2004), Selznick (1999) 'negative' and 'positive', and Dworkin (1985, 11-13) terms 'rule-book' versus 'rights' conceptions of the rule of law (later developed in Barak 2002). Thin, formal, or negative conceptions of the rule of law demand the essential separation of law from politics (or 'autonomous law'), and focus on the minimal conditions necessary for law to restrict sheer arbitrariness in the ruler's use of power.[30] Restraining, if not actually taming, Leviathan has been the historically original context within which the concept of the rule of law emerged. Hence for Dicey: 'the Rule-of-Law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint', so that no individual could be lawfully punished by the state 'except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.' (Dicey 1908, 188). Restraining discretionary use of power is similarly at the heart of Hayek's definition of the concept. 'Stripped of all technicalities' as Hayek's powerful formulation puts it: 'this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.' (Hayek 1944, 54). Such a conception – sometimes dubbed 'government by law, not by man' – stems from the historic struggle to curb the coercive force of the strongest in human society, and is thus chiefly concerned with the 'negative' goal of shackling coercive authority. The constitutive

[29] See Ungar (1976), who argues for a strong affinity between liberal market reforms and the rule of law, and McAuslan (1997). But see also the social-democratic defence of the rule of law in Scheuerman (1994).
[30] Nonet and Selznick (1978) used the term 'autonomous law' to denote the idea of law in modern legal culture, which is distinguished from 'repressive law'.

attributes of a thin conception, therefore, stress formal or procedural aspects of the rule of law: laws must be open and public so that they can act as a guide to people (there should be no secret laws); the meaning of laws must be reasonably clear so that ordinary people can be guided by them; laws should be relatively stable, so that people can plan their lives by them; laws must be prospective, not retroactive; and the making of laws themselves must be governed by known, clear, and relatively stable rules.

In contrast, a thick, substantive or positive (though anti-positivist) conception of the Rule-of-Law, accepts all the constitutive attributes of the thin definition, but at the same time insists that the Rule-of-Law cannot be divorced from fundamental elements of political morality and institutional practicality. In a substantive conception, laws enshrine and protect political and civil liberties as well as procedural guarantees. This kind of conception assumes that all those wielding public powers must themselves be embedded in a comprehensive legal framework, so that individuals can enforce their rights against the State as a whole. Since government itself is ruled by law, corruption and other forms of illegality are prohibited. The requirement that rights should actually be defendable means that the central institutions of the justice system, including lawyers, courts, the police, and the prosecution are at least reasonably fair, competent and efficient. This assumes a fairly effective structure of state institutions, wielding a degree of administrative capacity suitable for carrying out the functions of the State. It also means that judges ought to be impartial and independent of the remainder of the State apparatus – otherwise the ability of individuals to uphold their rights before them would be endangered by political dependence and manipulation. As may be intuitable, in every 'thick' conception of the rule of law an important part is played by the incorporation in the rule of law of fundamental rights as an integral part of it, even to the detriment of the better legislation (Bingham 2007 and 2010).

A substantive democracy, accordingly, is characterised by 'democratic rule of law', which itself embodies five main dimensions: (1) the protection of civil freedoms and political rights; (2) an independent judiciary and a modern justice system; (3) the institutional and administrative capacity to formulate, implement, and enforce the law; (4) an effective fight against corruption, illegality, and abuse of power by State agencies; and (5) security forces that are respectful of citizens' rights and are under civilian control. These five dimensions (whose contents are decided in the interests of citizens by their representatives through legal procedures and institutions) are our main indicators of changes in democratic quality.

Though the two concepts are not synonymous, the affinity between the democratic rule of law and liberal democracy is clearly profound and multi-dimensional. Even a minimal, electoral democracy cannot exist unless rulers comply with at least one rule – that which regulates who should occupy the position of ruler in the light of election results. More broadly, the virtues of the rule of law are substantially the same as those of the democratic process from three key respects: the rule of law upholds the political rights of a democratic regime; it protects the civil liberties and rights of the entire population (including minority and other disadvantaged groups), and it establishes 'horizontal accountability' – networks of responsibility 'which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts.' (O'Donnell 2005, 7). Indeed, as Carothers suggests, properly conceived, the interrelation between the rule of law and liberal democracy goes beyond democratic processes to permeate institutions and spheres across society: 'The Rule-of-Law makes possible individual rights, which are at the core of

democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it.' (Carothers 2006, 4-5).

The notions of legitimacy and authority feed into the rule of law and democracy matrix in many respects and have been consequently at the top-ranked position agenda in the scholarly debate among European scholars over the decades. As a matter of fact, historical facts and doctrinal thoughts are never unconnected. In many ways, the development of the European integration process led to good reasons to question the constitutional architecture of the European Union. Therefore, it is understandable that in the aftermath of the historical turning points that have marked European history, the constitutional process of the European Union has been fuelled with new quests and expectations, rising from the failures of 'integration by design' but, at the same time and somehow paradoxically, also from an acknowledgement of the significance of 'constitutional momentum'. It has been argued that one of the functions of a constitution within a social community is to make explicit the reasons why individuals, business sector organisations, civil society associations, and intermediate bodies, coordinate their actions into a common space marked by a common playground. With regard to the debate that has been ongoing within European scholarship and European discourse, this is a much-emphasised aspect. To go back to the albeit unsatisfactory process of the European Convention, the need for a renewed élan in the cultural cohesion of the Union has been mirrored by the quest for re-constitutionalisation.

In general, the European rule of law has become the experience of several thus-narrated 'constitutional momenta'. This has taken the form of a search for a re- justification of the choice of making ordinary decisions together, sharing in a part of a historical destiny. The debate around the values and principles of the European Union has by and large characterised the political scenario of a number of turning points. Going back to the foundations – the Treaty of Rome, Maastricht, and Amsterdam – but more recently and in a new form the definition of the Copenhagen criteria – it has been 'as if' a constitutional momentum were at play not only for the candidate countries but also for the old member States: 'if one should promote abroad a principle to set the standard against which a new member will be assessed as eligible to join the club, it should be made clear which is the foundational principle of the club'. Construction of the EU 'as if' it were a fully 'constitutional' experience has recently been relaunched in a number of studies (particularly Tuori 2015), but it has also been strongly contested. There is a risk of overlooking its specificities and its distinctions from the standpoint of the statehood in which the proper 'constitutional' experiences developed and consolidated, thus missing the possibility of refining and adapting the idea of the very idea of 'supremacy' (Lindseth 2016).

That being said, given the EU's extensive enlargement, the democratic rule of law can be said to have constituted a major element in the change in direction of both the new Member States and the changing EU.

Empirically, these events justified in the case of several 'turning points', the relevance of the democratic rule of law. The constitutional debate has mainly focused on the aspect of innovation, examining elements of discontinuity with previous forms of democratic rule of law. European scholars have been particularly articulate in this line of thinking. For scholars, the legal and, in particular, the philosophical change is due to a mixture of internal and external factors.

On the one hand, after enlarging eastwards, internal reorganisation has led to a change in the composition of those working within the Court of Justice. Currently, few judges at the Court have an academic background and have solid training in EU law. Hence, they are more likely to support the interests of the Member States. What is more, the change has been influenced by the economic crisis and the interests of the Member States in protecting their budgets. The migration crisis has been another decisive external factor.

Even if it is not a question of a specific concern about the democratic rule of law as such, it is nonetheless worth mentioning the main argument endorsed in this debate. Generally speaking, the main theme, apart from the different positions held in the debate, is the matter of the legitimacy of the translation of the 'statehood paradigm' into a post-statehood – or still post-modern and post-sovereignty – reality, as in the case of the EU. A subsequent, and more recent, occasion in which reflection on democratic rule of law has emerged is the series of backlashes witnessed – and it is not coincide – in central Eastern European countries over the last decade. It is not clear whether this should be considered a crisis specifically targeting a specific understanding of the rule of law or its connection with the democratic dimension (for the second hypothesis see Besselink and Reestman 2017). The creation of a series of tools to monitor and strengthen the rule of law within the EU (Closa and Kochenov 2018) confirms the fact that it should not be taken for granted and that it has to be considered as a never-ending aim of the European integration itself rather than a mere and acquired pre-condition for admitting new members.

Analytical and empirical reasons have been put forward to argue for the specific nature of the European democratic rule of law. From the analytical point of view, three main differences from the constitutionalisation of national States have been stressed. The first is the absence of the 'so-called *demos'*, which can constitute a legal authority and a political entity. The second is the absence of a social contract defining common goals. The third refers to participation in European decision-making. There appears to be an intrinsic lack of representativeness and participation by citizens in the EU public sphere, so the decisions taken within it are barely legitimate. The main shortcoming of this argument is the assumption that the legitimacy of the constitution can be reduced, on the one hand, to the genesis of the political entity and, on the other, to the capacity of any political system – as has been legitimately constituted – to work as a classical constitutional democracy. Only if this assumption is held to be true could it be possible to transfer the same mechanisms to take legitimate decisions proper to a national State at the collective level to a new kind of political system, the EU. The empirical evidence that the EU is not a State does not, nonetheless, lead to the assumption that constitutional democracies organised in the form of a nation State and the EU cannot be evaluated – from the point of view of their democratic functional components – using shared criteria. Here we would like to address the constitutional question more abstractly. We would argue that there is a level where any possible constitutional question may be approached using abstract analytical tools.) These tools refer, firstly, to the ability to accommodate legacies of the past and, second, the ability to cope with future innovations, which means that constitutional provisions have to be so designed that they take the historical legacies embedded in the institutions as a legitimate basis and where the constitution is to be implemented, also taking seriously the need to adapt to new needs and new situations.

Framed in these terms, the constitutional question is very much related to the learning capacity of the formal and informal institutions and the potential ability to adapt of the law that derive from the on-going interpretation and use of formal constitutional provisions.

The notions of good governance and good democracy both result from the multiple and layered waves of scholarship and political discourses addressing the needs and the functions of a) promoting democracies and b) assessing/understanding democracies from a comparative perspective.

4. Solidarity and justice

As stated at the beginning, solidarity/equality is another key quality in a democracy, extending even beyond the State horizon. These two notions are related to Justice. However, for an analytical understanding of this, we need to return to the notion of rights and subsequent definitions of equality. Dahl (1998), Beetham (1999) and other authors help to explain the further step required to arrive at a clarification and formulation of rights. Indeed, they suggest a number of more specific principles that are also means of offering the best institutional opportunities for ensuring freedom and equality. Above all, these principles do not just include aspects such as recognition of the political inclusion of all adult individuals, equal voting rights, the promotion of the effective participation of all citizens, and the availability of clear and correct information for all. Drawing once again on Dahl and Sartori, they also encompass the promotion of government accountability and its capacity to respond to the demands of citizens and communities, also through control of the decisional agenda and the outcomes of such decisions by citizens themselves or in various other ways that may be devised.

If these aspects, which are essential to the achievement of freedom and equality, are to be effectively pursued, contemporary democracies will also have to attend to issues such as environmental conservation, the right to health care, assistance for the elderly and invalid, the right to a job, provisions for the unemployed, the need to ensure everyone has a reasonable standard of living, the right to greater educational opportunities, and the promotion of equity in private disputes or between public and private interests. Not to mention the fact that in an analysis of the ideal democracy, safeguarding the substantive elements outlined above would paradoxically mean ignoring the steps already taken by many real democracies to promote equality. It would also involve failing to recognise that in today's world the protection and promotion of those social rights has become just as indispensable for democracy as the principles of inclusion, participation, equal voting rights, accountability, and so on, and indeed are closely related to them. In short, it would result in a definition of the ideal democracy that in some ways would fall short of what actual ones have already achieved.

A concrete understanding of the affirmation and protection of the values and rights mentioned above requires a third step, namely the pinpointing of the institutional tools that best realize them. Once again, Dahl [1971, 3 and 1982, 10-11] is useful here, with his emphasis on the need for the following eight institutional guarantees: *a*) freedom of association and organisation; *b*) freedom of thought (and expression); *c*) the right to vote; *d*) the right of political leaders to compete for (electoral) support; *e*) alternative sources of information; *f*) the possibility of being elected to public office (passive electorate); *g*) free and fair elections; *h*) the existence of institutions that make government policies dependent on the vote and on other expressions of preference.

The centrality of rights assumes the possibility that they may be extended and deepened and may be concretely exercised with greater satisfaction. One example of this in relation to the right to vote might be the granting of the right – which, indeed, has already become a concrete reality in many countries – to express a preference not only for a candidate or party but also for a government. In this way, citizens would feel that they have more scope for expressing their political will. Likewise, a more profound affirmation of the principle of inclusion, and once again of voting rights, would involve granting political citizenship to immigrant residents. Such a proposed definition of good democracy is inevitably complex. It starts with the individual and develops in at least three steps: the identification of the two most general principles; the preliminary delineation of more specific, intermediate principles, and the specification of a set of rights that stem from the first two steps. However, the empirical translation should be simpler with a concrete emphasis on the rights, the related content, and the ways of guaranteeing them.

With regard to the previous notions, a definitional analysis is also necessary.

Socio-economic equality and solidarity are usually considered democratic values. Of course, this has been a classic value since long before the 'invention' of the mass liberal democratic regime during the nineteenth century. More precisely, a key component of ideologies that became part of the political regime, and which we have labelled liberal democracy, is the promotion of socio-economic equality. In addition, there have been other non-democratic ideologies that have had equality or solidarity at their core. This is not the place to illustrate Marxism and other ideologies in which equality lies at the heart of a normative system. But in a nutshell, from an analytic perspective, justifications of equality are based on the belief that it is a value, a good to be implemented in itself, or the indirect source for other values or goods. There have also been many other justifications, but all of them raise doubts of a different kind from the normative perspective.[31] As Dahl stresses (2006, 37) there is also a wide range of other non-ideological motivations based on emotions such as altruism, compassion, empathy, envy, anger and indignation. Here, we will concentrate on more empirically relevant justification.

First, a key reason to consider equality as a democratic value stems from a procedural perspective on democracy. It is widely known that an enlightened, relatively unconstrained and fair formation of political opinion, which is essential for voting as well as for the proper functioning of accountability, responsiveness, participation and competition, entails at least adequate education and living conditions. But the presence of such conditions is only possible within a more equal society. This argument shows very powerfully how the substantive aspects of democracy are related to the procedural dimensions, and how those lines of thought that have disentangled the formal features from the substantive ones are completely wrong. Accordingly, Dahl (1989, 311) very effectively emphasises how the 'democratic process […] promotes freedom […] promotes human development […] protect[s] and advance[s] the interests and goods they (human beings) share with others….'.

The second, strongly empirical justification of equality comes from the data collected and the subsequent related conclusions reached by Wilkinson and Pickett in *The Spirit Level* (2009), the subtitle being *How Greater Equality Makes Societies Stronger*. Their key propositions are that

[31] Somaini (2002, ch. 1) effectively illustrates all these justifications.

'economic growth, for so long the great engine of progress, has, in rich countries, largely finished its work' (Wilkinson and Pickett 2009, 5) and today health and several other social problems, such as the level of trust, mental illness, life expectancy, infant mortality, obesity, children's educational performance, teenage births, homicides, imprisonment rates and social mobility are related to income inequality: the higher the inequality, the worse these problems are. Greater income differences imply greater social distance, a hierarchical society and profound social stratification (see ibid., chs. 2-12). Although some subsequent analyses cast doubt on a number of correlations, which do not necessarily involve a causal connection, the key aspect of their empirical research that justifies the salience of equality for a better society, with freedom as a complementary dimension, is solidly supported.[32] Besides the aspects mentioned in their analysis, we might point to the connection between equality and interpersonal trust (see e.g. Rothstein and Uslaner 2005) as an element that eventually contributes to the more effective working of a democracy, if not a better one.

The third – and for some, even more important – and related justification makes one aspect more explicit that also exists in other, non-egalitarian ideologies. This goes back to the close connection between equality and justice, especially distributive justice (see also Gosepath 2016). As suggested by Bobbio (1995, 8), unlike freedom, which is an individual value, equality is a social value and at the same time the necessary condition for justice or fairness. Although to differing extents, and with different characteristics according to the culture, people are prepared to accept unequal societies, but are much less or totally unwilling to tolerate injustice understood as unfairness. This has already been emphasised by Stiglitz (2012, chapter 5), and is one of the most salient results of recent psychological research: as in the real world there is a large variation 'in effort, ability, moral deservingness […] people don't care about reducing equality *per se* […] people have an aversion toward unfairness' (see for example Starmans, Sheskin and Bloom 2017, 3 and 5). It confirms the salience of the intuition at the heart of the most influential political philosophy of recent decades, that of John Rawls (see 1971), in addition to enabling us to understand some of the reasons for the enormous, profound, widespread attention and success he has had over all these years.

Fairness, however, is not actually possible without socio-economic equality. Or, from a different perspective, pursuing the goal of fairness is not possible without policies aimed at redressing extreme inequalities. Thus, the salience of socio-economic equality is restated and again necessarily lies at the centre of our attention. However, we are well aware that, on the one hand, the effective implementation of equality appears to be a utopian objective, in addition to not being advocated by all supporters of democracy; and, on the other hand, the justifications above are undermined by periods of economic crisis, even more so by a protracted one like the Great Recession. In fact, as we will see below, pursuing social and economic equality involves the lifting of limiting barriers by providing effective social rights. But the greatest problem associated with the implementation of these rights lies in the cost that they impose on the community, which entails taxation and the efficient use of resources, which need to be redistributed first of all towards public education and interventions in the labour world. Assuring individual health, environmental protection, disability and old-age pensions are also redistributive in nature, even if only partially.

[32] Their work has also been criticised from different perspectives. See Gilmore (2014), who briefly but effectively summarises those criticisms and Wilkinson's responses.

Accordingly, during the 2010s the justifications of equality have been compounded, if not contrasted, by the impact of the economic crisis, the ensuing austerity policies, and greater social indifference. Furthermore, in such a context the reasons for collaboration and solidarity have undergone changes. But we need to remember that the reasons for supporting socio-economic equality and related policies had already begun to weaken after 1989 with liberal economic reforms in Central and Eastern Europe. For example, the basic statement by Crouch (2000 and 2003, esp. ch. 1) on post-democracy is that a consequence of the increasing transformation of contemporary democracies in the direction of elitism is the progressive loss of appeal of any egalitarian theme. In analysing the 'crisis of equality', Rosanvallon (2011) singled out how the historical reasons and the related justification for promoting equality have been fading regardless of the economic crisis and have instead been opening up new spaces for national protectionism and xenophobia. He refers to three factors in particular that were previously pushing our democracies towards equality, but which have gradually disappeared: the 'fear that a lack of reform would cause social and political turmoil, the practical impact of the two world wars, and a decline in the belief in individual responsibility for people's destiny' (Rosanvallon 2016, 16).[33]

When providing a definition of equality, Sen (1992) is quite right in stressing the necessity of immediately considering the question 'equality of what?' or, we might add, 'inequality of what?' In our work, we are interested in social and economic equalities with regards to both outcome and opportunity. But let us add that in a more consistent empirical perspective, and considering connections with democracy, it seems more appropriate to refer right from the beginning to social and economic *equalities*, and to no other kind of equality (see also below). Here, for the purposes of our research, 'economic and social equalities' are the 'qualities of all people living in a given territory being equal with reference to income and other resources'. However, although the definition necessarily refers to outcomes, equality should also be analysed in terms of opportunities, that is, the existence or otherwise of the conditions for redressing inequalities.[34] As regards outcome, it is known that economic (in)equality refers to differences in income and social (in)equality to differences in social resources, which can also be related to gender and ethnic origin; as for opportunity, pursuing equality implies that everyone has an equal opportunity to improve their own life, as policies are decided and implemented to create the best conditions for improving income and social resources.

In deepening the key features of the proposed definition, a key concept requiring specification is that of *resources*. Important clarification on this issue has been contributed by some of the leading contemporary philosophers who have proposed theories of equality and justice in recent decades. We are mainly referring here to Rawls, Dworkin, Sen and Nussbaum, and to their notion of resources or something similar. Rawls talks of 'social primary goods', which include, beside basic freedoms, income and the social bases of self-respect, as aspects of basic institutions that assure the worth of citizens as moral persons (Rawls 1971, 58-61). When considering Dworkin (1981) we can set aside his notion of internal resources, which refers to

[33] The scholarly debate on these issues is much broader and richer than it appears from this cursory analysis, especially, for example, regarding policies for easing inequality without economic growth, or about undermining the incentive to growth when strong egalitarian policies are enacted.

[34] For a thoughtful discussion of the distinctive features relating to the equality of outcome vis-à-vis the equality of opportunities, see Somaini (2002, esp. ch. 3). To see more clearly the connection between equality and fairness, which is not merely analytical (see above), it should be remembered here that Dworkin (see esp. 1981 and 1981a) discusses those two notions (outcome and opportunity) in relation to fairness as well.

personal talents only, and consider his notion of external resources instead. Again, besides liberties (see next section), these include education, healthcare, employment and claims to external space, personal property, and public goods. Here, as stressed by Yilmaz (2016, 234-5), it is salient for us to note that 'Dworkin regards resources as inputs to production which can be used to create income. […] This implies that Dworkin's resource-ism is closer to being a theory of equality of opportunity, while Rawls' equality of primary goods is a theory of equality or fairness of outcome.'

Sen and Nussbaum present a different perspective, also a salient one for us, in which it is more relevant to look at the capabilities to function rather than to resources to better understand inequalities. This concerns people's effective opportunities to undertake the actions and activities that they want. Sen (1992, esp. chapter 3) labels them 'functioning' and capabilities.[35] They are more specifically spelled out by Nussbaum (2011, 33-34) in a list where, in addition to several forms of freedoms (see next section), the author includes: being able to live a human life of normal length, to have good health, to be adequately nourished, to have adequate shelter; to use the senses, to imagine, think and reason, cultivated by an adequate education, to use imagination and thought in connection with experiencing and producing religious, literary, musical and other works and events of one's own choice; to love, to grieve, to experience longing, gratitude and justified anger; to have the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others with provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and species; to live with concern for and in relation to animals, plants and the world of nature; to laugh, to play, to enjoy recreational activities; to control one's environment; to hold property (both land and movable goods), and to have property rights on an equal basis with others; to have the right to seek employment on an equal basis with others; to be able to work as a human, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers. Of course, there is no doubt that this long and fascinating list is fully part of a utopian world.

In this debate it is also relevant, although more marginal, to consider the analysis of Dahrendorf (1979, and 1994). Referring to Weberian 'life chances', he developed a theoretical proposal for a new liberalism characterised by 'provisions' and 'entitlements' and complemented by 'ligatures'. Provisions and entitlements overlap with the civil, political and – above all, within the perspective of equality – social rights that Marshall (1949) had already theorised; the ligatures relate to belonging, that is, the sense of being part of a national community. In this vein, fraternity is a possible link that justifies the rights, that is, the provisions and entitlements.

The political scientist O'Donnell (2004) follows these paths by referring to 'the universalistic attainment of at least some basic rights and capabilities' (p.11). Sen and Dahrendorf are being explicitly and implicitly referenced here, and O'Donnell emphasises how 'posing the issue of capabilities in the political sphere involves going beyond the universalistic assignment of the rights of political citizenship. It leads to the question of what conditions may allow the effective exercise of these rights' (2004, 30-31).

[35] We might also mention Dahrendorf (see for example 1979 and 1988) within this perspective.

If we translate these suggestions empirically, with some unavoidable simplification, we can easily accept a notion of economic and social equality, which refers to the *social rights* to check how much they are implemented and subsequently the extent to which the related inequalities are redressed through policy measures. In this perspective, we can see how the much older notion of the welfare state, as developed by Marshall with his theory of citizenship (1950) and the distinction between civil, political and social rights laid down and implemented through the policies of a few European democracies in the same years, already established the basis for the empirical analysis of equalities. From this point of view, the important work by Rawls, Dworkin, Sen, Nussbaum and others has provided a much stronger ethical foundation for the empirical analysis. Thus, there is a salient, objective convergence among all these works that greatly strengthens the entire issue of the necessity of equality or policies for redressing it within a democracy.

Coming to the more specific resources and social rights, when analysing economic and social in/equalities in an empirical perspective, in addition to the allocation of economic resources within the population, we should consider the actual implementation of: the right to education, the right to health or to mental and physical well-being; the right to assistance and social security; the right to work; the right to human dignity without gender or ethnic discriminations; the right to strike; the right to study; the right to healthy surroundings, and, more generally, to the environment and to the protection of the environment; and the right to housing.

Not taking into account the EU social *acquis*, these measures cause a worsening of the living conditions of EU citizens. In order to stop the negative effects of the crisis, Member States and the European institutions have introduced (to a certain extent) austerity measures, which have had the effect of reducing the national welfare state. These measures pervade the European area of meticulous binding provisions and determine the limitation and conditioning of the organisation of social security systems. In this context, Member States have been obliged to resolve their budgetary imbalances and recover their economic parameters such as efficiency and competitiveness. As a response, Member States have reduced the cost of social benefits, causing a rise in tension between national solidarity and European integration. In particular, problems concerning the free movement of European citizens in the Union and access to social rights from a transnational perspective, have increased discrepancies between Member States with a consolidated, generous and expensive welfare state and Member States with low labour costs, low regulation and a weak welfare state. Those national reforms have produced problems for the sustainability of social welfare and contributed much to making the economic crisis evolve into a full-scale social crisis, with a negative impact on the enjoyment of a wide range of social rights, especially with regard to certain groups, for instance children, women, the young, and pensioners. The social crisis occurred through the restriction of access to numerous fundamental rights protected by the Charter of Fundamental Rights[36] such as education, healthcare, housing and some rights to work[37]. In particular, as far as the right to education is concerned, Member States have seen a reduction in the number of schools, the number of teachers and administrative and school costs. In addition, cuts have worsened the

[36] See Coppola S., Social Rights in the European Union: The Possible Added Value of a Binding Charter of Fundamental Rights, in Di Federico G., The EU charter of fundamental rights: from declaration to binding instrument, Springer, London, 2011, 199-215.

[37] See Civitarese Matteucci S., Halliday S., Social rights, the Welfare States and the European austerity, in Civitarese Matteucci S., Halliday S., Social Rights in Europe in An Age of Austerity, London, 2018, p. 3-22.

general quality of education, causing an increase in unemployed workers in the education sector, a reduction in the availability of services and a deterioration of general classroom conditions. The greatest consequences have been felt by children with disabilities, Roma people, Travelers'children, and the children of migrants[38]. Furthermore, austerity measures have caused massive alterations to the healthcare system. For instance, Cyprus and Greece have to reduce costs by restricting access to healthcare, introducing or increasing attendance fees, reducing salaries, and freezing employment, imposing an equally heavy toll on the enjoyment of the right to health. Moreover, this reform has increased waiting times for treatment and unmet medical needs, as well as causing a reduction in preventive and protecting care[39]. These effects have been felt more acutely by the most vulnerable, such as poor and homeless people, older people, people with disabilities and their families, women and illegal migrants. Other fundamental social rights are no longer fully guaranteed in EU territory. In particular, austerity measures do not allow full protection of the right to collective bargaining; the right to social security, like social benefits and the right to housing, as foreclosures and evictions have escalated in Member States like Spain.

During the European crisis, the EU institutions failed to remedy the dangerous effects of austerity measures. On the contrary, they made the situation worse. Indeed, the study of new crisis in governance arrangements, changing policy and politics orientation under the European Semester[40] have shown that there is no correspondence between the institutional architecture of the EU authorities and the ability to provide answers to questions from EU citizens on the matter of social rights. Despite the economic crisis and an increased risk of social exclusion driving EU citizens to demand more protection, the Commission and the Council (led by a majority of Member States still opposed to better social integration) maintained an approach whereby social policy and social rights in the EU serve primarily to achieve market efficiency[41]. This is clear from an analysis of some processes related to the European Semester. The Semester is one of the most important and influential policy coordination and agenda setting programmes in the EU evolving governance structure. The Commission proposes a select number of Country Specific Recommendations (CSRs) to be adopted by the Council on the basis of Annual Growth Survey and Community reports. The CSRs are the key part of the European Semester and the strongest mechanism available for EU institutions to influence social policies and social rights at Member State level. In the framework of the European Semester, the conditioned and contingent changes requested by Member States show that social rights and social policies are still oriented to supporting market developments rather than correcting market failures.

Two other problems demonstrate how the current institutional structure is barely able to give valid answers to citizens regarding social rights. First, the recent line of jurisprudence of the ECJ reversed the function of the principle of solidarity and disconnected the freedom of circulation from the principle of non-discrimination. It is now aims to defend national welfare systems from the hypothetical risks of financial destabilization resulting from the free movement of

[38] See Costamagna F., The Court of Justice and the demise of the Rule of Law in the EU Economic Governance: The case of Social Rights, in Carlo Alberto Notebooks, 487, 2016, 11.
[39] See European Parliament, The Impact of Crisis on Fundamental Rights Across Member States of the EU. Comparative Analysis, Brussels, 2015, 13.
[40] The European semester was introduced in 2011, inaugurating a significant new annual governance cycle to monitor and enforce compliance with stringent budgetary and structural reform.
[41] See Copeland P., Daly M., 2018, 1003; Crespy A., Menz G., 2015; Streeck W., 1995, 31-59.

economically inactive citizens. The *Dano* case law strand restores residence criteria and emphasises the aim of the directive to protect national social welfare systems. Case law is one of the most reliable indicators of the social justice crisis at the EU level. Indeed, these judgments could have possible negative consequences in terms of permitting further restrictions on free movement in general, which may be seen in the current debate on the free movement of workers.

Second, the integration process has de-structured national mediation organizations - i.e. trade unions. The social partners, rather than freely expressing themselves, appear to have been swallowed up in an institutional game where they are unwilling to exploit differences.

In conclusion, it is possible to affirm that to recover legitimacy, the EU legal system must strengthen the rule of law through a full sharing and protection of social rights and social policy between Member States and the EU within the European transnational legal space. EU institutions and Member States must therefore once again take responsibility for protecting fundamental social rights. In particular, they must produce actions such as Treaty amendments to transfer new powers to the EU level, reconnect free movement and the principle of non-discrimination, and produce new EU redistributive legislation.

5. Democratic rule of law in the circuit of justice and solidarity

Legal foundations and formal distribution of power across the European institutional and functional levels – supranational, national, sub-national – play a dual role in the process of legitimisation of the authoritative allocation of values and resources that unfolds across and throughout the European policies. On the one hand, legal foundations bind the legitimate scope of action and assign the burdens of responsibility together with the privilege of holding power; on the other hand, the formal architecture of the European Union offers good reasons for rising expectations regarding the ability of the institutions formally vested with responsibility to finally deliver accordingly.

As European scholars have promptly highlighted, legal legitimacy – grounded in the provisions entrenched in the TEU – are necessary but not sufficient conditions to respond to the quest for substantial legitimacy. This is true for two compelling reasons. First and foremost, constitutional provisions underdetermine the political action of every political system. Therefore, the democratic processes that unfold within the supranational and the national arenas undermine cohesiveness between the rule of law and democracy, since the second is responsible for setting the first in motion. The second reason refers to the fact that as a consequence of the hiatus that separates the legal foundations from the socio-political life of the European Union, the demands of citizens are gradually being reoriented towards those institutions that are perceived – and narrated – as the most committed in the actual enforcement of individual rights. Therefore, in order to disentangle the different mechanisms and patterns acting within the legitimisation processes featured by the European Union, it is of utmost importance to understand what expectations citizens and political leaders have developed concerning the democratic rule of law in the EU. What is the rule of law that the European Union has been seeking? And why? To what extent has this quest for the rule of law been a functional replacement mechanism for the progressively hollowed out process of legitimisation so dependent on the solidarity and the justice that citizens enjoy and expect to enjoy?

At this point we might return to the interplay between democratic rule of law and equality, which seems to be crucial in the creation of an analytical framework for our research. For decades, the 'rule of law-equality' matrix has been addressed by international practitioners and policy makers engaged in promoting the rule of law [Merryman, 1977; Sen, 2000; Trubek, 2002; Carothers, 2006; Ghai and Cotterell, 2009].[42] The link between the two sides of the coin, rule of law and equality, has been observed from different normative and methodological perspectives. Even recently, an interesting work [Pinzon Rondon et al., 2016] has pointed to the correlation between the rule of law and individual wellbeing, this being assessed in terms of standards of life expectancy, child mortality rate, and health. This quantitative analysis follows the same line already traced by previous studies, which aimed to show that a fair and transparent legal environment is strongly linked to economic development and thus to better living standards [Rigobon, 2004; Haggard et al., 2008; Botero and Ponce, 2011]. Far from being unchallenged, these works reveal a widespread interest in the relationship between rule of law and equality. Yet very little empirical investigation has been carried out on the interconnection between access to justice and equality[43]. Without doubt, on the normative and prescriptive level, the relationship between the two (the formal and institutional guarantees of equality before the law and equal access to the justice system) is accepted worldwide. In practical terms, citizens should be equal before the law and consequently have the same access to the court systems whereby the laws are enforced.

Empirical observation of trials and qualitative analysis of experiences within courthouses as well as, so to say, at the entrance, to quote a Kafkaesque metaphor, of the 'castle of the law' seem to reveal however that this relationship is far from genuine. Indeed, even in socio-political contexts where the formal guarantees of an impartial and impersonal application of the law are well established, there is no assurance that citizens actually have equal opportunities to receive an equal answer from the justice system. In this case 'equal' means: equally predictable, equally certain in terms of timeframe and readability, equally promptly and executed with certainty [Hazel, 2002; Agrast et al., 2008]. For citizens, this dimension of equality is every bit as important as the formal dimension. It is even more so for citizens in less favourable circumstances [Barendrecht, 2014; The Hague Governance Institute, 2013; UNDP, 2013; Ostermann, 2016].

Within the European Union, the demands and policies of the democratic rule of law equality are channelled through a permanent and recurrent interaction between domestic and

[42] It goes without saying that the scholarship touching on both the rule of law and the equality principle is extremely vast: it goes beyond the focus and the aim of this article to address it critically and comprehensively. The authors here referred to represent, by means of their scholarly works, different perspectives adopted to frame and observe the issue of 'equality-law'. The perspectives offered to the international readers are plural both because of their normative premises and because of their level of analysis (national systems, transnational systems, groups, etc.).

[43] As a matter of fact, the concept of 'equal access to justice' merges two principles: equality before the law and equality of opportunity. Equality before the law is the pivotal principle of the rule of law: laws have their primacy over the will of men if they hold each individual equal to any possible other. This applies (and must apply) also in the case of individuals who rule. Equality of opportunity points to a different principle and refers instead to the possibility for everyone to have access to the same set of opportunities, regardless the economic, social, cultural, and linguistic conditions under which they act. If, on the one hand, equality before the law is a procedural principle – which is reflected in a range of institutional mechanisms conceived to ensure that individuals are equal before the law – on the other hand, equality of opportunity is a substantial principle – one referring to a metaphorical door that people can open and through which they can go.

transnational levels of institutions and actors. This channel has to be addressed. Consequently, the three faces of a complex and interdependent conundrum need to be portrayed.

Whereas equalities and freedoms, as principle components of the substance of the democratic rule of law, are entrenched in the formal provisions of domestic and European Union laws, what matters from the citizens' point of view are the actual patterns of rights enforcement reflected in access to these rights, and the possibility to claim the right to protection, policy delivering, and the ultimate effectiveness of the last resort: the system of implementation of the rule of law. This chain – the ability to access policy delivering and the effectiveness of the last resort – has been put under strong pressure during the economic crisis that hit the sovereign debt in 2007 and 2008. If legitimacy derives from the combination of a championing rule of law – stronger than any other legal setting in the world – and the capacity to ensure a cohesive collaboration based on an objective approach to problems – technocracy – and a distribution of power that respects the multiple identities, legacies, and competences of the institutions that populate the European space, the quest for a response to the crisis, respecting the high standards of freedoms and equality that are the great promises of the European dream has not (yet) found a satisfactory answer. 'More freedoms and equalities' have been the promises of European integration (Warlouzet, 2014). In a nutshell, this is the narrative at the basis of the constitutional trajectories developed by EU legislation (de Witte, 2001). With different paces and paths, this has also been the narrative inspiring the bulk of the policies carried out by the European institutions. As a matter of fact, the scope of action of the European Union impinges upon them through a wide range of policy tools, spanning from normative to cognitive input. On the 'demand side', i.e., on the side of the expectations of citizens and businesses, the EU is expected to deliver more mobility, more opportunities, and less diversified results among member States and among regions (Ferrera, 2005; Caporaso, 2007). However, the gap between the results achieved and the promised outcomes represents a slippery ground for the EU's legitimacy, especially if this legitimacy is assessed against a set of output-oriented criteria (Kriesi, 2013).

To carry out sound empirical research on the gradual disconnection between citizens' demands and expectations and institutional response – which entails a crisis of responsiveness as we have highlighted in the first section– the subject for analysis must be the 'networked rule of law', the system of mechanisms and patterns of access, capacity, delivering, and last-resort operativeness that unfolds across the levels of governance and in between the different institutional arenas characterised by the Member States.

The thesis here is that in the European Union the rule of law is an umbrella under which a variety of policies coexist. Under this umbrella, policies are handled according to a top-down as well as to a bottom-up pattern of rule-making and rule enforcement. Actors involved at different stages and levels in this complex pattern predominantly act through horizontal and diagonal patterns of interaction. All these empirical reasons contribute to the creation of a common understanding in the EU: justice is the key to the well-being and quality of life of EU citizens. Consequently, the promotion of a reliable, homogeneous, and predictable legal environment where the primacy of the law is ensured gains a 'top priority' position in the political agenda of the institutions.

From the analytical point of view, to disentangle the mechanisms that are at play in the production, distribution, and consolidation of justice and solidarity – notably of equalities of

opportunities – for all citizens across the European space, the focus of the analysis must shift towards a 'meso-level', where the rationales of interaction among key players are grasped. The focus of the analysis should be on the actors and, more specifically, on 'change agents.' Change agents are actors who are strongly committed to causing and to steering processes of change. We draw inspiration from the use made of this concept in Morlino and Magen (2008), where the concept of the change agent (from an earlier definition by Finnemore and Sikkink, 1998) features a highly intensive preference for change. From the point of view of the concept of operationalisation, a change agent might be driven by a myriad of reasons ranging from expectations of professional upgrading to idealistic engagement in a policy approach, also including office seeking and rent seeking motives. Whether an agent fits in with one of these motives is a question that can only be answered on the basis of empirical research. The concept is abstract enough to cover different options regarding motivation and preferences. What is important in our analysis are the levels of governance and the institutions through which change agents act. In order to support their motivation to promote change and to steer the process of change accordingly, a change agent needs resources, which can be of any kind: material (financial resources, for instance), cognitive resources (an experienced agent can be better situated than a non-experienced one), communicative resources (if a policy needs the support, broad public communicative resources may play a crucial role in promoting it), and political resources (which stem from the position of the agent in relation to the political elite or any other type of elite): 'the supremacy principle which establishes the primacy of EU law throughout the whole of the EU, even overruling domestic law, has represented for more than three decades a formidable power pushing through the integration of radically different legal systems (Piana and Guarnieri, 2012, p. 139; see for a broader analysis Arnull, 1994; Dehousse, 1998).

Not only does the process of the transnationalisation of the law entail an increasing transnationalisation of the processes of law-making and a profound transformation of the process of law enforcement (Garapon, 2010), it also triggers processes of change due to the high salience of domestic systems to external inputs and, consequently, to the capacity of domestic offices to communicate with other similar organisational units (Goodwin-Gill and Lambert, 2010). In this scenario, horizontal interaction, including dialogue among courts (Slaughter, Stone and Weiler, 1998), the transfer of legal practices and reasoning (Scott and Trubek, 2002), and the networking activities bridging domestic institutions once enclosed within their domestic borders, seem to trigger further processes of change. The process that needs to be reconstructed is 'rule of law networking.'

The actual configuration of rule of law networking first took on a distinctive shape in the late nineties, triggered by two interrelated vectors. The first consisted in the promotion of legal and judicial guarantees of judicial independence as the most viable solution to entrench the rule of law in action in incoming Member States. A whole range of policies, ranging from the design and implementation of constitutional courts to the rewriting or the replacement of civil and penal procedural codes, has been adopted under the auspices of the European institutions. With the passing of time, once the institutional guarantees of judicial independence were considered to be in place and the fundamental rights to a fair trial ensured by proper rules included within the legal codes were deemed to be sufficiently protected, the concern of the rule of law promoters – namely the EU and the Council of Europe –moved away from *grand politique* and started to incorporate into its policy focus the administration of courts and all the

conditions that would allow the judiciary to work efficiently. In most cases, the support provided by international and transnational actors was instantiated by the creation of a wide range of financial incentives, which made the option of judicial reforms profitable for the domestic elites. The financial programmes and so-called 'financial conditionality' thus joined the membership conditionality and created a set of incentives for any domestic actors wishing to seize the opportunity offered by an external actor to reform and change the court system. Surely the system itself – by financially supporting the transfer of best practices from old Member States to incoming members as well as supporting learning by imitation and the circulation of ideas – the EU and the Council of Europe set up favourable conditions for the socialisation of the domestic judicial actors and the legal experts. However, as we will show, this socialisation did not happen homogeneously. In reality, it took effect later, when the transfer of ideas and the internationalisation of new frameworks and ways of doing things in the judiciary came to fit in with the domestic context. None of the judicial actors picked up new ideas from the external environment, which is to say also through the judicial networks – unless these ideas helped them to gain benefits in terms of reputation or professional advantages at home.

The dynamic of the process as a comprehensive phenomenon arising from the combination of strategies adopted by actors at different levels of governance is fairly complex and demands a multi-level analytical strategy where the capacity of actors handling the cultural, political, and economic resources to access the arenas where the rights are defined and enforced must be focused on and investigated empirically. Justice and solidarity are, accordingly, the macro and systemic result emerging from the interaction between macro and micro factors, where institutions and legal norms act as windows and opportunities, and not only as legitimising mechanisms, for those actors with the capacity to address them with claims and requests of goods, services, policies, actions.

These three points pose the puzzling questions raised by contemporary reality in the attentive view of a curious citizen. Are citizens who move across domestic borders equally protected under the rule of law of the European Member States? What is the minimum standard of the rule of law as shared by all Member States? Is there any privileged promoter of the rule of law, or are we facing a multiplicity of rule of law promoters? And if this is the case, do mechanisms of mutual learning and policy transfer exist to ultimately ensure that future EU citizens will enjoy the benefits of a commonly built rule of law? What is the degree of differential implementation that citizens are ready to accept without a feeling of deprivation and injustice and therefore a severe hiatus with respect to the democratic rule of law?

Concluding remarks

In an influential part of the international academic scholarship, the concept of rule of law is understood to refer to an ideal principle and a legal phenomenon. It is a principle, such as 'in order for a political order be legitimate, it should comply with the principle of the primacy of the law, beyond the discretionary power of any political actor'. In this respect, the rule of law is a principle and a criterion, against which any political order can be assessed and evaluated. As a *corollarium*, the rule of law, thus understood, relies on a definition of the law as 'impersonal norms impersonally worded and impartially applied'.

From the legal point of view, this has crucial and undeniable consequences. Whether the constitution is written or unwritten, the exercise of power is subjected to specific bounding clauses, such as those we encounter in the civil and penal codes procedural, including predictability and the non-retro activity of laws and the definition of fundamental rights. Laws are institutional facts as defined by Searle: 'facts, belonging to the realm of the empirical reality (subjected to be measured and empirically investigated) and with a normative dimension (by 'normative' here one means based on normative beliefs, values, recognized by the individuals for whom these facts represent a norm)'.

However, the rule of law has much more rich and enriching potential both at the semantic and empirical levels. Semantically speaking, if one accepts that the law is not the law designed and adopted intentionally by authoritative institutions, if then one does not endorse a legally positivistic view, the law has its roots in pre-legal facts and has repercussions on the institutional architecture of a political order.

There would be no rule of law if no one respected the general and abstract rules of civic and civil life. Harsh as it may be, there would be no rule of law from a broader perspective – incorporating the legal dimension, but not reducing the rule of law to that dimension – if the primacy of abstract rules were not part of the daily life of the rulers and the ruled. This holds true regardless of the specific structure that a political order might have. Therefore it holds, regardless of whether we have or do not have a State.

Where the State enters, it is the door of the institutional architecture that fits with the principle of the rule of law. Division or separation of power, checks and balances, and a structure for the administration – of the rule enforcement authorities – that ensure the impartiality and the impersonality of the application of the law. Bounding the public space by means of ensuring mechanisms of impersonality and impartiality, and exercising authoritative power in a defined and bounded territory where the rules are applied, are two sides of the same phenomenon, tying together the rule of law, State building, and State consolidation according to a model that is very much rooted in the culture of Western Europe.

Thus, in order to investigate the relationship that (necessarily) exists between the rule of law and sovereignty, one should first disentangle the dimensions of the concept of the rule of law.

1. *The legal dimension*. The empirical content of this comprises constitutions, the constitutional provisions (as they are written), statutory laws, regulations, and the provisions by means of which rights are entrenched in legal codes.
2. *The social dimension*. The empirical content of this covers social trust, values and people's beliefs (both ruled and rulers).
3. *The institutional dimension*. The empirical content is represented by the architecture of the political order, how the power is divided among the branches but also among the different layers of a multi-governance system.
4. *Patterns of enforcement – the 'access capacity delivering last resort' chain*. The way the rules are enforced.

Of course, 1 impacts on 2, 3, and 4. Two impacts on 4, and ultimately perhaps on 1. But from the empirical and methodological points of view, it is heuristically opportune to keep them distinguished.

The development of those aspects involves the achievement of different extents of: the equal enforcement of the law to everyone, including all State officials; the implementation of the principle that no one is above the law; the supremacy of the law throughout the country, leaving no areas controlled by organised crime, local oligarchs, or political bosses who are above the law; the minimisation of corruption, and where it does exist, its detection and punishment in the political, administrative, and judicial branches of the state; the development of efficiency and competency of a state bureaucracy at all levels that applies the laws and assumes responsibility in the event of an error; the achievement of a professional and efficient police force respectful of individuals' legally guaranteed rights and freedoms, including rights of due process; the equal and unhindered access of citizens to the justice system to defend their rights and to bring legal action between private citizens or between private citizens and public institutions; the hearing and expeditious solution of criminal cases and civil and administrative lawsuits; the independence of the judiciary at all levels from any political influence; the respect for, and enforcement of, rulings of the courts by other agencies of the State; the supremacy of a constitution as interpreted and defended by a Constitutional Court.

Then, one comes to SOVEREIGNTY. Sovereignty relates to the four dimensions from two points of view. It is the structure, i.e. the authority of the State, and as such it is based, indeed rooted in 1 and articulated according to 3. But it is also a function, the set of tasks performed by the State on the basis of the demands and needs that come from 2 and are reflected and worked out into policy deliverables through 4. A way to address the issue of the rule of law/sovereignty matrix is to start with the policies, those where the balance between the rights, the expectations of right enforcement and policy delivering on the one hand, and the capacity of the organization of power (the political order) to live up to those expectations on the other, is put under pressure. Only in this way are we able to provide the EU with a set of policy guidelines and a set of potential programmes and strategies to deal with the biggest challenge on its agenda now: to increase its legitimacy by means of the rule of law and use this legitimacy to lead a process of transnationalisation of sovereign functions.

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Part II: Democracy, the Rule of Law and Three Visions of European (Dis)Integration

Joseph Corkin

Any examination of the rule of law and democracy in the context of a project concerned to (re)connect the EU and its citizens must grapple with the tensions between these concepts and how they play out in three visions of European (dis)integration – nationalist, federalist and confederalist – that span the ways in which states can fetter, or refuse to fetter, their sovereignty: The EU as a threat to the nation state. The EU as a federal United States of Europe in the making. And the EU as a confederation of nation states.

1. Three visions of (dis)integration

Nationalists reify the nation state as the cradle of democracy and the largest political community in which we possess the requisite social solidarity to realize our democratic self-determination. They view sovereignty as the absence of constraint, so that any limitation thereon is acceptable only in so far as the state voluntarily and explicitly agrees to it, in the exercise of its freedom to contract with other states. This excludes anything that contracts the state into the 'slavery' of open-ended or even 'sincere'[44] multilateral cooperation through permanent institutions and all their inevitable compromises. At most, states might negotiate free trade agreements on an *ad hoc* basis, whereby they commit to open their markets to one another to secure the mutual benefits of 'comparative advantage'[45] through 'deals' that tend to have a victor and a vanquished, depending on the relative power of the states negotiating them. This contractual vision of international relations assumes states possess practically unbridled sovereignty to direct outcomes within their borders, while the international 'arena' is a no-holds-barred competition between states: a zero-sum, predatory business environment writ large. Or as two senior figures from the Trump administration put it:

> *'The world is not a 'global community' but an arena where nations, non-governmental actors and businesses engage and compete for advantage … Rather than deny this elemental nature of international affairs, we embrace it.'*[46]

Given the law-based, institutionalised world order that we have painstakingly build since the Second World War – most ambitiously in Europe – the nationalists' power-based, non-institutionalised world order is disintegratory. It would return us to the older, purely Westphalian model. In Europe, it is revealed most vividly in the British brand of Euroscepticism that led to the referendum result in 2016 and that regards the EU as little more than a glorified free trade agreement. Britain never lost its democracy in the Twentieth Century and always struggled to embrace the idea that European integration serves some higher purpose, at least one that it has any need of. For British nationalists, the EU was little more than a means to a transactional, mercantile end. As such, its law and institutions inevitably looked a bit over-

[44] Article 4(3) TEU.
[45] D. Ricardo, *On the Principles of Political Economy* (1817).
[46] H.R. McMaster (U.S. National Security Advisor) and Gary Cohn (Head of the U.S. National Economic Council), 'America First Doesn't Mean America Alone', *Wall Street Journal*, 30 May 2017.

blown; designed for something more ambitious than the trade arrangements that were the summit of their aspirations for it. More confident in their disregard for its achievements than nations with more tragic Twentieth Century histories, their commitment to the EU was lukewarm, pragmatic and superficial, to be departed from when the perceived costs outweighed the perceived benefits.

This nationalist vision contrasts most starkly with the internationalist vision of those like Altiero Spinelli and Ernesto Rossi who wrote their manifesto *Per un'Europa Libera e Unita* on cigarette papers and smuggled it out to the Italian Resistance from the island of Ventotene, where Mussolini had imprisoned them in the war. In it, they argued that the fight against nationalism would be in vain if it led only to the restoration of the old Westphalian order of sovereign nation states, jockeying for advantage in ever-shifting alliances:

> *'The dividing line between progressive and reactionary parties no longer follows the formal line of greater or lesser democracy, or of more or less socialism; rather … those who conceive the essential purpose and goal of struggle as the ancient one, that is, the conquest of national political power – and … those who see the creation of a solid international State'.*[47]

Extending national political communities to a supranational equivalent appeals to those who believe our factual interdependence – environmental, markets, technologies, cultures – is now so extensive that we can only protect our substantive (regulatory as well as welfare) and procedural (liberal democratic) achievements through an ambitious multilateralism, pooling our national sovereignties. This internationalist (or in the European context: federalist) vision, aspires to a world (or at least a European) order of enduring, legally mediated engagement between states, held together by permanent multilateral institutions that are rendered democratically accountable to a new supranational people with a shared cosmopolitan identity, goals, solidarities and ideas of justice. It is a vision that, as things stand, is as hopelessly romantic as that of the nationalists who fetishize eighteenth-century ideas of sovereign states despite all the evidence of the world's ever-increasing factual interdependence. While the EU is the closest the world has come to implementing this vision, it still falls significantly short of a United States of Europe that binds its members into a hierarchical (federal) order, under which they forgo their rights (under traditional sovereignty principles) to make and implement law across the piece, without constraint. This would raise all the attendant problems of democratizing the law and institutions involved, given the reluctance of Europeans to become a genuinely European political community.

Thankfully, we need not choose between a nationalism of European disintegration or a federalism that aims at a United States of Europe. Confederalism offers a coherent path between reifying national sovereignty and isolationism, or subsuming states into a European state-like order. It accepts that our factual interdependence necessitates some degree of integration – obliging states to forgo their right to make and implement law without constraint, contrary to the nationalist vision – but declines to go so far as the federalist vision. It integrates only nations, not their still distinct national peoples, and has then affinities with theories that

[47] A. Spinelli and E. Rossi *For a Free and United Europe: A Draft Manifesto* (*Per un'Europa Libera e Unita: Progetto d'un Manifesto*).

depict the EU as a *demoicracy*,[48] as 'not-a-state',[49] and as embodying a 'constitutional pluralism'[50] or 'constitutional tolerance':[51] each of which take national legal independence seriously while insisting on some other-regardingness that denies outright national parochialism. Essentially, confederalism steers a path between solipsism and federalist 'temptations of centralization and hierarchical constitutionalization'.[52] It offers then a realistic alternative to the starker choice that Habermas suggests we face, of either resurrecting the Westphalian model, so reducing national peoples to governments that claim to secure their democratic self-determination on the international stage vicariously, through the agreements that they strike with other governments – he calls this 'post-democratic executive federalism' – or committing to the genuine federalism of a democratically organised United States of Europe.[53]

2. Federalism and the rule of law

The federalist impulse to take the EU to the next constitutional level, reifies juridification, the rule of law and a clear, legally delineated separation and hierarchy between the national and supranational. It celebrates legal doctrines like supremacy, direct effect and their progeny for strengthening the effectiveness of EU law and for nudging the EU towards an ever-closer, legally and hierarchically organised Union. This is the EU whose coherence is underpinned by law, that reaches deep into the states' constitutional systems – their courts obliged to guarantee remedies that give EU citizens effective judicial protection in all the fields that its law covers[54] – as envisioned by the lawyers, judges, bureaucrats and academics who launched the project in the first place, and who deliberately set it on this legal-rationalistic path.[55] Their preferred destination – explicitly or implicitly, consciously or unconsciously – was always ultimately a truly federal United States of Europe.

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[48] K. Nicolaïdis, 'European Democracy and Its Crisis' (2012) 51 JCMS 351, 354.

[49] J. Weiler, The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and other essays on European Integration (CUP, 1998).

[50] N. Walker, 'The idea of Constitutional Pluralism' (2002) 65 MLR 317; M. Kumm, 'The Cosmomolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state', in J. Dunnof and J. Trachtman (eds), *Ruling the World: International law, global governance* (CUP, 2009).

[51] J. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', in K. Nicolaïdis and R. Howse (eds), *The Federal Vision: Legitimacy and levels of governance in United States and the European Union* (OUP, 2001); J. Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (OUP, 2003), 7.

[52] K. Nicolaïdis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 *Law and Contemporary Problems* 263, 264-8; K. Nicolaïdis, 'European Democracy and Its Crisis' (2012) 51 JCMS 351, 356.

[53] J. Habermas, 'The Crisis of the European Union in the Light of a Constitutionalisation of International Law' (2012) 23 *The European Journal of International Law* 335, 345. For a more recent (and more nuanced) position, see J. Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the *Pouvoir Constituant Mixte*' (2017) 55 JCMS 171.

[54] For a recent restatement, see Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, 27 February 2018, para. 34.

[55] A. Vauchez, The Force of a Weak Field: Law and Lawyers in the Government of the European Union (2008) 2 *International Political Sociology* 128; A. Cohen, Constitutionalism Without Constitution (2007) 32(1) *Law & Social Inquiry* 109; D. Chalmers, M. Jachtenfuchs and C. Joerges (eds), *The End of the Eurocrat's Dream: Adjusting to European Diversity* (CUP, 2016).

As with nationalism, federalism depicts the interaction between the EU and its member states as a zero-sum game: a simplistic reading of the European dilemma that suggests Europeans must choose either sovereign nation states or a United States of Europe; that whatever the EU gains, the states must lose, so we either end up with a United States of Europe that subsumes its members into a hierarchically organised (federal) constitutional order, or the states remain in charge and there is no Union. But this excludes a more attractive confederal vision of integration that is all about enabling diversity to flourish, and that accepts a messier stand-off between the national and the supranational, mediated by politics as well as law. Federalism may be neater, but it brushes aside important sociological constraints that confederalism does not: not least the reluctance of the many Europeans to work through the EU.

The federal vision of integration *through law* might serve as a long-term objective. But the cherished status of the nation state among most Europeans demands that, for the time being at least, the EU continues to integrate through an altogether messier blend of law *and politics*: a more nuanced confederal constiutionalisation that declines to pursue ever-more comprehensive EU law and ever-more centralised institutions. The EU must continue to defer *politically* to national legal independence, even if this muddies a pan-European rule of law, to leave the meshing of the national and the supranational somewhat *legally* incoherent. It also means accepting the existing division between the comprehensive sovereignty of the states, justified by their stronger democratic claims, and the predominantly economic order of the EU that draws heavily on a functionalist legitimacy.

By contrast, the federal vision of integration applies a classical constitutional frame to the EU, to depict it as a state in the making, albeit a highly decentralised one. It envisions the EU continuing to integrate through law – and the technocratic reason enshrined in that law – while seeking to tie this legal-rationalism to more democratic processes that discard an overtly economic bias: to better balance the economic with the social. In sum, legitimacy lies in the EU doing more of the same, only better, including adopting a richer, social as well as economic functionalism that justifies it proceeding towards an 'ever closer union' *through law*, with all the federalist trappings: the subjection to hierarchy, legal completeness and a clearer but ultimately still *legal* allocation of competencies between it and its members. This assumes the disconnect between the EU and its citizens – a disconnect that nationalists exploit – will gradually disappear if only the EU responds better to its citizens' concerns and interests. However, the disconnect may be wider than mere tweaks to the EU's functionalist legitimacy can bridge. What if Europeans feel disconnected from the EU because they do not consider themselves to be a European people, ready to institutionalise their democratic self-determination as a European political community, save for in the limited fields that the EU already operates in, if even that? As such, they experience its empire of law and (predominantly economic) reason as something done to them, not something they do, in the same way as they experience their national systems of democratic self-determination.

Federal versus confederal visions of integration raise more than just an obscure topic for constitutional theorising. They mirror a debate played out in everyday politics, around the EU's contested legitimacy and how the EU should handle national assertions of sovereignty that are

now sweeping the continent.[56] That these same nationalists regularly attack liberal institutions at home suggests that their quarrels with the EU are rooted in, and continue a conflict with, an earlier transition to the modern state. A state that claims legitimacy through the law itself, as conditioned by reason, by contrast to pre-modern states that claimed legitimacy based on natural law principles and an aristocratic or theocratic right to rule.[57] This undermined much of the mystique that nationalists attach to the nation state, as somehow timeless and incontrovertible (a feeling that exerts such a powerful hold on the nationalist imagination that so many have been prepared to sacrifice their lives in the nation's name over the centuries). The modern nation state is now more recognisably constructed: an 'imagined political community' that is sustained (it needs constant reaffirmation) by a shared culture that reassures its members that it is somehow nevertheless 'rooted in everyday life'.[58] Furthermore, it is a product of a universalising Enlightenment, in that it replaced rule by theocratic aristocracy with institutions that owe their *imperium*, of privileged and unilateral discretionary power over our lives, to neither tradition – a divine or natural right to rule – nor to the charisma of the officeholder, but to the law itself: law that is based on reason and latterly on the reason of those with a democratic link to us (necessary as we now realise that our 'betters' have no monopoly on good reason). This universal legal-rationalistic means of grounding the state's legitimacy represents a decisive break from the idea of a fixed, natural and timeless nation state. Nothing prevents us from scaling it up, or indeed down, other than that it must involve a group of people who want to govern themselves as such a community: locally, nationally, or supranationally.

As the world becomes more complex and interdependent, and public expectations of the modern state accumulate, it turns to new clerics and aristocrats to navigate this complexity and interdependence. Today's philosopher kings, who have mastered the necessary knowledge, are the lawyers, technocrats, economists and scientists who devise legal-technocratic solutions to policy problems that they define and frame, based on a supposedly universal rationality. Often accounting more intensely to one another than to the political communities on whose behalf they make and implement law, they interact in closed circles – transnational networks that form around epistemic perspectives and broadly committed to market framings of the world – to generate a continuous stream of semi-automated market corrections (regulatory and redistributive) that amount to, and further, a pseudo-universalism that they pretend is anything but. Their legal-technocratic fixes gloss over political issues that ought to play out in contested public spheres and democratic processes, prematurely excluding alternative perspectives because they presume to have perfected how to move towards the universal along a given path. The democratic grounding of *imperium* disappears with the diminishing scope for open-ended democratic self-determination and the ongoing pluralism that is essential to it. Law cannot be made on an arid terrain that necessitates only the application of the correct economic principles to sociological data, any more than it can be made on a postmodern terrain of incommensurable political and moral values that permit anything, provided everyone was

[56] G. Falkner and G. Plattner, 'EU Policies and Populist Radical Right Parties' Programmatic Claims: Foreign Policy, Anti-discrimination, and the Single Market', published online, 2 September 2019, forthcoming in the *Journal of Common Market Studies*.
[57] See, generally, M. Weber, 'The Three Types of Legitimate Rule' (trans. H. Gerth) (1958) 4 *Berkeley Publications in Society and Institutions* 1.
[58] B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).

heard.[59] Those who pretend otherwise only invite democratic backlashes, nationalist or otherwise.

Democracy under the rule of law demands that those who wield *imperium* over those with no choice but to submit to it, do so *through law* (abstract, general and relatively clear norms) and are *constrained by law* (organised, controlled and limited by legally-constituted processes and institutions) in ways that connects their *imperium*, and the law through which they exercise it, to those who are its objects. A degree of co-originality operates here: *Imperium* is not just something that exists, on which we impose mechanisms to ensure its objects can hold it to account. It arises with and exists only in the presence of those mechanisms. They establish *imperium* in the same instant as they establish the obligation to obey it: a shared expectation among those in an arrangement of asymmetric power, by which those who are the objects thereof accept the arrangement *because* it is exercised consistently with pre-established norms (the rule of law) that they can influence (democracy) and, at least in a specifically *liberal* democracy, within substantive constraints that respect their dignity because they protect certain inalienable rights.

The rule of law and democracy are then locked in an eternal dialectic in which the rule of law is concerned with *certainty* – to secure social stability through juridification – whereas democracy is concerned with *flexibility*, to secure the political contingency of that law: fixed temporarily but beholden to the changing will of the people who it binds and who are then the objects of that law. The constitution sits at the heart of this arrangement, maintaining an equilibrium between the empires of politics, on the one hand, and of law and reason, on the other. It polices the borders and interactions between those empires, so that neither overreaches and we avoid the hyper-juridification of the technocratic state and the hyper-politicisation of nationalism and other brands of populism. The constitution constitutes and empowers the legislature and the executive to secure the common good, which they fix in the law they make and implement. And it also establishes an independent judiciary to interpret the same. This Madisonian model distributes power across legally constituted institutions that check and balance one another through legally constituted processes, as supplemented in a liberal democracy by the legal protection of certain inalienable rights, latterly incorporated into a further set of supranational (EU) legal checks.

Social change is then channelled through law, as conditioned by reason and a democratically determined common good. Beneath and above it all, sit the people, to whom this happens, and who also make it happen. But the EU cannot draw on any such European people (singular) to legitimate its legal-rationalism. Regardless of how democratically perfect its procedures are, there is no cohesive European political community that aspires to democratic self-determination, in all but a few limited fields. And even if this aspiration were more extensive, there is no single locus of sovereignty to embody the will of that people, to ground the EU's *imperium*. Its empires of law and (predominantly economic) reason are then decoupled from those they rule over, who have no specific sovereign to assert their collective will.

All this is profoundly disenchanting for those who draw their identities from their attachment to the local, the particular, and the traditional, who are without the tools and vernaculars to engage modernity's secularising, disenchanting empires of law and reason if they are

[59] See, generally, T. Prosser, *The Regulatory Enterprise: Government, Regulation and Legitimacy* (2010, OUP).

insufficiently mediated through democratic processes. Disempowered and disenfranchised, they resent an order that is seemingly programmed exclusively by the universal logics of law and (predominantly economic) reason, over which they have no say. And they rebel against its creeping juridifications, de-contextualised technocracy, and the philosopher kings who uphold it.

In these circumstances, nationalists claim to 'unleash' the will of the people through a hyper-politicisation that circumvents the legal and institutional constraints that a self-serving elite have used to further their own interests: a universalising legal-rationalism, inalienable rights, the checks-and-balances of national constitutions, the EU, and even the rule of law itself. The claim is exaggerated but not entirely without foundation. European integration progresses through a juridified economic reasoning that embeds a structural bias towards certain economic theories and is neglectful of the social. Skewed towards a market- or ordo-liberal framing of the world, and the technocracy that underpins it, the EU exacerbates a pervading sense of powerlessness, or what Durkheim called 'anomie'.[60] It leads many Europeans to conclude that the EU does not work for them, and so triggers almost inevitable backlashes against its constitutional density: how it constrains national sovereignty and thwarts democratic change. This prompts growing calls to deny it powers or even to repatriate power.

The EU ignores these sentiments at its peril. For as long as Europeans remain politically, culturally and emotionally attached to specifically *national* political communities, they will be suspicious about supranational constraints on their legal independence, especially when these constraints embed a largely economic form of integration.[61] Any European rescue-cum-civilization of the nation state must avoid imposing a socially-disembodied, alienating economic rationality that homogenises national political communities by flattening out cultural and social differences, as they manifest in national law, to fit them to a pseudo-universalism, especially in politically sensitive fields.[62] The EU must respects national political communities whose projects of collective (democratic) self-determination have developed over time, to express their member's cultural identity and to furnish them with a feeling of solidity that reinforces their sense of the local and the particular; of what is specific to their community and its values.[63]

3. Confederalism and the rule of politics

The EU's founding fathers had assumed Europeans would gradually transfer allegiances to it, rewarding it with their loyalty, as it secured their peace and prosperity. In fact, culture and identity remained resolutely national, so while Europeans acquiesced to the transfer of economic power, the desire for political integration failed to keep pace with accumulating spill-overs that demanded more supranational intervention on social issues. The powers that the EU acquired to counterbalance the economic with the social then ended up falling between two

[60] É. Durkheim, *Suicide: A Study in Sociology* (J. Spaulding and G. Simpson, trans.) (The Free Press, 1897).
[61] G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2, 19.
[62] U. Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal* 14; M. Everson, 'European Citizenship and the Disillusion of the Common Man', in R. Nickel (ed), 'Conflict of Laws and Laws of Conflict in Europe and Beyond' (ARENA Report 01, Oslo 2009); G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2, 16.
[63] J. Simons, 'Democratic Aesthetics' (2009) 50 *Culture, Theory and Critique* 1; F. de Witte, 'Sex, Drugs & EU law: The recognition of moral and ethical diversity in EU law' (2013) 50 CMLR 1545.

stools: insufficient to offset its economic programming,[64] too far reaching for available legitimating resources to bear.

For the moment, the peoples of Europe aspire to realise their social solidarity and justice predominantly within communities whose borders coincide with those of the nation state. The nation state continues to be the only coherent *political* community in which Europeans are prepared to determine mutual obligations around how they calibrate their regulatory and welfare programmes, make trade-offs between freedom and security, organise public services and provide other collective goods. Any widespread 'thick' European identity that would legitimate the transfer of such decisions to the EU is, at the very least, some way off. The EU must then remain a confederation: Charles de Gaulle's *Europe des patries* (Europe of nations). It is necessarily a 'community of projects, not a community of identity',[65] whose 'dry, institutional, symbolic conception'[66] of integration can sustain only a measure of political integration (and then only of a largely economic bent). As long as its peoples resist transferring more power over social policy to it, it cannot overcome any disconnect with them by imposing a Madisonian state-like model, whose checks-and-balances are purely self-referential: an attempt to pull itself up by its own bootstraps. Instead, its checks-and-balances must continue to incorporate historically recognisable (national) political communities, and their public spheres and democratic processes, in a warts-and-all way, thereby anchoring the EU's constitutionalisation therein to avoid the problem of self-referentiality.

The visceral commitment that Europeans feel towards their specifically *national* political communities limits how far the EU can lock those communities into a legally mediated (federal) hierarchy – a supranational constitutional unity – that constitutionalises them from above. Europeans broadly accept that they will only secure the advantages of European integration if they forgo some short-term national exigencies. But that does not mean they consent to relinquish national sovereignty beyond a threshold that they deem essential to their ongoing democratic self-determination within *national* political communities. If there is no European people (singular), the EU cannot (re)connect with the peoples of Europe (plural) by simply establishing or declaring them as *a European* people in its constitutional order. This, regardless of how effectively its democratisation, including its parliamentarisation, ensures that a majority of their number get to steer what it does. That does not exclude such efforts slowly working to evolve a more legitimate EU over time; only that they cannot achieve this overnight, or alone. Absent a European people, they will only legitimate powers that the peoples of Europe *are* prepared to transfer to it. This limits the EU to pursuing integration based on a less ambitious cross-border solidarity and justice than found within the state and that means (for the moment) excluding substantial, redistributive social policy. The EU has simply not acquired the necessary democratic consent to transform its (by international law standards) constitutionally dense form of *legal* integration into a deeper *political* project that includes extensive (let alone

[64] F. Scharpf, 'The Joint-Decision Trap: Lessons from German federalism and European integration' (1988) 66 *Public Administration* 239.

[65] K. Nicolaïdis, 'We, the Peoples of Europe...' (2004) 83 *Foreign Affairs* 97, 102; K. Nicolaïdis, 'The Idea of European Demoicracy', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012) 247, at 265; P. Lindseth, 'Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration' (2014) 15 *German Law Journal* 529, 548.

[66] Y. Stavrakakis, *The Lacanian Left: Psychoanalysis, Theory, Politics* (State University of New York, 2007), at 216.

comprehensive) powers over social policy. On this, it can only complement, not challenge national action.

Lacking a genuine (felt) political community that desires to operate as such, the EU remains reliant on that problematic legal-rationalism that draws on a 'thinner' functionalist legitimacy, supplemented by the limited democratic legitimacy that it can eke out of its parliament (absent a European people who desire to govern themselves through it in any comprehensive sense) and its relations to its member states and the indirect legitimacy they offer. EU law rests then more on the *ratio* (reasoning) that underpins it, than the *auctoritas* (authority) that it derives from the democratic credentials, or institutional pedigree, of those who make and implement it.

This emphasis on a functionalist legitimacy that vests power in those who claim authority based on expertise – a preference for the epistemic over the political – was no accident. Legal-rationalism was designed into the EU from its inception; inscribed onto the genome of a project that was all about immunizing Europe against the sort of totalitarian abuses of *political* power that had ravaged the continent in the first half of the Twentieth Century. That this design now provokes nationalist backlashes does not, however, demonstrate that the EU is working well. The gradual politicisation of the project, as it struggles to counterbalance the economic with the social, has made its legal-rationalist programming unsustainable. Problematically, however, the peoples of Europe seem unwilling to transfer significantly more political power to it. What to do?

At its most fundamental, how the EU should deal with this (sociologically undeniable) nationalistic constraint is what distinguished federalism from confederalism. Instead of breaking out of the impasse by forcing the issue, as federalism proposes, let alone taking the nationalist route towards systemic breakdown and disintegration – states severing their ties with the EU because its organisational burdens and complexity out-weigh its benefits – confederalism advocates nurturing a virtuous circle that will slowly build the confidence to transfer the necessary powers to it (though, crucially, only when the peoples of Europe are so inclined). For the time being, and into the foreseeable future, the EU must integrate states through a blend of law *and politics*, thereby avoiding the over-juridification and excessive hierarchy of a federal order. It must avoid what Joerges and Everson dismiss as the 'self-referential trumpeting of its own supremacy', which they contrast unfavourably with the (confederal) pursuit of 'civilised political (non-legal) interest consideration'.[67] In that sense, politics must continue to trump law.

Confederalism takes seriously the idea that the EU establishes a multi-level order in which the EU and its members combine to form a *sui generis*, non-state-like constitutional construct. It is an equilibrium theory of integration that establishes a precarious balance between supranational law and intergovernmental politics that evolves through what Nicolaïdis describes as a 'dance between law and power, judges and politicians'.[68] It establishes an institutional balance that carefully blends the supranational and the intergovernmental: a

[67] M. Everson and C. Joerges, 'Re-conceptualising Europeanisation as a Public Law of Collisions: Comitology, agencies and an interactive public adjudication', in H. Hofmann and A. Türk (eds), *EU Administrative Governance* (Edward Elgar, 2006), 512, at 513.

[68] K. Nicolaïdis, 'European Democracy and Its Crisis' (2012) JCMS 1, 11. And see, generally, J. Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 267.

continual *political* pull back to national (democratic) self-determination that checks the *legal* pull to the European centre. Realised in ideas like 'multi-level' and 'new' governance, confederalism responds to the reluctance of Europeans to merge their national systems into a federally organised United States of Europe and so confirms that integration is no longer about (if it ever was) proceeding inexorably towards an ever-closer *legal* union.

The dialectic between supranational law and intergovernmental politics that unites these opposing concepts in their opposition to one another, constitutionalising arrangements between states in a way that lends them increasing supranational *legal* bite, to which the states then respond intergovernmentally by reasserting their *political* power on behalf of their national peoples. Continual rebalancing either side of this pivot then stabilises integration, to sustain its legitimacy over time. In this way, the EU shifts glacially towards ever-more *legal* integration, without ever arriving at a hierarchically configured (federal) constitutional unity. Its incrementalism also means its constitutional fundamentals are rarely addressed directly. Taken in isolation, each shift of the glacier is too small or ambiguous to be objectionable, so tensions accumulate only gradually, released in the occasional seismic event that re-establishes the equilibrium. Recent nationalist backlashes are just such events. They include the British decision to leave the EU that registers especially highly on the Richter scale. And they demand considerable political acumen to avoid a disequilibrium that could tip the EU into a disintegratory dynamic.

Confederalism is perhaps best illustrated by the interactions of national and supranational judiciaries. The Court of Justice and national constitutional courts dance warily around one another, deferring to the other's jurisdiction over matters within the legal domain of the other, while accepting an uneasy truce on conflicts at the limits of their respective domains. These conflicts play out in a shared-yet-disputed jurisdictional no man's land, in which the discussion over which court ought to have the final say over this contested legal territory – the so-called *Kompetenz-Kompetenz* debate[69] – turns on boundary disputes that are suited only to ongoing judicial dialogue, characterised by sincere cooperation, self-restraint and mutual accommodation.[70] Federalists claim this fudge is no more than an outcome of unrealistic or wishful thinking, or is even a means to avoid tough choices. As Keleman and Pech put it in an earlier paper in this series: 'a theory designed for polite society'.[71] For them, a confederalist constitutional pluralism is just too accommodating of certain national constitutional transgressions that the EU cannot afford to overlook, if it is to honour its fundamental values.[72] But confederalists do not insist that the EU handle all such transgressions with sensitivity. Just as liberalism's fundamental value of tolerance does not demand that it tolerate intolerance, if a member state or national constitutional court fails to respect the EU's fundamental principles of sincere cooperation, self-restraint and mutual accommodation, the EU and its judiciary are perfectly justified in reciprocating.

[69] G. Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz' (2011) 17 *European Law Journal* 471.
[70] A. Bobic, 'Constitutional Pluralism is Not Dead' (2017) 18 *German Law Journal* 1395.
[71] D. Kelemen and L. Pech, 'Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland', Reconnect Working Paper No. 2, September 2018, https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf.
[72] See, e.g., R. Kelemen, 'On the Unsustainability of Constitutional Pluralism' (2016) 23 *Maastricht Journal of European and Comparative Law* 136.

4. Confederalism in action

As long as the peoples of Europe withhold their consent for anything more, the EU's federalist impulse and the accompanying *legal* hierarchies combine with its asymmetric distribution of competencies – economics predominant at the EU level, social policy at the national level – to produce tensions with democratic-self-determination. This is illustrated with reference to two paradigm cases in which cross-border solidarity and justice interact with the rule of law and democracy: (1) the social rights that attach to EU citizenship and (2) the EU's response to sovereign debt crises in the Eurozone periphery.

From a federalist perspective, extending powers to the EU to make and implement social policy and rights that attach to EU citizenship, alongside more extensive judicial protection thereof, might (re)connect the EU with its citizens. But it might also do the reverse. Especially when unscrupulous nationalists reframe these moves as undertaken by 'remote' Eurocrats and European judges, telling 'us' what to do, on issues as politically sensitive as who is entitled to certain social benefits. Indeed, the Court of Justice heeded this warning in retreating from a more expansive jurisprudence, in which it had seemingly been nudging the EU towards accepting a more cosmopolitan form of European citizenship,[73] to effectively return these decisions to the national political domain, where (for the time being) they probably belong.

We might wish it were otherwise – that Europeans were more committed to a deeper sense of cross-border solidarity and justice, and more cosmopolitan in their preparedness to extend social rights to non-nationals – but these are arguments that must be made and won in the public spheres and democratic processes of *political* communities that (again for the time being) are resolutely national. The peoples of Europe must be able to thrash out all the necessary issues of solidarity and justice – to determine an elusive common good, and the social obligations that they are prepared to extend to one another – in political communities in which they are comfortable organising their collective lives in a thorough-going sense. But acknowledging that these communities remain national, need not mean accepting European disintegration, let alone surrendering to chauvinistic nationalism: national sovereignty wielded with no concern for all who it affects in a factually interdependent world. It does, however, exclude rule by judicial or EU decree on issues that demand proper democratic consent.

In this regard, we might also consider the EU's prioritisation, structural bias and legal embedding of the economic over the social in its response to the sovereign debt crises that arose in the Eurozone periphery. The judicially endorsed,[74] monetarist rationality that it imposed on indebted states – a 'conditionality' regime that eroded social programmes contrary to the democratically expressed will of their peoples – was a prime example of its overreaching empire of law and (economic) reason. But these were also classic cases of factual interdependence, where one state's budgetary (ir)responsibility impacted on the currency union they shared with other states, justifying at least *some* EU management of these

[73] Compare C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI-2358 and C-67/14 *Jobcenter Berlin Neukolnn v Nazifa, Sonita, Valentina and Valentino Alimanovic* [2015] ECLI-597 with Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI-458 and Case C-413/99 *Baumbast v SoS for the Home Department* [2002] ECLI-493. For commentary, see A. Hoogenboom, 'In Search of a Rationale for EU Citizenship Jurisprudence' (2015) 35 *OJLS* 301, 307.

[74] Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] EU:C:2012:756 and C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* [2015] EU:C:2015:400.

otherwise sovereign states. Achieving the balance is delicate. Taken too far, fiscal straightjackets and imposed austerity, combine with the idea that the EU serves primarily to achieve economic ends, prevent states from upholding nationally guaranteed social rights and so undermining their democratic self-determination *and* the rule of law.

There are no easy answers. But none lie in the federalist solution of meekly succumbing to the relentless logic of integration spill-overs, to transfer ever-more power to the EU to determine social policy, or even to make fiscal transfers, that then establish a redistributive 'social Europe' with shared responsibly for achieving solidarity and justice, without the necessary consent of the peoples of Europe (that federalism assumes will eventually catch up). This will only exacerbate existing disconnects and be every bit as undemocratic as imposing austerity. It is hypocritical to criticise the EU for imposing a juridified economic reasoning that legally embeds a structural bias in favour of market liberalism, only to suggest that the EU embed a particular form of social justice instead.[75] A similar point was made long ago by the late Tony Benn MP, who elevated his commitment to democracy above his commitment to socialism when criticising Jacques Delors for commending European integration to the trade unions as a means to circumvent Margaret Thatcher's political programmes: to secure wage and social protection by connecting into a pan-European consensus on a 'uniquely European model of society'.[76]

> *'Some people genuinely believe that we shall never get social justice from the British Government, but we shall get it from Jacques Delors. They believe that a good king is better than a bad Parliament.'*[77]

5. Confederal constraints

Confederalism is depicted above as political sensitive towards the member states – less the rule of law, than the rule of politics, and the only vision of integration that truly reconciles 'demands for autonomous policy solutions at the supranational level with a continuing (and dominant) cultural attachment to national institutions'[78] – but that does not mean it imposes no constrains at all. Though it places limits on integration that federalism does not recognise, nor does it give states the free rein to which nationalists believe they should be entitled. Instead, it expects national political communities to recognise that their projects of democratic self-determination raise issues of cross-border solidarity and justice in a factually interdependent world, and so assume unignorable inter-state dimensions. Confederalism aims at a (constitutionally necessary) balance that respects Europeans' historically contingent preference to pursue democratic self-determination nationally, while managing the external effects thereof. In this way, it seeks to complete the constitutionality of the nation state by respecting the democratic self-determination that the state secures, even as it embeds that self-determination in an integration project that ensures states acknowledge the parallel projects of neighbouring states. The idea is that the EU should moderate – subvert without

[75] See, e.g., D. Schiek, 'A Constitution of Social Governance for the European Union', in N. Ferreira and D. Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press, 2016), 17; O. de Schutter, 'The European Social Charter at the Social Constitution of Europe', in N. Bruun (ed), *The European Social Charter and Employment Relations* (Hart Publishing, 2017), 11.
[76] Trade Unions Congress, Bournemouth, 8 September 1988.
[77] Tony Benn MP, speech House of Commons (debate on Maastricht), 20 November 1991.
[78] P. Lindseth, 'Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration' (2014) 15 *German Law Journal* 529, 536 and 566.

usurping – national sovereignty to manage interactions between the neighbouring sovereignties of its member states.

Confederalism does not reify the nation state in the same way as nationalism, but it does take the nationalistic impulse as an undeniable sociological constraint, around which constitutional theory must work. It is prepared then to work pragmatically and sensitively with the historically contingent importance of the nation state, in a way that federalism is not so inclined. Acknowledging that the EU is not (and nor is it likely to become anytime soon) a hierarchically organised, state-like order, confederalism suggests the EU should remain what Kant once called a 'federation of free states' that 'does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself'.[79] A confederal order needs no *single* European people to ground it, nor does it seek to become an overarching, federally structured United States of Europe. Instead, it upholds the legal independence of its members, and their still distinct national peoples, while demanding that they respect the same in their neighbours.

Responding to a factually interdependent world, confederalists read the legitimacy of the EU and its member states together, as combining to establish a non-state-like, multi-level constitutional construct in which they *complete* one another's constitutionality. The EU can only assert its constitutional claim *alongside* the states' pre-existing claims. And likewise, the states can only assert their claims *alongside* the EU's constitutional claim, which is now essential to managing the external effects of their increasingly factually interdependent sovereignties. The constitutional claim of the EU does not then standalone any more than that of the member states, as separate from this confederal order that renders their parallel projects of democratic self-determination as mutually compatible as possible.

To acknowledge the external effects of legal independence in a factually interdependent world, in which all our fates – economic, technological, cultural and ecological – are connected, has profound implications for how we reconcile our neighbouring political communities and their parallel but interacting projects of democratic self-determination. Confederalism reads the EU as a non-hierarchically configured multi-level order that should enable the peoples of Europe to manage their external effects, and to cooperate across borders, by permitting a plurality of legally independent yet factually interdependent national systems to interact closely within a European whole. The states might then use it to coordinate their parallel projects of democratic self-determination within a European-wide constitutional construct that institutionalises their cooperation and manages their conflicts, to respect their peoples' ongoing attachment to distinct, national institutions and political cultures, while accepting that cross-border solidarity, justice and even democracy demands they at least *consider* the concerns and interests of non-constituents.[80]

The confederalist vision of integration is operationalised through the market freedoms and especially the doctrine of mutual recognition: a regime that obliges states to *consider* the

[79] I. Kant, 'Perpetual Peace: A Philosophical Sketch' (1795) in H. Reiss (ed), *Kant: Political Writings* (CUP, 1970), at 104.

[80] See, generally, B. de Sousa Santos and C. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (CUP, 2005), at 13; K. Nicolaïdis, 'European Democracy and Its Crisis' (2012) 51 JCMS 351, 352 and 358; J-W. Müller, 'Beyond Militant Democracy?' (2012) 73 *New Left Review* 41; F. Scharpf, 'Legitimacy in the Multi-Level European Polity' in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism* (OUP, 2010).

concerns and interests of non-constituents by *justifying* any refusal to recognise the substantive equivalence of a neighbour's law if it hinders free movement (the relevant external effect) between them. The states effectively undertake to recognize one another's laws as valid on their territory, unless they can objectively explain why they insist on their own legal standards despite the adverse consequences for their neighbours. The potential to justify that insistence is crucial to their retaining a democratically necessary degree of legal independence: to sustain the link between law and *national* systems of democratic accountability by enabling local responses to local concerns and interests. But the mutual recognition regime also polices these justifications by empowering non-constituents to challenge them whenever they are adversely affected by any such refusal to recognise the substantive equivalence of a law that then hinders the free movement of a good or service that they produce in conformity with that unrecognised law. Controlled by transparency, reasoned justification and judicial review mechanisms, they can use the regime to demand the state in question at least considers the effects of its non-recognition upon them.

Effectively, the obligation to recognise the substantive equivalence of a neighbour's law (unless the refusal is objectively justified) is neither automatic, as under the sort of free trade agreements that nationalists believe are the only legitimate fetter on national sovereignty, nor open-ended, as under a state-like federal order. The idea is that it internalises the externalities of national legal independence by fixing the conditions under which states can democratically justify their sovereign authority, given interactions with equally democratically legitimated neighbouring sovereignties. Ideally, it works to correct a systemic failing in the national democratic process, or as Christian Joerges so provocatively puts it: the nation state's very own 'democratic deficit'.[81] This legitimating mission – to manage the factual interdependence of legally independent states – would then compensate the states' tendency to exercise legal independence without regard to the impacts on non-constituents, to overcome what he calls 'the structural democratic deficits of nation-statehood'.[82] This is rather like a scaled-up version of the Coasean prediction that economic actors will combine to form a 'single firm' to internalises their externalities when no state intervention is forthcoming to correct a dysfunctional market.[83] In the absence of a world state to manage the external effects of their legal independence, under conditions of ever-increasing factual interdependence, European states formed the EU.

The EU must only rein in a state's tendency to ignore its effects on it neighbours. But when does this require the EU to step in, and when should the EU respect a state's justifiable claim to assert its legal independence despite that external effect, on the basis that it stems from a process of democratic self-determination? Or to put it another way: how extensive are the obligations of a (national) political community towards non-constituents? Ultimately, the EU demands a degree of good neighbourliness: cross-border solidarity and justice between its members states and their peoples. This constraint on national legal independence is necessarily limited because, taken too far, it would undermine each state's claim to operate as a political

[81] C. Joerges, 'Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form', *LEQS Paper* No. 28/2010, accessed 30 January 2017 at www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper28.pdf.
[82] C. Joerges, ''Brother, can you Paradigm'' (2014) 12 I. Con. 769, 782; C. Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' (2014) 15 *German Law Journal* 985, 1026; M. Dawson, *New Governance and the Transformation of EU Law: Coordinating EU social law and policy* (Cambridge University Press, 2011), at 151.
[83] R. Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

community whose constituents determine their law *for themselves*. The balance is a fine one and the limits are difficult to ground normatively and raise legal, democratic and moral issues. The confederalist reading of the EU is as performing a function similar to that which Kant ascribed to a *ius cosmopoliticum* that obliges otherwise sovereign states to treat one another's constituents with *Hospitalität*: an obligation to behave as good republics that co-exist peacefully with one another.[84] This understands democratic self-determination in a deeper, more universal sense: not just as individuals demanding recognition as members of a *particular* political community, but *as human beings*, whose dignity demands that they are treated, and in turn treat others, as the relevant objects of *any* law that affects them, whether or not they are constituents of the community that makes and implements it. Taken too far, however, this would destroy the idea of a political community and the democratic self-determination that it enables. If democratic self-determination *within* the state were constrained to promote a universal idea of democracy at an inter-state level, to such an extent that its political community acted undemocratically merely by discounting the concerns and interests of non-constituents, even if only lightly, then its relevant constituency would effectively extend to the whole world. But borders and citizenship are inherent to the very idea of a specifically *self*-determining political community. The very idea of a community presupposes a limited constituency. To require it to internalise *all* its many external effects – inevitable in a factually interdependent world – by showing *equal* concern for all (constituent and non-constituent alike) would make it no longer a political *community* exercising *self*-determination. Or as Alexander Somek puts it:

> *'It is within the nature of a limit that it is noticed by whoever is either inside or outside of it. … [A constituency] can be infinite only at the price of not being a political unit since actual constituencies need to be finite.'*[85]

Law made and implemented through constitutionally impeccable procedures imposes a *prima facie moral* obligation to obey on all members of the political community, even when they disagree with its particulars. But *who* belongs to that community, and is then *morally* obligated, is not exclusively a theoretical-legal determination. That determination exists somewhere 'between facts and norms',[86] necessitating some sort of sociological grounding. If constitutional theory is to avoid revelling in an unworldly esotericism, it has ultimately to be grounded in social reality.[87] To demand more – to expect national political communities to justify themselves in the light of some higher universal, natural, or moral law – would necessitate locating a transcendental *a priori* position that operates above (or goes behind) this historical contingency, thereby triggering all the attendant (and insurmountable) problems of grounding that position. The justification for grounding constitutional theory in the relationship between the *nation* state and *its* people is no more than a pragmatic claim that turns on the historically contingent value of political communities at this scale. That said, it is only in concrete communities – to which individuals commit viscerally, head and heart – that we develop ideas of solidarity and social justice, build relations of reciprocity, and cultivate that patience, humility

[84] I. Kant, 'Perpetual Peace: A Philosophical Sketch', in H. Reiss (ed), *Kant: Political Writings*, 2nd edn, trans. H Nisbet (Cambridge University Press, 1991), at 93.
[85] A. Somek, *The Cosmopolitan Constitution* (OUP, 2014), at 249; A. Somek, 'Europe: Political, not cosmopolitan' (2014) 20 ELJ 142, 146.
[86] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996).
[87] See, e.g.,H. Hart, *The Concept of Law* (Clarendon Press, 1994).

and tolerance that are necessary to enable collective (democratic) self-determination in the first place.

More prosaically, linking constitutional theory to popular understandings of democratic legitimacy also immunizes against nationalist backlashes. And, somewhat paradoxically, confederalist respect for this popular (nationalist) understanding of legitimacy might act less as a stymie on the federal vision of integration than trying to hasten its realization by forcing the issue. Confederalism may well bring about the federal vision of integration more successfully than going at that vision directly, that might even lead to disintegration. Any attempt to transcend real-world choices, as to how and critically *with whom* the peoples of Europe wish to determine a common good, represents a monstrously imperialistic imposition that fails to respect the limit of those peoples' ambitions for the integration project, and their determination (at least for the time being) to go on organising their collective lives predominantly within national political communities. Far from the confederal vision of integration leaving us stuck with an unsatisfactory *status quo* – little more than a dilute version of the federal vision in aspiring 'only' to 'unity in diversity,' not to an ever closer legal union – its respect for the historical contingency of the nation state and the preference of most Europeans to determine the extent of their social obligations in national public spheres and democratic processes, is potentially both more constitutionally justifiable than the federal vision and more strategically wise if that were the objective.

6. Confederalism as a virtuous circle

The federalist vision of integration forces an issue that cannot be forced. Moreover, it does so unnecessarily and even counter-productively, given the confederal alternative. Frustrating as it is for those who would pursue deeper political integration, the nation state remains for now (and seemingly into the foreseeable future) what Gráinne de Búrca calls the 'legitimate locus for the provision of social and political welfare'.[88] As a matter of sociological observation, most Europeans continue to attach importance to the idea of organising their collective lives – their democratic self-determination – within specifically *national* political communities: an allegiance founded on their being communities of shared history and fate. No more, but also no less. For as long as Europeans cherish their national political communities in this way, they must remain the foundation of any satisfactory constitutional theory of the EU. Otherwise, its predominantly economic form of integration – effected through law, so inclined to prioritise legal coherence and a clear hierarchy of norms and institutions[89] – will continue to overreach. The EU's universalising legal-rationalism and technocratic functionalism are simply insufficiently tempered by democracy to ground the federal vision of integration.

By contrast, confederalism is more respectful of these situated (national) forms of democratic self-determination, so focuses on achieving 'only' what the ill-fated Constitutional Treaty once called 'unity in diversity,' though it does not exclude the idea that the EU might strive for the more federalist 'ever closer' *legal* union in the longer term. A confederal vision of integration still envisages the peoples of Europe working together on a shared project, to *progressively* universalise their particular (national) political cultures, but it is more prepared to let them

[88] G. de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *Community Law Review* 814.
[89] H. Kelsen, *Pure Theory of Law* (1960).

dictate the pace, compared to a build-it-and-they-will-come federalism. The EU cannot constitutionalise itself into a legitimate sovereign through procedural engineering alone. That said, it might gradually *become* more federalist through a virtuous circle. The more procedurally perfect it is, the more Europeans will accept it as a legitimate *part* of a multi-level order that, on the one hand, respects their desire to go on realising democratic self-determination through national political communities, but on the other, enhances their self-determination by managing its impacts on equally democratic neighbouring states and their peoples, even as it enables their multilateral cooperation on issues that are beyond their unilateral (national) self-determination altogether. The EU might thereby respect national democratic self-determination, while buttressing national efforts to determine social conditions by protecting them against the predatory deregulatory forces of globalisation, on which there is a pressing need for cross-border solidarity and justice. The EU must, however, offer the peoples of Europe the means to steer how it goes about this, to avoid exerting legal-rationalistic domination. If it gets this right – ensuring its procedures are the best they can be, within the sociological constraints – it might nurture a virtuous circle that gradually enables that 'ever closer union.' Indeed, this is just how national identities were formed:

> *'The ethical-political self-understanding of citizens in a democratic community must not be taken as a historical-cultural a priori that makes democratic will-formation possible, but rather as the flowing contents of a circulatory process that is generated through the legal institutionalization of citizens' communication'.*[90]

But such a virtuous circle cannot be grounded on procedural perfection alone. It must be anchored in a genuine commitment on the part of the peoples of Europe to make at least *some* European law together, as well as their accepting that solidarity, justice and even democracy demand that they submit the external effects of their national legal independence to some supranational scrutiny. Only then might procedural perfection, to achieve these objectives, persuade them (over time) that EU law and its supranational discipline are truly *theirs*. They might then confidently commit more to it. Their sense of connection – their solidarity and justice – perhaps even the idea that they might become a single European people, grows through the very process of making some law together, at the same time as respecting one another's legal independence by tempering their own law, all through processes that they deem legitimate for the purpose and that they then licence to do more. And so on *ad infinitum*.

If the EU gets it wrong – forces the issue federally – it runs the risk of disintegration: setting up a vicious cycle rather than a virtuous circle. Durkheim depicts society as a problem-solving organisation that becomes increasingly organisationally (and technically) complex to match the problems it must solve.[91] This enables yet more social complexity, but in turn demands yet more organisational complexity, and so on *ad infinitum*. Only in theory can this dynamic continue for ever. In practice, it is held in check by a pattern of diminishing returns: eventually society reaches a point when the complex systems that had initially delivered significant benefits become so overstretched that they scarcely sustain the *status quo*, beyond which their organisational burdens out-weigh the social benefits that they deliver. The stresses become so profound that they are only released through a systemic breakdown: popular resentment,

[90] J. Habermas, 'Reply to Grimm', in P. Gowan and P. Anderson (eds), *The Question of Europe* (London, Verso, 1997), at 264.
[91] See, generally, E. Durkheim, *The Division of Labour in Society* (1934).

revolt and provincial breakaways that lead to enforced simplifications and that return society to a lower level of complexity (only for the whole cycle to start up again). Durkheim observed this dynamic in pre-revolutionary France, when the monarchy responded to increasing social complexity by delegating discretionary power over peoples' lives to an increasingly complex (and therefore unwieldy) bureaucracy, only to trigger the Revolution, as a backlash thereto. The phenomenon is especially true of empires. The historian Joseph Tainter depicts the demise of ancient Rome and the collapse of the Mayan, Minoan and Hittite civilisations, as well as that of the Chinese Zhou dynasty, in these very terms.[92] These were empires that reached just such an inflection point, when declining returns made complexity a less attractive problem-solving strategy than severing the ties that linked local units to central structures. The lessons for the EU do not need spelling out.

International relations traditionally turns on power, diplomacy and politics, whereas the EU is a uniquely ambitious project to integrate its members *through law*, at a constitutional density that is unprecedented in any existing or previous international order. A legacy of the rule of law tradition nurtured by the modern state, this legal method of integration is also a source of contestation. The EU has not wholly abandoned the older international relations tradition and its supranational law and institutionalism remains tempered by a residual intergovernmental politics that makes its order more confederal than federal: integration through an altogether messier blend of law *and politics*. This responds to a sociological truth: that the peoples of Europe still attach great weight to the idea of organising their collective lives – their democratic self-determination – within specifically *national* political communities. This allegiance, founded on the historically contingent value of political communities at this scale, makes them reluctant to transfer powers to the EU over social policy, to counterbalance its predominantly economic programming, which in turn sets up an imbalance that is sustainable only through the flexibility of confederalism: an order held together by intergovernmental politics as well as supranational law. Attempts to federalise this order too quickly, disturbing its equilibrium, risk nationalist backlashes and, ultimately, disintegration. A federal order may remain a long-term aspiration, but it depends on the virtuous circle that confederalism nurtures.

[92] J. Tainter, *The Collapse of Complex Societies* (Cambridge University press, 1988)

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