The Future of Europe

Political and Legal Integration Beyond Brexit

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Introduction

Towards Sustainable Political and Legal Integration in Europe

Peering into the Future

ANTONINA BAKARDJIEVA ENGELBREKT AND XAVIER GROUSSOT

The European Union (EU) is at a crossroads. Worn out after a series of unprecedented crises, questioned and contested in its foundations, entwined in complex negotiations of the first ever exit of a major Member State, it is desperately in need of a new optimistic vision for its future. The past decade has, not surprisingly, generated gloomy analyses and predictions. Scholars and political commentators have scrambled to draw up one pessimistic scenario after another, ranging from stagnation and new crises to the very disintegration of the EU.[1]

To be sure, it is not easy to be optimistic at a time when the intellectual and political resources of the EU are being drained by the unfolding Brexit drama and by efforts to ensure basic compliance with commonly agreed decisions and policies in the face of the opportunistic behaviour of populist national governments. However, there is also a widespread feeling of urgency to look beyond the vagaries of the current political situation and reflect on the long-term choices that Europe is facing. The faults of the present institutional and legal set-up of the EU need to be identified, the possible consequences of alternative paths carefully weighed and the conditions for sustainable European integration spelled out.

This book is conceived as a scholarly reflection on the future of the EU, deliberately leaving the topic of Brexit aside. Whereas the Brexit theme is inevitably present in some of the contributions, our ambition has been to not let ourselves be absorbed by the current pains of deconstructing Britain's EU membership, but instead to mobilise scholarly rigour and imagination in thinking constructively of the future of the European political and legal order irrespective of potential exits from and entries into the EU.

[1] For a sample, see I Krastev, *After Europe* (Philadelphia, University of Pennsylvania Press, 2017); H Vollard, 'Explaining European Disintegration' (2014) 52 *Journal of Common Market Studies* 1142 and other publications cited in Neyer, ch 1 in this volume, n. 1.

The starting point for the book has been the European Commission White Paper of 2017 on the Future of Europe.[2] In this document, the Commission famously described five scenarios for the future of European integration. To this, Commission President Jean-Claude Juncker added his own 'sixth' scenario.[3] Whereas some of the scenarios differ little from the current state of the European project and could at best be described as preserving the status quo (or, less flatteringly, as muddling through), others are bolder and more ambitious. In its future-telling, the Commission has deliberately chosen not to get entangled in the detailed institutional and legal modalities underlying each scenario. As the White Paper puts it: 'The form will follow the function.'

In contrast to the White Paper, the contributions in this book are not directed at elaborating discrete scenarios for the future. Nor are they exclusively preoccupied by the topic of 'more' or 'less' Europe. Instead, the aim has been to critically approach a few overarching themes, which in our view are crucial for the sustainability of the European legal and political order. The chapters are grouped into three thematic clusters: (i) institutional and constitutional fundamentals of the EU; (ii) the rule of law and security; and (iii) the rule of law in the Member States.

The centrality that the rule of law *problématique* occupies in this book can of course be at least partly explained by the predominantly legal scholarly affiliation of the contributing authors. More importantly, however, the rule of law principle has been singled out in the White Paper of 2017, as well as in other EU policy documents, as being at the core of a community, whose Member States have committed to 'replace the use of armed forces by the force of law',[4] and respectively fundamental for any positive vision for the EU as a community of values.[5] Indeed, it is also our conviction that the rule of law as a constitutional value of the EU is crucial for sustaining mutual trust between Member States, national authorities and citizens in the EU. It is thereby indispensable to think more profoundly on the meaning of the rule of law principle in the context of the European integration project.

The focus on security is in turn prompted by the prominent place accorded to this theme in the White Paper of 2017 and, more generally, in the contemporary discourse on European integration. Security is often invoked as being a reserved domain for the nation state and an utmost expression of national sovereignty. However, it is also increasingly being brought forward as an area where the EU has a new and bigger role to play, giving reasons to speak of the 'securitisation' of European integration.[6] Security features prominently

[2] European Commission, *White Paper on the Future of Europe*, 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

[3] Commission President Jean Claude Juncker, State of the Union Address 2017, available at: https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2017_en.

[4] European Commission (n 2) 6.

[5] See Commission President Jean Claude Juncker (n 3).

[6] See Gill-Pedro, ch 7 in this volume.

in the positive agenda for Europe, summarised by Commission President Juncker as 'a Europe that protects, a Europe that empowers and a Europe that defends'.[7] And in 2018, the Commission advanced a proposal for nothing less than a European Security Union. The complex ways in which this advancement in the domain of security both challenges and strengthens the rule of law in the EU is in our view worthy of sustained scholarly and political attention.

If we now turn to the individual contributions, the chapters in the *first* thematic cluster address some of the eternal institutional and constitutional questions of the European project, such as democracy, representation, the division of powers and rights. A common trait of all four chapters in this part of the volume is that the authors look into past experiences seeking to find keys to the future of European integration; we can speak of a sort of 'back to the future' approach.

The most daring dive into history is made by Jürgen Neyer (Chapter 1). Neyer notes the altogether pessimistic tone of recent EU scholarship and the expanding genre of disintegration studies. Although he acknowledges the long-heeded wisdom that history never repeats itself, he nevertheless argues that there are useful lessons to be drawn from past experiences, provided we recognise the limitations and risks of such historical parallels. In his chapter, he embarks on a journey into the history of past European political orders and examines the reasons for their eventual demise. His retrospective goes as far back as the Holy Roman Empire and includes the end of the Catholic hegemony in the early sixteenth century, the French Revolution of 1789 and the end of the Weimar Republic in 1933. Neyer identifies some striking similarities in the events and patterns of political behaviour that have led to the collapse of these political orders. The demise is typically preceded by periods of modernisation shocks and the dramatic reallocation of resources, triggering perceptions of relative depravations within large portions of the population followed by popular unrest. The other common trait is 'a dispersed structure of accountability, preventing a clear attribution of responsibility and competence to tackle the grievances of those feeling relatively deprived'. The third and final element is a culture of political ignorance of the ruling political elite, reinforcing their determination to preserve the political order without major compromises and adaptations. According to the author, this pattern can be discerned, albeit still in a less pronounced form, in the current political state of the EU.

A chief concern with the existing institutional and legal set-up of the EU should, according to Neyer, be that those most affected by the crises – both citizens and Member States – are not adequately represented in the most important political institutions of the EU order. The author thus approaches the familiar *topos* of EU's democracy deficit, yet gives it a different twist. Whereas the EU, at least at first glance, has institutional structures and principles in place that are

[7] Commission President Jean Claude Juncker (n 3).

designed to ensure accountability and representation, according to Neyer, the institutional set-up is (and with reference to Fritz Scharpf's influential analysis) skewed in favour of fostering liberalisation and not social integration. Neyer's appeal to current European political leadership is to transform the present EU political order by embracing social values and responding adequately to the grievances of the socially and economically deprived. He advances some concrete proposals for overcoming the prevalent system of 'organised unaccountability'. Some of the bold reform proposals he advances are: assigning to the European Parliament the competence of directly electing a European government, voting on a European budget and reallocating tax funds from the wealthy to the needy, and introducing European unemployment insurance. The proposals have a clear ideological tinge and aim at freeing Europe from its 'outdated neoliberalism and pushing it towards social democracy'. The author underlines the special responsibility of Germany, 'the indispensable nation', for carrying through a similar ambitious reform agenda. However, he does not offer a forecast as to the likelihood that his proposals will be followed at the practical political level. Overall, the chapter is inspired by the belief that only a socially balanced European society will provide for sustainable European integration.

In Chapter 2, Paul Craig also looks into the past, but his time perspective is much more limited and focused on the evolution of the institutional structure of the EU. At the centre of his analysis is again the question of the EU's democracy deficit, understood as a mismatch between voter power and political accountability. Generally, Craig shares much of the critique being levelled against the lack of adequate democratic representation and other flaws of the EU's institutional architecture. He briefly traces the transformation of the European Parliament from having only symbolic powers to achieving a close to co-equal status with the Council in the legislative process. However, despite this positive evolution, he concedes that the political reality is that voters still cannot directly affect a change of policy direction in the EU by removing the incumbents and replacing them with those espousing different policies ('throwing the scoundrels out'). However, the main objective of his analysis is not to join the chorus of critics, but rather to explore the question of who is to be held accountable for this unsatisfactory political status quo. His unequivocal answer to this question is: the Member States. The present disposition of EU institutional power is the result of successive Treaties, in which the principal players have been the Member States. This implies that the current institutional balance is one that the Member States have been willing to accept. The author shows through careful and dispassionate analysis that at every juncture when the opportunity for designing a more democratic EU has presented itself, Member State governments have opted to foreclose such choices and to retain their ultimate control through perpetuating the existing classical intergovernmental arrangements. Examples include the debates on a single EU president or on a reinforced European Council with a

long-term president. In each and every respect, the blame for the imperfect, undemocratic and at times dysfunctional institutional structure of the EU is thus to be placed not on the European institutions or on the EU itself, but on the Member States. Naturally, to say that the Member States are the masters of the Treaties is almost a truism. Yet, this fact is easily forgotten when the balance sheet of the pros and cons of European integration is being drawn up. Member State governments (and not only of the recent populist brand) are often quick to assign the responsibilities for unsuccessful policies to the EU, thus deflecting internal political critique.

As to the possibility for alleviating the democratic deficit and ensuring a more adequate match between EU institutional decision-making structure and the precepts of democracy, Craig identifies four main constraints to such development: political, democratic, constitutional and substantive. Politically, he sees no prospect that the Member States would be willing to relinquish their control over the decision-making process. In terms of democratic constraints, he points out the double dimension of representation in the EU, namely of the people and of the Member States. Insistence on transferring more decision-making powers to the directly elected European Parliament implies vesting more trust in people's representation. However, a disregard of Member State representation is undesirable, politically highly unlikely and even potentially disruptive, generating radical anti-European sentiments. Constitutionally, the prospects of alleviating the democratic deficit are seriously constrained by the (over-)constitutionalisation of the Treaties, on the one hand, and by the selective competence accorded to the EU, on the other. In particular, the lack of EU competence in the crucial fields of taxation, welfare and redistributive policies puts a severe limitation on political choices. Finally, and with reference to Fritz Scharpf again, the substantive constraint flows from the asymmetry between the economic and the social, the single market being the prime domain of EU, while the social remaining in the ambit of the Member States. However, also in this respect, the main responsibility resides with the Member States.

In a sense, Craig's chapter can be read as a sobering and even disheartening response to the bold reform proposals advanced by Neyer. In essence, Craig's analysis demonstrates that there has been no lack of progressive visions and specific suggestions for constitutional and institutional transformations in direction towards greater accountability and real democracy. However, such attempts have notoriously failed, often as a consequence of Member State governments' open or covert obstruction. To expect that Member States will in the future change their behaviour is highly unlikely.

The next chapter of this thematic cluster (Chapter 3) addresses the central issue of EU competences by looking into the past, present and future of the EU flexibility clause (currently Article 352 of the Treaty on the Functioning of the European Union (TFEU)). In this chapter, Graham Butler tries to decipher to what extent the clause still has a role to play in the present institutional framework and distribution of competences in the EU. He traces the rise of the

flexibility clause from an initial dormant state, through a dynamic and activist phase of more frequent and assertive legislative use of the clause, following the Paris Summit of 1972, to the gradual fall and rolling back of the clause from the 1980s onwards. The chapter captures an interplay between the EU legislator, extensively using the clause in the activist phase as an incubator of new competences (the environment, consumer protection, intellectual property (IP) rights) to be subsequently taken up into the Treaties, and the Court of Justice of the European Union (CJEU), generally confirming this activist stance through its jurisprudence. Correspondingly, in the phase of decline, a winding down of legislative use is matched by stricter control by the Court. Butler also vividly demonstrates how the interpretation and scope of the clause is influenced by the dynamic of Treaty change and the budding of new conferred competences, as well as by recalibrated wording of the clause with the Lisbon Treaty.

Although the amendment of the clause through the Lisbon Treaty prima facie suggests that its use should become broader and less controversial, Butler finds that the decline of the clause has in fact continued. The clause has in his view become narrower in scope compared to its predecessors and subject to stricter procedural requirements, not least subsidiarity control. Furthermore, national courts and legislators have not stayed passive, but have through a variety of mechanisms asserted their right to keep a national check on potential intensification of legislative use of the clause.

As regards the future, Butler does not predict any spectacular development in an expansionist direction. However, he also stresses, and generally praises, the remaining hidden potential of the clause to wake up to new unexpected vigour, should the political or constitutional evolution of the EU require so. The clause has thus served the EU well and remains a source of much-needed flexibility for the future.

Finally, in Chapter 4, Xavier Groussot and Anna Zemskova trace the role of rights and their spillover in the process of European integration. According to them, the rights-based vision of the future of Europe is problematic, given the irrefutable fact that EU rights have been politically and legally contested in recent years. The process of European integration begs one essential question: why are the rights so resilient in the process of European integration? Groussot and Zemskova's analysis has its starting point in the 'Ever Closer Union' clause enshrined in Article 1(2) of the Treaty on the European Union (TEU), which is viewed as reflecting the legacy of neofunctionalism. For them, the spillover of rights is driven at the general level by the clause and can thus be itself viewed as an integral part of the neofunctionalist legacy for explaining the process of European integration. The observed spillover of rights is a powerful phenomenon that acts as a trigger for facilitating European integration – even though, as in any system, there are obvious reverse processes in the form of spillback, specifically demonstrated by the limitation of individual rights during the economic crisis. According to the authors, the spillback of rights demonstrates

their pliancy and their responsiveness to the persistent calls of effectiveness. It also explains why rights are so resilient in the process of European integration.

As shown in this chapter, the European rights are resilient since they constitute the privilege tools for ensuring the institutionalisation of the 'Ever Closer Union' clause through a process of rationalisation. In other words, 'Unity', 'Diversity' and 'Transparency' (the normative core values of Article 1(2) TEU) have been institutionalised by the EU Courts' case law on individual rights with the help of a complex network of legal principles, the most central among them being the autopoietic principle of EU administrative and constitutional law, namely the principle of proportionality. This network of principles tied to the application of rights tells us that the telos of European integration is not only about unity but also about diversity. In practice, it means that the effectiveness of EU law is not absolute and that there are situations in which it is accepted that EU law should yield and where national interests should prevail. In order to understand the resilience of rights in the process of European integration, it is also important to analyse their internal logic or 'voice'. Rights in EU law are founded on a functional logic epitomised by their own origin, structure and hermeneutic. The strength of the obligations and the concomitant functional logic of the European Court of Justice (ECJ) offer a plausible explanation regarding the resilience of 'rights' in the EU legal order. Yet the resilience of 'rights' in EU law can only be fully explained if it is connected in turn to the recognition of their functional acceptance at the domestic level by different epistemic communities representing private interests. This phenomenon constitutes the positive feedback loop of European rights in the process of European integration.

At the centre of the inquiries in the *second* thematic cluster are the questions of rule of law and security, the latter concept understood both more specifically as part of the EU's policy towards an Area of Freedom, Security and Justice (AFSJ) and, more broadly, as preserving the integrity and continued existence of the European liberal project.

In a first reflective and theoretical chapter (Chapter 5), Massimo Fichera advances the concept of 'discursive constituent power' and analyses its relation to European integration. The starting point in Fichera's discourse-theoretical analysis is the classical idea of the people as the constituent power from which a system of government derives its authority. He argues that transnational integration, and European integration in particular, does not renounce the idea of the people as constituent power. However, 'the people' is understood in a novel way, namely: (1) partly as 'mobile people', ie, a construction of people as moving from one place or another of the EU territory; and 2) partly as 'peoples' in the plural, ie, a construction of 'demoi' that is supposed to underpin the *process* of development of the EU as a polity. In both configurations, the security and fundamental rights discourses as discourses of power acquire particular relevance. In fact, for Fichera, the EU liberal project can

only survive if it does not negate constituent power, but instead reinstates it as discursive constituent power through the self-justifying discourses of security and fundamental rights.

Consequently, Fichera believes that we should resist the temptation to characterise European integration as a process replacing constituent power with constitutional rights, on the one hand, and individual economic freedoms, on the other – or to view it as a primarily economic process; on the contrary, the political has never been really removed from the inner core of the process of European integration. However, as he states, discursive constituent power cannot escape the ambiguities and contradictions that are typical of the EU liberal project. The main reason for this is that the discourses of security and fundamental rights have been presented since the early stages of European integration as if they were neutral, whereas in fact they have always disguised a specific political direction. As a result, conflicts and tensions have been downplayed. From this perspective, security and fundamental rights as discourses of power express the interplay between the expansive trend of the EU machinery (for example, through the doctrine of primacy and the development of the internal market) and the resistance by Member States. It is through these discourses that the EU pursues a strategy of self-justification and self-empowerment accomplished in the name *of the peoples of Europe*.

In Chapter 6, Anna Jonsson Cornell investigates to what extent national security, understood as an EU constitutional law concept, presents a challenge to EU legal integration and what role it might play for the integration process in the future. The chapter outlines two meanings of national security as a constitutional law concept, namely: (i) national security as a competence-deciding concept; and (ii) national security as a justification for the derogation from and the restriction of fundamental rights protection. Although the difference between these two aspects is underlined, Jonsson Cornell notes that the dividing line is increasingly difficult to uphold. The overall ambition of the chapter is to map out how EU constitutional law deals with national security matters from a competence-deciding point of view in order to draw conclusions as to how it impacts on Member States' national security prerogative.

The chapter proceeds with an analysis of the concept of national security in the EU Treaties. Jonsson Cornell notes that Article 4(2) TEU is fairly clear as regards the national security exception. However, there is no clear understanding of the definition and scope of national security as a competence-deciding norm. At the same time, the expansive Court of Justice of the European Union (CJEU) jurisprudence on national security and public order as compelling reasons for limiting fundamental rights and freedoms prompts a conclusion that the scope of retained powers for national security purposes is very limited and restricted chiefly to institutional and organisational issues, together with operational (especially coercive) measures.

Turning to security in the EU policy towards AFSJ, Jonsson Cornell rightly points out that this area of legal integration still bears important traits of

intergovernmentalism and state sovereignty even after the entry into force of the Lisbon Treaty and the removal of the pillar structure. Relying on Tuori, she emphasises that the 're-surfacing of state-sovereigntist concerns, reliance on the international law system, opt-ins and opt-outs, reflects [sic] an exceptionally high tension between the transnational, European and national'. The main tools for integration in AFSJ are coordination and cooperation, mutual recognition and legal harmonisation, in that order; thus, cooperation rather than integration remains the prevailing principle within this policy area.

In order to add to our understanding of how national security can be a driver for, or pose a hindrance to, EU legal integration Jonsson Cornell conducts two case studies. The first case study is on Schengen and the temporary closing of borders, while the second is on privacy rights in a national security context. The parallel study of these two cases is helpful to reveal if there are any differences as to how the concept of national security is understood, and hence what role it is allowed to play in different areas of European integration. The case studies show that in the Schengen context, national security as an EU constitutional law concept is given a broad understanding and the scope of the Member States' national security prerogative is correspondingly broad, both in terms of national security as a competence-deciding and a rights-restricting concept. In contrast, in the data retention and data processing context, the bar is set high in terms of rights protection, and the scope for claiming a national security exception is narrowed significantly.

Jonsson Cornell concludes that national security as an objective and interest can serve both as an accelerator and as a brake to EU legal integration. So far it has primarily served as an accelerator. Taking the political turmoil in Europe into account, especially the growing tendencies towards nationalism and the return to the nation state as the primary actor in the wake of the so-called migration crisis and Brexit, reaching the conclusion that the national security argument will serve to slow down EU legal integration in the future is not far-fetched. Still, the expansive understanding of national security, the lack of a clear national security competence-dividing norm, the growing impact of the Charter and the general constitutionalisation of EU law have so far had the effect that Member States' national security prerogative is shrinking and that rights protection to the benefit of individuals is increasing.

In a chapter partly commenting on Fichera's and Jonsson-Cornell's contributions (Chapter 7), Eduardo Gill-Pedro develops an independent theoretical framework for approaching the issue of security in the EU, building on the two concepts of 'community' (*communitas*) and 'immunity' (*immunitas*), as elaborated by the Italian philosopher Roberto Esposito. The point of Gill-Pedro's chapter is not to give a detailed exposition of Esposito's philosophy; rather, he aims at using the concepts advanced by Esposito and applying them as heuristic devices in order to think about the securitisation of the EU's area of freedom, security and justice. For Gill-Pedro, the EU deploys immunitarian logic to protect European integration from that which might threaten it. This results

in a paradox. Indeed, we can understand the idea of European integration as imposing an obligation of community on the Member States, that is, as an obligation to be open to 'the other'. But this very idea of European integration is in turn deployed as the idea that justifies the immunitarian logic which imposes on Member States the obligation to identify and exclude 'the other'.

For Gill-Pedro, the 'special path' that justified the EU was that it acted as counter to such immunitarian logic. If instead the EU reinforces and legitimises immunitarian logic, then it may be the case that the peoples of Europe choose to deploy that logic not to immunise European integration, but instead to immunise ideas that they may consider more important and more relevant to them – the idea of their 'people', their 'nation' and their 'race'. Gill-Predro suggests that we are at a crossroads. If the EU continues to develop the logic of immunity in the service of the idea of European integration, but there are no meaningful processes by which the peoples of Europe can see themselves as authors of that integration, then the growing rift between the EU, as a political project, and its putative citizens becomes ever wider. By bringing in the importance of democracy in the EU security context, Gill-Pedro's chapter connects to the analyses of both Neyer and Craig in the first part of the book.

The *third* thematic cluster includes three chapters offering perspectives on European integration and the rule of law in individual Member States. The chapters remind us that probably the most decisive issue for the future of the European legal order is the EU's ability to guarantee the rule of law in its Member States and in all areas of EU policies. The first chapter in this part of the book (Chapter 8) is predominantly theoretical. In it, Juha Raitio presents the rich theoretical debate concerning the rule of law concept in Finland. He argues that nowadays in any EU Member State, the intellectual framework to approach the rule of law concept should be the 'triangle of democracy, human rights and rule of law'. For him, a 'thick' concept of rule of law would be the most balanced interpretation of rule of law not only in contemporary Finland but also within the EU as a whole. As shown in his chapter, in Finland, the interpretation of the rule of law principle is derived in constant reference and comparison to the Anglo-American concept of the rule of law and the German *Rechtsstaat* concept. Recently, the rule of law principle has also been considered from a global trade and comparative law viewpoint. Yet, there is in Raitio's view still reason to study the rule of law from a more theoretical point of view, since the concept, in particular in Scandinavian countries, has been questioned as being so vague and ambiguous that it had allegedly lost its meaning in legal argumentation. Provocatively, the concept has been compared to a 'rhetorical balloon'. Raitio does not find this sceptical view to be justified. He argues, in line with contemporary legal literature (and especially in the field of EU law), that one can refer to a 'thick' conception of rule of law, which contains both formal and material elements, including notably human and fundamental rights. Moreover, it is essential that the EU legal rule of law concept be interpreted in

close contact with the democracy principle. Democracy cannot exist and human rights cannot be respected if the rule of law principle is not adhered to.

Turning more specifically to the situation in Finland, Raitio briefly reviews Finland's overall compliance with its EU law obligations, including the tendency of Finnish courts to follow CJEU preliminary rulings. He concludes that the country generally tends to respect its EU legal obligations and there are thus no significant problems as regards the rule of law or mutual trust from an EU law perspective.

A similarly positive assessment can hardly be found in the detailed and highly critical account of András Jakab on the situation of rule of law in Hungary (Chapter 9). The provocative title of Jakab's chapter, referring to the situation in post-socialist countries as one of 'institutional alcoholism', reflects his concern for societies which are experiencing the legacies of their authoritarian past and where those in power have a deeply problematic relationship with the very basic requirement of respect for law and for the constitutionally established decision-making process. Jakab's analysis is informed by institutionalist theory, where institutions are understood as formal rules, informal practices and narratives. He considers one of the major reasons for the systematic disrespect for the rule of law in post-socialist countries to reside in a formalist, rule-centred conception of law and a corresponding disregard for the actual, institutionalised, practice of law. In the prevailing narrative of the legal system, Jakab identifies the traces of the Marxist-Leninist theory of law, among others legal instrumentalism, ie, the view that law is an expression of the will of the ruling class, a preference for textual approaches to legal interpretation, the doctrine of unity of power instead of separation of powers and the belief that the force of international law is derived from national sovereignty and secondary to it.

Jakab describes the making of the Hungarian Constitution of 2010/11 from the perspective of institution-building, showing the mismatch between formal rules and actual practices. According to him, the institutionalist view of law advanced in the chapter yields two main findings: (i) that honest determination for achieving a radical institutional overhaul of a complete legal system is not sufficient and that such transformation can only be successful in the presence of external pressure; and (ii) that the reinforcement of substantive elements of a rule of law culture can be gradually achieved only if increased attention is paid to actual practices and narratives in the realm of legislation, on the application of the law and legal training. However, this requires political action and the adjustment of formal rules. In the Hungarian case, external pressure has decreased after the country's accession to the EU and political action is not to be expected, since it is not in the interest of the incumbent decision-makers. Hence, Jakab's bitter diagnosis is that overcoming the impasse seems unlikely for the time being.

A different 'national' story emerges from Ulla Neergaard's analysis of Danish 'exceptionalism' (Chapter 10). Neergaard traces Denmark's complex

relationship with the EU, providing an overview of the many opt-outs and special arrangements surrounding the country's EU membership, such as: the EU citizenship opt-out, the Economic and Monetary Union (EMU) opt-out, the defence policy opt-out, the AFSJ opt-out, the 'second home' protocol and other areas of differentiation. From this analysis, a portrait emerges of a 'high-maintenance' Member State, which is often deviating from the commonly decided course of action, claiming individual and privileged treatment. To be sure, the regime Denmark has carved out for itself by way of special waivers and exceptions is a regime under the rule of law. This is confirmed in mutually agreed protocols and provisions. Nevertheless, this record of institutionalised exceptionalism seems to beg the question of whether the country is fully committed to its EU legal obligations, a question acquiring additional relevance in the aftermath of the *Ajos* saga featuring the largely disobedient behaviour of the Danish Supreme Court.

Yet Neergaard does not stop at providing a legal positivist analysis of Denmark's differential arrangements; she also looks behind the 'black letter' law and seeks to assess the actual practice and effects of the various instruments. Obviously, all the exceptions and special arrangements have been prompted by a fear of eroding national sovereignty and national identity. However, contrary to the dominant narrative, and surprisingly, the chapter shows that many of the opt-outs are subsequently mitigated in the process of implementation, sometimes to the extent of remaining only exceptions on paper. For instance, the opt-out on EU citizenship has practically no impact today. The opt-out on the EMU is certainly valid. However, Denmark follows consistently a fixed-exchange-rate policy vis-a-vis the euro, its (indirect) participation in the European Exchange Rate Mechanism has been long-lasting and compliant, it chose to join the Stability and Growth Pact in 1997 and the Treaty on Stability, Coordination and Governance in the EMU, and currently, joining the Banking Union is considered. As to the defence opt-opt, commentators note a permissive interpretation of the opt-out by Danish foreign policy-makers. Finally, despite the AFSJ opt-out, Denmark still contributes and participates in the cooperation within this policy area and to a much larger degree than anticipated.

In a way, Neergaard's inquiry into the 'bits and pieces' of Denmark's special regime provides a much-needed realistic perspective revealing more uniformity and compliance than is admitted by the Danish government and than is probably realised by the Danish public and even by some Danish politicians. Thus, according to Neergaard, the Danish situation may be seen as fitting well into the EU motto 'United in Diversity'. Moreover, according to all recent polls, the Danes are among the most eager supporters of remaining in the EU and a 'Dan-exit' is not a likely scenario at present.

In a chapter that serves as an epilogue to the book (Chapter 11), Kaarlo Tuori reflects on the dialectic relationship between European and Member States constitutionalism, seeking to resolve the tension between the two and to see whether they can be conceived as complementing or conflicting. Tuori makes two

main points: first, the relationship between EU constitutionalism and Member State constitutionalism is not only about conflict, but is also about dialogue and cooperation, as well as complementarity; and, second, this relationship should not be discussed only within the juridical and political constitutions, but also within the sectoral constitutions, such as the economic, social and security constitutions.

Tuori elaborates his two points through criticism of two influential portrayals of EU constitutionalism and Member State constitutionalism: (i) constitutional pluralism, as conceived by Neil MacCormick[8] and developed by others; and (ii) the proposal to locate the constitutional aspect exclusively on the Member State side and approach the EU in terms of administrative law, as advanced by Peter Lindseth.[9] Tuori's concern with constitutional pluralists lies in their overblown emphasis on the conflictual nature of the relationship between European and Member State constitutionalism and their focus on what he calls the juridical constitution. Conversely, his discord with Lindseth concerns the use of a thick concept of democratic legitimacy, refusing to recognise the constitutional aspect of the EU and its legal system. Against these views, Tuori submits that in the European context, efforts to secure democratic constitutional legitimacy should be examined through the interaction between the transnational and national levels of constitutionalism (two-stage legitimation). In some crucial respects, European constitutionalism has been, and still is, parasitic in relation to national constitutionalism. Most importantly, this also holds for constitutional and democratic legitimacy. The fact that the general public has primarily confronted EU measures not directly, but indirectly, through the political and administrative institutions and the legal system of the respective Member State, has been crucial for the legitimacy that the EU and its individual policies have enjoyed among European citizenry. Along with the importance of sectoral constitutionalisation, the interaction between the transnational and national levels belongs to the features, which distinguish European from state constitutionalism. This interaction is vital for providing European institutions and policies with democratic legitimacy.

In Tuori's view, the legitimacy deficit, aggravated by the recent crises, cannot be mended through measures presupposing European citizenry – European demos – as a collective political agent. The solution lies instead in further strengthening the mechanisms of two-stage legitimation. The difficulty consists in reinforcing the influence of national democratic procedures while simultaneously avoiding nationalistic excesses, ensuring attention in national debates to the viewpoints of other Member States and the EU, and engaging national democracies in a constructive dialogue.

[8] N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999).

[9] P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford, Oxford University Press, 2010).

As was stated at the outset, the objective of this book has not been to give an unequivocal answer to the much-debated question of 'more' or 'less' Europe; rather, the chapters in this volume demonstrate, each in its particular way, that such a dichotomy is simplistic and misguided. A more important objective that has steered the inquiry has been to identify conditions for and paths towards sustainable European political and legal integration – integration that would survive, and even be strengthened, by the inevitable crises that will arise in the future.

Probably not surprisingly, most of the chapters in the book highlight the importance of spelling out even more clearly the fundamental values on which the EU builds – democracy, the rule of law and fundamental rights. However, what the book also emphasises is that in the context of European integration, each of these fundamental values has to be redefined and reconceived, and can only be understood by taking into account the transnational character of the European project. This does not mean that the values are becoming malleable or devoid of content and meaning; rather, it implies that in a multi-faceted and diverse European polity, these values are inevitably contested and renegotiated in constant tension between the national and the European.

The chapters in this book outline and analyse various expressions of this tension: the horizontal and vertical dimensions of representation in the EU, discussed in Craig's chapter, the spillover and spillback of rights, traced by Groussot and Zemskova, the interplay between change and permanence, constitutive of the European liberal project as claimed by Fichera, the expansion and rolling back of the flexibility clause described by Butler, the role of national security as an accelerator and a brake of European integration, as pointed out by Jonsson Cornell, and ultimately the interplay between EU and Member State constitutionalism in Tuori's convincing conceptualisation.

Some of the examples given in the book point to the paradoxical nature of this tension, like the apparent coherence and loyalty achieved through differentiation in Neergard's account of Danish EU membership, the mutually reinforcing national and European dimensions of the rule of law in Ratio's account of the theoretical debate in Finland, and the need for external pressure for enhancing internal institution-building in Jakab's analysis of the rule of law in Hungary.

Certainly, the current protracted and multi-dimensional crisis in Europe has generated a sense of emergency which understandably prompts appeals for radical overhaul of the EU's institutional and constitutional set-up in direction that will lead to strengthening the democratic fundament of the EU and of adequate representation of the socially deprived in the EU political process, as powerfully argued by Neyer. And Gill Pedro is right to warn us that the growing tendency of 'securitisation' and of invoking 'immunity' in EU policy-making are in dire contradiction with the core idea of 'community' underlying the European project, and may dangerously feed nationalist and isolationist reactions.

Still, as noted by the Commission in its 2017 White Paper, the EU has always been at a crossroads. While acknowledging the graveness of the current situation, the chapters in this volume can nevertheless be read as giving grounds

for moderate optimism. They seem to provide at least partial support for the 'evolutionary pragmatism' line of reasoning defended by scholars in the liberal intergovernmentalism string of European integration studies.[10] The key to the relative success of the European project has, at least until recently, resided in maintaining the tension between the Member States and the EU to a degree where it is productive and mobilises the enormous political and economic resources of a diverse polity. Rather than seeking legitimacy in a central source of authority, the strength of the EU has been in embracing the plurality of the peoples of Europe, as the legitimating force of a European democracy.[11] Therefore, as contended in many of the chapters in this book and as argued by influential scholars of European integration, rather than maintaining the mantra of an 'Ever Closer Union',[12] it is more promising for the EU to continue to heed the logo 'United in Diversity'.[13]

To be sure, there is today a more dramatic divergence in preferences and in models of economic and political governance across EU Member States, the fissures going along both the East/West and the South/North dimensions. There is likewise boiling dissatisfaction within broad portions of the population who feel left behind by the process of Europeanisation and globalisation – a dissatisfaction that nurtures anti-democratic, nationalist and populist politics. The long-term success of European political and legal integration therefore seems to depend on the EU's ability to contain rising illiberal regimes within the EU,[14] while converging more decisively around a vision for a socially just and sustainable European integration based on mutual trust, dialogue and a long-nurtured discipline of tolerance.[15]

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[10] A Moravcsik, 'Preferences, Power and Institutions in 21st-Century Europe' (2018) 56 *Journal of Common Market Studies* 1648.

[11] K Nicolaïdis, 'Braving the Waves? Europe's Constitutional Settlement at Twenty' (2018) 56 *Journal of Common Market Studies* 1614.

[12] See most recently Case C-621/18 *Wightman*, ECLI:EU:C:2018:999, paras 61 and 67.

[13] C Joerges, 'How is a Closer Union Conceivable under Conditions of Ever More Socio-economic and Political Diversity? Constitutionalising Europe's *unitas in pluralitate*' (2018) 24 *European Law Journal* 257; Nicolaïdis (n 11).

[14] S Meunier and MA Vachudova, 'Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union' (2018) 56 *Journal of Common Market Studies* 1631.

[15] JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 2 *ICON* 173.

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