

## Discussion

# The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance

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### Introduction

The contributions we have been asked to comment on here – those of Francesco Martucci<sup>1</sup> and of Hjalte Lokdam and Michael A. Wilkinson<sup>2</sup>, respectively – each take an historical approach to understanding the current state of the EU's Economic and Monetary Union (EMU). Both contributions identify broadly similar 'neoliberal' ideological foundations and outcomes, although in tracing this genealogy each uses a somewhat different approach. Francesco Martucci deploys what we might call the classic tools of historical political development and policy history, whereas Hjalte Lokdam and Michael A. Wilkinson focus more on historical political economy and critical intellectual history. The results, however, are broadly complementary. As a threshold matter, as Francesco Martucci puts it, we think it is fair to say both contributions agree that:

L'UEM reflète une construction qu'on pourrait qualifier de néolibérale en ce sens qu'il s'est agi d'adapter la politique économique et monétaire en fonction de la contrainte des marchés financiers. Les racines théoriques de l'UEM révèlent en effet qu'il s'est agi, afin de garantir une stabilité macro-économique nécessaire à une monnaie unique, d'imposer le respect de règles dans la conduite des politiques monétaire et économique. Toutefois, il convient de relativiser la portée juridique de ces règles car, derrière le discours du constitutionnalisme économique, une large marge de manœuvre est laissée au politique.<sup>3</sup>

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1 See *supra* in this volume, F. Martucci, « Les racines historiques et théoriques de l'Union économique et monétaire ».

2 See *supra* in this volume, H. Lokdam & M. A. Wilkinson, « The European Economic Constitution in Crisis : A Conservative Transformation ? ».

3 See *supra* in this volume, F. Martucci, « Les racines historiques et théoriques de l'Union économique et monétaire », Subchapter 2.2.

Hjalte Lokdam and Michael A. Wilkinson are, however, more ambitious in their effort to characterize the precise nature of this neoliberal imposition of policy constraints on national and supranational governance. In their view, this history has given rise to “an authoritarian framework of governing”, one designed “to insulate the market from democratic pressures”.<sup>4</sup> Most importantly, this framework has “entrenched a distinction between the authorization and exercise of governmental powers that was supposed to limit governmental flexibility at both the Member State and Union level, subjecting governmental discretion to constitutional rules rather than ordinary political contestation”.

The observations we will offer here are broadly sympathetic to the interpretations offered by both Francesco Martucci and Hjalte Lokdam and Michael A. Wilkinson. We thoroughly agree that, under the guise of a purported economic constitutionalism,<sup>5</sup> European elites have tried to remove highly contested matters from the realm of traditional democratic politics.<sup>6</sup> The principal means of doing so has been the supranational imposition of rule-based constraints on the exercise of sovereign power at the national level. In our view, however, one should avoid speaking of these constraints in autonomously ‘constitutional’ terms (economic or otherwise), as that discourse obscures something crucial about the nature of EU governance. These constraints no doubt have had an impact on the exercise of constitutional power at the national level; nonetheless, they should not be understood as ‘constitutional’ in their own right.<sup>7</sup> To use that terminology is in fact a category mistake, confusing the idea of a supranational ‘constitution’ with the EU’s essentially technocratic and juristocratic, i.e. ‘administrative’ (and hence ‘sub-constitutional’), character. This is not just a problem of legal semantics or a dispute over labels with no

4 Ed.: regarding the question of “authoritarian liberalism”, see also *supra* in this volume, Section 2 – *The (Neo)Liberal Recapture of the Concept*, and esp. W. Bonefeld, « Economic Constitution and Authoritarian Liberalism – Carl Schmitt and the idea of a “Sound Economy” » and the discussions by S. Audier (« Le néolibéralisme : Un “libéralisme autoritaire” néo-schmittien ? ») and V. Valentin (« L’idée de constitution économique et l’hypothèse du libéralisme autoritaire »).

5 Ed.: concerning the evolution of economic constitutionalism in the (neo)liberal discourse, see *supra* in this volume, T. Biebricher, « An Economic Constitution – Neoliberal Lineages ».

6 Ed.: see *infra* in this volume, T. Biscarie & S. Gill, « Three Dialectics of Global Governance and the Future of New Constitutionalism ».

7 Ed.: in the introduction (*supra* in this volume, G. Grégoire & X. Miny, « Introduction – La Constitution économique : Approche contextuelle et perspectives interdisciplinaires »), we (Editors) share this view when we describe the EU’s ‘constitutional’ rhetoric as ‘catachrèse’ (catachresis), i.e. an “improper use of words; application of a term to a thing which it does not properly denote; abuse or perversion of a trope or metaphor” (Oxford English Dictionary).

substantive import. The constitutional discourse leads, rather, to a profound misunderstanding of what a fundamentally technocratic and juristocratic (again, 'administrative') EU can realistically and legitimately achieve on its own. We submit that the disconnect between the language of constitutionalism and the EU's fundamentally sub-constitutional, administrative character is a core contradiction that the contributions by Francesco Martucci and by Hjalte Lokdam and Michael A. Wilkinson each highlight but do not name. Our purpose here is to bring that contradiction more squarely to the fore, in order to demonstrate how it defines the limits of EU (and EMU) governance.

## 1 Resource Mobilization and the Boundary between Administrative and Constitutional Power

The EU generally, and the EMU more specifically, today sit uncomfortably at the boundary between mere administrative governance and the aspiration to a genuine form of supranational constitutionalism. European governance depends, first and foremost, on a delegation of regulatory power from constitutional bodies on the national level to primarily technocratic and juristocratic (again, 'administrative') agents on the supranational level. Of course, EU institutions also enjoy an electoral component by way of the European Parliament (EP) – something that many lawyers, judges and law professors often see as essential to advancing the EU's autonomously democratic and constitutional legitimacy. Nonetheless, this electoral dimension of European governance has in fact done little to alter the fundamentally administrative character of European integration.<sup>8</sup>

The essential purpose of delegating regulatory power to EU institutions has been to create mechanisms to police the Member States' fulfilment of their legal 'pre-commitments' to each other (most importantly, but hardly exclusively, in

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<sup>8</sup> See A. E. Stie, *Democratic Decision-Making in the EU: Technocracy in Disguise?*, Abingdon, Routledge, 2012. For earlier formulations of this administrative/technocratic perspective, see P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, Oxford University Press, 2010; P. L. Lindseth, « Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community », *Columbia Law Review*, 1999, vol. 99, n°3, pp. 628–738. See also, more recently with regard to the EP, P. L. Lindseth, « Executives, Legislatures and the Semantics of EU Public Law: A Pandemic-Inflected Perspective », in D. Fromage and A. Herranz-Surrallés (eds.), *Executive-Legislative (Im)balance in the European Union*, Oxford, Hart Publishing 2021, pp. 303–327.

the area of free movement in all its forms).<sup>9</sup> In fulfilling this function, these supranational agents – above all the European Commission and the Court of Justice of the European Union (CJEU), joined more recently by the European Central Bank (ECB) – possess considerable technocratic and legal legitimacy as well as normative autonomy (again, supplemented by an electoral component via the EP). And there can be no doubt that this ‘pre-commitment’ function has had important consequences for the operation of democratic and constitutional power on the national level, something also true of the rise of the administrative state more generally over the course of the 20th century.<sup>10</sup> But even as this ‘pre-commitment’ function has had important constitutional consequences, it has never attained autonomous democratic and constitutional legitimacy in its own right, at least in the most robust sense we will describe in this contribution. Rather, the EU’s legitimacy, as an instantiation of supranational administrative power, has remained fundamentally ‘parasitic’ on the democratic and constitutional legitimacy of national institutions.<sup>11</sup> Indeed, as will also be detailed below, the limitations inherent in the EU as an extension of administrative governance to the supranational level, without robust constitutional authority of its own, explains much about the struggles of European integration over the last decade of crisis.

One would never understand these limitations, however, by looking at the discourse of legal elites in the EU – lawyers, judges, law professors – who, for the most part, continue to describe the function of the EU’s supranational agents in autonomously constitutional terms. Perhaps the leading example is the landmark *Les Verts* judgment in 1986, in which the Court of Justice itself famously described the European Treaties as a “constitutional charter of a Community based on the rule of law”.<sup>12</sup> This lofty characterization – which casts the EU as a vehicle for ensuring the rule of law through the enforcement

9 For further theoretical background on the role of ‘pre-commitment’ in governance beyond the state, see P. L. Lindseth, « Theorizing Backlash: Supranational Governance and International Investment Law and Arbitration in Comparative Perspective », *Journal of World Investment and Trade*, 2020, vol. 21, n°1, pp. 34–70.

10 See P. L. Lindseth, « The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s », *Yale Law Journal* 2004, vol. 113, n°7, pp. 1341–1415.

11 On this concept, see, e.g., K. Tuori, *European Constitutionalism*, Cambridge, Cambridge University Press, 2015, p. 42. For further exploration of the concept, see generally P.L. Lindseth, « The Perils of ‘As If’ European Constitutionalism. Review of K. Tuori, *European Constitutionalism* (Cambridge University Press, 2015) », *European Law Journal*, 2016, vol. 22, n° 5, pp. 696–718.

12 ECJ, 23 April 1986, *Parti écologiste ‘Les Verts’ v European Parliament*, Case 294/83 (ECLI:EU:C:1986:166), para 23.

of seemingly constitutional principles – has long dominated European legal scholarship even as there are persistent concerns today about its aptness.<sup>13</sup> No doubt, this characterization contains an important element of truth on a semantic level. Among the many meanings given to the term ‘constitution’,<sup>14</sup> perhaps the most widespread in the EU relates to the limitation and constraint of power, and more particularly of *national* power. For many advocates of integration, this function serves as integration’s ultimate *finalité*, addressing the pathologies of nationalism after the atrocities of 1914–1945, countering the “democratic malfunctions in national political processes”<sup>15</sup> and taming the domination of one or more nation states over others.<sup>16</sup> The internal market has certainly been one of the major achievements of that effort, requiring Member States in the EU to delegate power to supranational ‘pre-commitment’ institutions to police the Member States’ fulfilment of their mutual legal commitments to each other and thus prevent the asymmetric vindication of power by any single Member State.

And yet, even as the Union’s output legitimacy (at least in terms of a prosperous internal market) has often met expectations, the EU is nonetheless still a paradoxical combination of strength and weakness. On the one hand, the Union itself has been accused of questionable self-empowerment,<sup>17</sup> as well as developing mechanisms of democratic legitimation that are inadequate to

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- 13 This is particularly the case with regard to so-called ‘rule of law backsliding’. See, e.g., D. Kochenov and L. Pech, « Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality », *European Constitutional Law Review*, 2015, vol. 11, n°3, pp. 512–540. See also J. Komárek (ed.), *The EU Constitutional Imagination: Between Ideology and Utopia*, Oxford, Oxford University Press, forthcoming.
- 14 See R. Schütze, « Constitutionalism », in R. Masterman and R. Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, Cambridge University Press, 2019, pp. 40–66.
- 15 M. Poiares Maduro, « Passion and Reason in European Integration », *FCE 3/10 Forum Constitutionis Europae* (Humboldt University, Walter Hallstein-Institut Für Europäisches Verfassungsrecht 2010), p. 6.
- 16 R. Bellamy, *A republican Europe of states. Cosmopolitanism, intergovernmentalism and democracy in the EU*, Cambridge, Cambridge University Press 2019, pp. 174–208. Ed.: the project of a Europe of peace through economic integration (and the resulting balance of power) can already be found in the past, notably in the theories of the French Physiocrats of the 18th century (see *supra* in this volume, P. Steiner, « Les Physiocrates, l’économie politique, l’Europe »).
- 17 P. Lindseth, « The metabolic constitution and the limits of EU legal pluralism », in G. Davies and M. Avbelj (eds.), *Research handbook on legal pluralism and EU law*, Cheltenham (UK)/Northampton (MA), Edward Elgar, 2018, pp. 223–242, esp. p. 227.

counter-balancing the EU's 'supranational technocracy'.<sup>18</sup> On the other hand, in terms of resources available to it, the EU is broadly recognized as quite weak. At least up until the coronavirus pandemic (about which more below), the EU's budget was capped at a level between 1.29% of all the Member States' GNI for commitment appropriations and 1.23% of the EU GNI for payment appropriations<sup>19</sup> (amounting to 153 billion euro in payments for 2020). In other words, the budget was traditionally set at an amount much smaller than the average budget of a medium-size Member State. This could hardly be sufficient to fulfil the demanding objectives set forth in the Treaties, much less addressing a crisis on the scale of the climate emergency or the coronavirus pandemic. According to the objectives set out in Article 3 TEU, integration is, among other things, supposed to help achieve "the well-being of its peoples" and "a highly competitive social market economy, aiming at full employment and social progress", while also "combat[ing] social exclusion and discrimination" and contributing to "the sustainable development of the Earth" and the "eradication of poverty".

But one might fairly ask: how could the EU possibly achieve these demanding goals if it lacks the ability to mobilize its own revenues, most importantly via its own taxing and borrowing authority? This question of resource mobilization, frankly, is crucial to determining whether the EU is merely an (admittedly powerful) supranational administrative body rather than an autonomously constitutional entity in its own right. The EU Decision on own resources – which applies *both* to taxes as well as common borrowing under the Multiannual financial framework (MFF) – requires unanimity in the Council and only the consultation of the European Parliament, and its entry into force is conditional upon the approval of the Member States according to domestic constitutional requirements (Article 311 TFEU). Moreover, the EU budget has traditionally been financed by national contributions (nearly 80%), whereas the remainder has come from a series of taxes that are in fact collected nationally – historically sugar levies, customs duties, and a percentage of the harmonized Value-Added Tax (VAT).<sup>20</sup> The pandemic response has altered this reality to some extent, by adding to these nationally-collected taxes a layer of shared

18 N. Scicluna, « Politicization without democratization: How the Eurozone crisis is transforming EU law and politics », *International Journal of Constitutional Law*, 2014, vol. 12, n°3, pp. 545–571, esp. pp. 562 ff.

19 Article 3 of Council Decision 2014/335 on the Union's own resources.

20 C. Fasone and N. Lupo, « The Union Budget and the Budgetary Procedure », in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law*, Vol. I, Oxford, Oxford University Press, 2018, pp. 809 ff., esp. pp. 814–816.



EU debt, allowing the budget to reach a level of roughly 2% of GNI for a limited five-year period. However, just as before, this debt will be backed by tax revenues mobilized at the national level, not the EU's own taxing authority.

In other words, there remains no EU tax collection service that 'wears the EU badge', so to speak, operating on the basis of the EU's own autonomous legitimacy rather than that of the Member States. The absence of a supranational power and legitimacy to mobilize these resources directly has created never-ending tensions around the EU budget between Member States that are net contributors and those that are net beneficiaries, as well as the recurrent claims by the former to so-called 'rebates' (first of all for the UK – while it was still a Member State – and thereafter for such net contributors as Austria, Denmark, Germany, the Netherlands, and Sweden).<sup>21</sup> The last decade of crisis in the EU has only accentuated these tensions in the European system. During the Eurozone crisis, observers rightly criticized the nature and the pace of the supranational response,<sup>22</sup> which was constrained in considerable part by the EU's lack of autonomous fiscal capacity. The persistent reliance on inter-governmentalism, as well as the use of extra-EU sources of law to manage an obviously pan-European problem – not to mention a heavy reliance on unconventional monetary measures by the ECB – brought the legitimacy and effectiveness of the collective European response into question.

The Eurozone crisis, alongside the incomplete nature of the EMU – long devoid of a fiscal pillar<sup>23</sup> – brought to the fore one of the main weaknesses of the European system: while the EU may claim an autonomously constitutional character, that character is based almost entirely on constraining Member States' power. The EU cannot, however, compel the legitimate mobilization of resources on its own accord – arguably the very essence of genuinely 'constitutional' authority. As one of us has argued elsewhere:

[...] The 'constitution' of power entails the sociopolitical emergence of mechanisms to extract and redirect ('mobilize') human and fiscal resources in a legitimate and compulsory fashion. Legitimate compulsory

21 R. Crowe, « The European Budgetary Galaxy », *European Constitutional Law Review*, 2017, vol. 13, n°3, pp. 428–452, esp. pp. 432–433.

22 M. Dawson and F. De Witte, « Constitutional Balance in the EU after the Euro-Crisis », *Modern Law Review*, 2013, vol. 76, n°5, pp. 817–844; A. Menéndez, « The Existential Crisis of the European Union », *German Law Journal*, 2013, vol. 14, n°5, pp. 453–526.

23 See A. Verdun, « An "Asymmetrical" Economic and Monetary Union in the EU: Perceptions of Monetary Authorities and Social Partners », *Journal of European Integration*, 1996, vol. 20, n°1, pp. 59–81.

mobilization is the crucial element in the political metabolism of a community, converting social and economic resources into work for public ends. This ‘metabolic’ function, if you will, is the essential element of any genuinely ‘constituted’ public authority. [...] In this sense, legitimate compulsory mobilization is the true *sine qua non* of constitutional authority.<sup>24</sup>

Regardless of the breadth of the EU regulatory powers,<sup>25</sup> the unwillingness of Member States to equip the EU with the autonomous power to mobilize revenues in a compulsory fashion casts serious doubt on the EU’s purportedly constitutional character, at least in the most robust sense. What remains, therefore, is an EU fundamentally of a sub-constitutional, technocratic and thus ‘administrative’ character. In this state of affairs, the metabolism of the EU remains primarily in the hands of the Member States and their budgetary authorities, even as that power is now subject to regulatory constraints at the supranational level. The conditionality imposed by the EU on this power may have many variants – linked, as it often is, to financial assistance, the compliance with macroeconomic rules, green standards, or the rule of law. But despite that conditionality, the situation – in terms of the actual mobilization of resources – is not unlike the ‘pre-constitutional’ United States under the Articles of Confederation, in which the ‘confederal’ level, such as it was, remained entirely dependent on the polycentric legitimacy of its constituent states to mobilize resources on the confederation’s behalf.<sup>26</sup>

It follows that the EU’s ‘metabolic constitution’ – the manner in which resources are mobilized towards the ends of European integration – is fractured in several ways, leaving the EU, as fundamentally a form of administrative governance, unable to transcend its own socio-legal and socio-institutional limitations as such. The most fundamental limitation, discussed in the second subchapter below, flows from the disconnect between power and legitimacy in the Union, by which we mean the repeated conferral of regulatory power on European institutions, albeit without the EU enjoying the necessary democratic

24 P. L. Lindseth, « The metabolic constitution and the limits of EU legal pluralism », *op. cit.*, p. 223.

25 See, amongst many, G. Majone, *Regulating Europe*, London/New York, Routledge, 1996, pp. 47–80 and pp. 265–301.

26 See T. Wozniakowski, « Why the sovereign debt crisis could lead to a federal fiscal union: the paradoxical origins of fiscalization in the United States and insights for the European Union », *Journal of European Public Policy*, 2018, vol. 25, n°4, pp. 630–649, esp. p. 631.



and constitutional legitimacy to support the exercise of this power through an autonomous mobilization of resources in its own right. This contribution then explores how this break in the necessary ‘power-legitimacy nexus’<sup>27</sup> has manifested itself in EU governance over the last decade, most importantly in the Eurozone crisis. We then critically examine measures foreseen as part of the response to the coronavirus pandemic (most importantly, the Next Generation EU recovery and resilience facility). Our overall aim with this analysis is to assess the extent to which these more recent efforts may constitute a paradigm shift – a ‘critical juncture’<sup>28</sup> – in the EU’s fractured metabolic constitution (spoiler alert: they do not, at least not fully and not yet, again leaving the EU fundamentally of an administrative, technocratic character). Finally, in conclusion, we take stock of where the EU now stands and what might need to happen in order to overcome or transcend the boundary between administrative and constitutional power, thus perhaps leading to development of a genuinely autonomous constitutional metabolism at the supranational level in Europe.

## 2 The Fundamental Fracture between Power and Legitimacy in European Integration

As has long been recognized, it can be very disorienting trying to come to terms with the EU’s “constitutional structure ... of bits and pieces”.<sup>29</sup> The complex interplay between the scope of the EU’s power and its lagging legitimacy contributes directly to a sense of estrangement on the part of the average European citizen towards the European system. The power to mobilize resources in a compulsory fashion – most importantly, to tax – is intimately bound up with the scope of legitimacy enjoyed by the political structure in question, notably by a national legislature. Regulatory powers, by contrast, may be possessed by an entity with a lesser and more derivative legitimacy, such as a technocratic agency within the limits provided by the principle of legality. In short, different degrees of legitimacy support different kinds of power. We can call this the

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27 P. Lindseth, « The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance », in F. Bignami (ed.), *EU Law in Populist Times. Crises and Prospects*, Cambridge, Cambridge University Press 2019, pp. 505–530, esp. pp. 508–510.

28 See G. Capoccia, « Critical Junctures and Institutional Change », in J. Mahoney and K. Thelen (eds.), *Advances in Comparative-Historical Analysis*, Cambridge, Cambridge University Press 2015, pp. 147–179.

29 D. Curtin, « The Constitutional Structure of the Union: A Europe of Bits and Pieces », *Common Market Law Review*, 1993, vol. 30, n°1, pp. 17–69.

‘power–legitimacy nexus’, which refers to “the linkage between the nature of the legitimacy enjoyed by a legal or political order (legal, technocratic, functional, or robustly democratic and constitutional) and the scope of power that the legal order can then successfully exercise”.<sup>30</sup>

No less than in any other system, that power-legitimacy nexus defines the scope of power that the EU can successfully exercise. The bases of legitimacy in the EU are, variously, national-executive (the European Council and the Council), technocratic (the Commission and the ECB) and juristocratic (the Court of Justice). Moreover, the EU’s ‘legislature’ (European Parliament and Council), such as it is, may inject an electoral component into the system, either directly or indirectly, but that ‘legislature’ lacks the autonomous power and legitimacy to extract and redirect fiscal and human resources on a societal scale akin to a national parliament.<sup>31</sup> This crucial feature of the European system points us towards the ambiguous and incomplete ‘constitutionalism’ in EU public law.<sup>32</sup> European supranationalism undoubtedly reflects the constraining type of constitutionalism, for example in the separation of powers or the protection of rights as well as in the use of various kinds of conditionality mechanisms. But EU public law falls short of constitutionalism in the most robust sense, i.e. the legitimate-compulsory mobilization of resources separate and apart from the Member States.

This is hardly to say that the constraining activity of EU institutions is without value. Indeed, the opposite is true: the EU acts as a crucial agent of peaceful cooperation and coordination, seeking to ensure that the Member States fulfil their myriad legal and political commitments to each other. “For this reason, as a matter of functional necessity, the EU must operate with a degree of autonomy from direct member-state control (although not from member-state legitimation)”.<sup>33</sup> But in pursuing this essential function, the EU lacks a robustly constituted power, precisely because the EU does not (as yet) possess

30 P. L. Lindseth, « The metabolic constitution and the limits of EU legal pluralism », *op. cit.*, p. 235; V. A. Schmidt, *Europe’s Crisis of Legitimacy. Governing by Rules and Ruling by Numbers in the Eurozone*, Oxford, Oxford University Press 2020, pp. 57–66, who talks of a ‘split-level legitimacy’.

31 See P. Lindseth, « Executives, Legislatures, and the Semantics of EU Public Law », *op. cit.*

32 Not to mention that EU public powers are often exercised by or together with private actors: See A. Vauchez, « In Search of Europe’s Phantom Public. “Public-ness” and the European Union », *German Law Journal*, 2020, vol. 21, n°1, pp. 46–50. For more details on the ambiguous and incomplete ‘constitutionalism’ in the EU, see P.L. Lindseth, « The Perils of ‘As If’ European Constitutionalism », *op. cit.*

33 P. L. Lindseth, « The metabolic constitution and the limits of EU legal pluralism », *op. cit.*, p. 236.

the deep-rooted democratic and constitutional legitimacy of a pan-European variety needed to sustain it.<sup>34</sup> And it is for this reason that the metabolic constitution of the EU is polycentric, fractured among the several Member States, where – despite the extensive delegation of power to EU technocratic and juristocratic bodies – the robust form of democratic and constitutional legitimacy continues to reside.<sup>35</sup>

In this way, the EU is ‘parasitic’ on the democratic and constitutional authority on the national level.<sup>36</sup> Thus, when national democracies suffer from constitutional retrogression or are under populist attack or risk a serious economic downturn, the EU is also affected in its ability to deliver. Since the 1990s, the increasing globalization of economies and the interdependence among legal systems have combined with other challenges – from climate change to migration, terrorism, and health emergencies – to demand forms of governance beyond the nation-state. In the case of the EU, these challenges have further amplified both the functional demands for ‘more Europe’ as well as the gap between the EU’s needed powers and its lagging legitimacy. Not only is the legal basis for the exercise of EU authority often contested, but the EU is also unable to mobilize the needed resources in a compulsory and legitimate manner to support that authority even when it is legally determined to exist. Although the EU is often, functionally and even legally, the most apt level to act, it nonetheless cannot provide the fiscal and human lifeblood to the response. By contrast, national political communities, while equipped with the democratic and constitutional legitimacy to mobilize resources, are often functionally limited in what they can achieve alone and therefore must coordinate through the EU in order to address problems effectively.<sup>37</sup>

The challenge, therefore, is to bridge this fundamental disconnect between the two levels of governance in the EU – robustly democratic and constitutional at the national level, primarily administrative, technocratic and juristocratic at the supranational level. Both are essential to addressing the myriad challenges that Europe has faced over the last decade – from the Eurozone crisis, to the climate emergency, to the coronavirus pandemic. From the perspective

34 Of course, it also lacks constituent power on its own, though it has been argued that the EU enjoys a *pouvoir constituant mixte*: see J. Habermas, « Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the *Pouvoir Constituant Mixte* », *Journal of Common Market Studies*, 2017, vol. 55, n°2, pp. 171–182.

35 Ed.: see also *infra* in this volume, C. Joerges, « Economic Constitutionalism and “The Political” of “The Economic” ».

36 On this concept, see, e.g., K. Tuori, *European Constitutionalism*, *op. cit.*, p. 42.

37 See P. L. Lindseth, « The metabolic constitution and the limits of EU legal pluralism », *op. cit.*, p. 240.

of the so-called ‘democratic deficit’ at the supranational level, this may appear mainly as a challenge of institutional engineering, something that can and should be addressed by further ‘democratization’ at the EU level. That is a normatively attractive option but, as experience has shown, it has proven easier said than done. The reason is that the ‘democratic deficit’ misunderstands the actual nature of the European edifice, assuming it is robustly constitutional when Member States refuse to endow it with powers beyond those of an (again, admittedly powerful) administrative agency. At this stage of the EU’s development, the true challenge is thus to find ways to bridge the ‘democratic disconnect’ between the European and national levels, which today requires finding a way to channel the democratic and constitutional legitimacy (and hence mobilization powers) of the national governance to the supranational level. Such channelling remains essential when dealing with forms of fundamentally administrative governance, as in the EU. Unless and until a deeper transformation – that is, a ‘critical juncture’ – takes place in the relationship between power and legitimacy in European governance, the EU will remain fundamentally a sub-constitutional instantiation of administrative governance.<sup>38</sup> The problem is much more socio-political and socio-cultural than it is simply legal and institutional, something that integration’s most fervent (usually legal) advocates repeatedly ignore.

If one were to translate this point into the terms of Dani Rodrik’s famous ‘political trilemma of the world economy’,<sup>39</sup> the challenge in the EU context becomes clearer. Rodrik’s model tells us why, as between maintaining national sovereignty, preserving democratic politics, and pursuing deep economic integration, “we can combine any two of the three, but never have all three simultaneously and in full”.<sup>40</sup> Considerable nuance is necessary, however, to apply this model to the EU case. Most importantly, one needs to reconcile integration’s extensive delegation of regulatory power to the supranational level with the retention of legitimate-compulsory mobilization powers by national parliaments. The best way to do so, we suggest, is through an appreciation of the aforementioned power-legitimacy nexus,<sup>41</sup> as well as how this nexus has shaped the balance between democracy, sovereignty, and economic integration in the EU context.

38 P. Lindseth, « The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance », *op. cit.*, p. 522–525.

39 For a succinct overview of that trilemma, see D. Rodrik, « The Inescapable Trilemma of the World Economy » (*Dani Rodrik’s weblog*, 27 June 2007), available at: [http://rodrik.typepad.com/dani\\_rodriks\\_weblog/2007/06/the-inescapable.html](http://rodrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html) (last consulted on 12 February 2022).

40 *Ibid.*

41 See the passage above accompanying note 30.

To achieve this reconciliation, integration necessarily built on what we can call, in historical terms, the ‘post-war constitutional settlement of administrative governance’.<sup>42</sup> When applied to realities of European integration, Rodrik’s trilemma would properly look something like this:

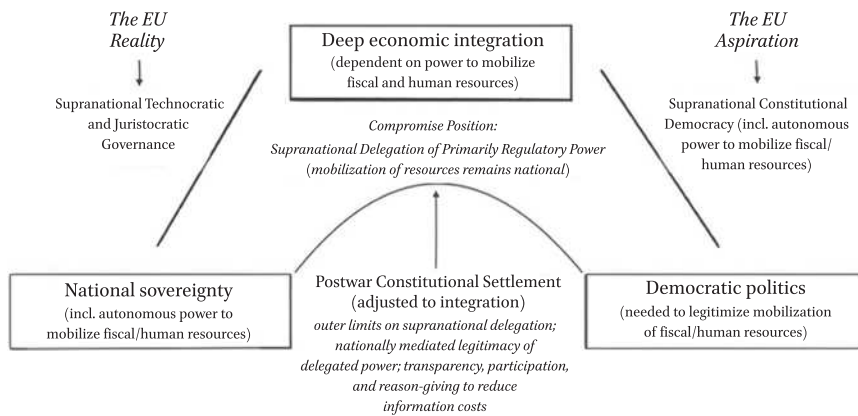


FIGURE 1 Rodrik's trilemma applied to European integration

The EU operates primarily along the left prong of Rodrik's model, through the delegation of regulatory power to supranational 'pre-commitment' institutions, both technocratic (e.g. the Commission or the ECB) as well as juristocratic (the CJEU). The very purpose of these institutions is to police the member states' fulfillment of their legal commitments to each other in the treaties (hence mobilizing national sovereignty in service of deep economic integration). Because the EU's ability to achieve autonomous democratic and constitutional legitimacy is limited (alas, the ever-present 'no-demos problem'), it cannot combine supranationalized democratic politics and deep economic integration as it aspires to do (the right prong of the model). In the end, the necessary reconciliation of supranational regulatory power and national democratic and constitutional legitimacy must occur along the bottom branch of the trilemma, albeit with some adjustments not properly accounted for in Rodrik's original. These include constitutional limits on the scope of power delegable to the EU level (particularly in terms of resource mobilization); nationally-mediated oversight (executive, legislative and judicial) of powers otherwise delegable to the EU; as well as transparency, participation and reason-giving obligations at the EU level in order to reduce information costs to such nationally-based oversight.<sup>43</sup>

42 See P. L. Lindseth, *Power and Legitimacy*, *op. cit.*

43 See generally P. L. Lindseth, *Power and Legitimacy*, *op. cit.*

The purpose of such mechanisms, in other words, is to find ways to bridge the ‘democratic disconnect’ between the national and supranational levels in the EU. But in the end, this bridging challenge is not simply one of institutional engineering; rather, it is more deeply socio-political and socio-cultural, imposing clear constraints on what a still-fundamentally ‘administrative’ EU, as currently constructed, can realistically achieve without constitutional legitimacy of its own.

### 3 The Multilevel Impact of the Democratic Disconnect in and after the Eurozone Crisis

Europe’s experience with the global financial crisis, and more particularly with the Eurozone crisis, manifested this socio-political and socio-cultural challenge quite well. The Eurozone crisis was defined by two inter-related impacts operating in parallel: on the one hand, the sense of power-legitimacy fracture deepened at EU level; on the other hand, the response to the crisis brought the nexus between power and legitimacy at the national level into question as well. We will take each of these parallel effects in turn.

#### 3.1 *The Eurozone Crisis and the Deepening Sense of Power-Legitimacy Fracture at EU Level*

Confronted by a risk of collapse of some Member State economies (and hence, potentially, of the EMU as a whole), the EU was in desperate need of an immediate common response to the debt crisis that erupted in 2010. Aside from not having enough resources of its own to deal with the situation credibly, the EU also faced legal obstacles to a proper deployment of support and assistance. Articles 123 and 125 TFEU, as is well known, prevented two potentially helpful responses: on the one hand, the ECB was barred from providing financial assistance to Member States through direct purchase of government bonds; on the other hand, the Union itself was prohibited from “assum[ing] the commitments of central governments, regional, local or other public authorities [...]”. Despite these restrictions, EU institutions and the Member States were very creative in developing work-arounds in order to save the euro. At the very early stages of the Eurozone crisis, the EU established a temporary fund, the European Financial Stabilisation Mechanism (EFSM), to provide emergency lending of up to 60 billion euro, backed by an implicit guarantee in the EU