«TRANSFORMATIVE CONSTITUTIONALISM» AND THE EUROPEAN UNION? A COMPARISON WITH LATIN AMERICAN CONSTITUTIONAL EXPERIENCES*

di Giuliano Vosa**

1. Introduction. On Friday, October 13th, Armin von Bogdandy's speech inaugurated the ICON-S 2023 Italian Chapter at Bocconi University[1]. Emphasis was put on the idea of transformative constitutionalism as a tool that Europe may be willing to experiment in some depth. In his speech, von Bogdandy, who among other things has co-directed a MPIL project on Latin American *Ius Constitutionale Commune*[2], raised three issues. First, he challenged the political-ideological bias on transformative constitutionalism that, in his opinion, would hinder the reception of the concept in the European environment – for it is routinely, but mistakenly labelled as «a leftist project». Second, he looked at the objectives of Latin American transformative constitutionalism to compare them with the objectives that the Court of Justice sought as confronted with the «rule of law crisis». Third, he rather provocatively asked whether the Court of Justice has ever deployed transformative constitutionalism as a constitutional tool: in his view, the Kirchberg judges have never dared to openly act in response to nationalist threats to European democracy. This is why, he added, Orbán has been walking the European political scene for a decade, which reveals that

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[1] More information on the conference at www.icon-society.org/italy; as for the material content, no official registration has been made public, but the arguments are not distant from those put forward in A. von Bogdandy, L.D. Spieker, *Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions*, in *Columbia Journal of European Law*, 29, 32, 2023, 65-91, in part. 71 ss.

[2] Accounted for, *inter alia*, in A. von Bogdandy, *Ius Constitutionale Commune en América Latina: Context, Challenges and Perspectives*, in A. von Bogdandy, E. Ferrer Mac-Gregor, M. Morales Antoniazzi, F. Piovesan, X. Soley (eds.) *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Constitutionale Commune*, Oxford, 2017, 27-48.

anachronistic *élites* from authoritarian times have found their way to seize power again. «There is a very serious problem in Europe with our political society» – he contended – «as our political system, as a whole, does not manage to work well». Then, it would be for the Union Court, he underscored, «to give impulses for the system to beat again» and for democracy to be better established. Conclusively, von Bogdandy called for some sort of «transformative constitutionalism» to strengthen democracy and the rule of law in the European regimes. Such a direction, in his view, should be vigorously taken by the Court of Justice, whose clerks would add another instrument to their already abundant constitutional toolkit. Whether such a tool – a *European transformative constitutionalism* – aligns with the Latin American *constitucionalismo transformador*, or is designed in a different way for different objectives – to the extent that it would be hazardous to use the same *nomen* for both – is the research question that animates this paper. A three-step reasoning is provided as a ground for further reflection. First, basic traits of Latin American transformative constitutionalism are listed to sketch out a model encompassing the manifold variety of those systems. Second, the Union's constitutional context is analysed to unveil the characteristics of a «European transformative constitutionalism». Third, comparative insights are outlined as for a number of parameters that help highlighting differences and similarities. Eventually, it is suggested that a European transformative constitutionalism is possible and credible so long as the core of *constitucionalismo transformador* does not evaporate in the process but keeps intact its axiological potential, including the attention for public deliberation as instrumental to democracy and the rule of law.

2. Latin American transformative constitutionalism: an essential portrait. The «transformative constitutionalism» concept arisen in Latin America captures multiple issues of crucial constitutional relevance. *Inter alia*, one may cite the relation between legislators and courts, the protection of fundamental rights, and the conception of democracy and of the rule of law, as well as of their mutual implications[3]. The magnitude of the concepts involved in such a definition calls for further elaboration, especially in light of the diversity among the national constitutional orders affected.

2.1. Purpose & Scope. Despite the manifold variety characterising the transformative constitutionalism experiences in Latin America, purpose and scope may be taken as fundamental features of the «model» concerned.

Purpose has been accounted for as making reality the promises of social change laid down in the Latin American constitutions[4]. This terse statement ultimately calls for an enhanced protection of fundamental rights, in terms of a reinforced relation between legislators and

[3] Cfr. The debate on the 1991 Colombian constitution and its effects on the protection of human rights: *ex multis*, M.J. Cepeda, *¿Cómo se hizo la Asamblea Constituyente? Introducción a la Constitución de 1991: hacia un nuevo constitucionalismo*, Bogotá, 1993, 173-186. On South-African transformative constitutionalism, see K. Klare, *Legal Culture and Transformative Constitutionalism*, in *South African Journal on Human Rights*, 14, 1, 1998, 146-188, and T. Roux, *Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?*, in *Stellenbosch Law Review,* 20, 2, 2009, 258-285. More bibliography and information in A. von Bogdandy, *Ius Constitutionale Commune en América Latina: Una mirada a un constitucionalismo transformador*, in *Revista Derecho del Estado*, 34, 2015, 3-50.

[4] J.E. Roa Roa, *La ciudadanía dentro de la sala de máquinas del constitucionalismo transformador latinoamericano*, in *Revista Derecho del Estado*, 49, 2021, 35-58, 39 fn 4 (nota n. 4), uses this expression in discussing a renowned book (R. Gargarella, *Latin American Constitutionalism 1810-2010. The Engine Room of the Constitution,* 2013) yet confirming that Gargarella did not immediately agree on the term «promises».

courts aimed at promoting democracy and the rule of law.[5] Yet, it has to apply to States where profound, radical social differences and weak democratic institutions lead to increasing insecurity, often degenerating in unregulated violence[6].
The scope embraces an array of cases whose constitutional relevance is established in light of national, supranational (regional) or international law[7]. Thus, the concept possesses a multi-layered structure: it relies on multiple interactions between legal orders, but does not provide any of them with a supremacy doctrine. Rather, a sort of mutual reinforcement between such orders is envisaged to strengthen the normative force of certain fundamental legal principles that all of them are supposed to contain. These principles, which some see as a *Corpus* of Inter-American law[8] – or as a *Ius Constitutionale Commune*[9] – are claimed to support the respective national constitutional claims when basic human rights are at stake[10]. This universal vocation couples with the robust moral connotation of such a *Corpus*, which rests on, and is directly linked with, the universal ethics enshrined in international law instruments concerning the protection of human rights, democracy and the rule of law, as designed and implemented in the aftermaths of WWII[11].
In this vein, Latin American transformative constitutionalism generally endorses a *multi-level* approach to constitutional issues. Comprehensive of national, regional and international law, it calls for cooperation between legislative, administrative and judicial law-makers at all levels, having as a cornerstone the respect for the human person[12].

2.2. A Cosmopolitan (Counter-)Narrative. This approach reflects a narrative that, albeit with different declinations in the States concerned, can be understood as a single one[13]. In general, the transformative approach repudiates the linear, ever-progressing conception of time typical of (neo-)liberalism; rather, it is aware of the multiple pitfalls of history, and pays attention to the preservation of social cohesion while inducing non-violent processes of change – law being the most refined instrument to such an objective[14]. In this vein, it tries to pave the way for a pluralist articulation of the community circles peoples belong to, as well

[5] A general account in R. Niembro Ortega, *Dos lecturas de la teoría de la justicia constitucional de Roberto Gargarella*, in *Revista Derecho del Estado*, 49, 2021, 159-178.
[6] It seems preferable to skip the notion of «weak states» (avoided, too, in A. von Bogdandy, *Ius Constitutionale Commune..*, cit., 8; but see fn 13 (nota 13) , and fn 16(nota 16) in order to avoid overlapping with the «Strong State» notion as emerged in the 1930's German debate: see, on the latter point, W. Bonefeld, *Freedom and the Strong State: On German Ordoliberalism*, in *New Political Economy*, 17, 5, 2012, 633-656.
[7] R. Arango, *Fundamentos del Ius Constitutionale Commune en América Latina: Derechos Fundamentales, Democracia y Justicia Constitucional*, in A. von Bogdandy, H. Fix-Fierro, M. Morales Antoniazzi (eds.), *Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos*, México, 2014, 179-192.
[8] M.E. Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, San José, 2011, 243 ss.
[9] Add, *inter alia*, G. Aguilar Cavallo, *Emergencia de un derecho constitucional común en materia de pueblos indígenas*, in A. Bogdandy, E. Ferrer Mac-Gregor, M. Morales Antoniazzi (eds.), *La Justicia Constitucional y su internacionalización. Hacia un Ius Constitutionale Commune en América Latina? Vol. 2*, México, 2010, 3-84.
[10] M. Morales Antoniazzi, *Interamericanización como mecanismo del* Ius Constitutionale Commune *en derechos humanos en América Latina*, in A. von Bogdandy, H. Fix-Fierro, M. Morales Antoniazzi (eds.), *Ius Constitutionale Commune en América Latina*, cit., 417-456.
[11] Cfr. K. Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in P. Alston (eds.), *The EU and Human Rights*, Oxford, 1999, 117-144.
[12] Y. Negishi, *The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control*, in *European Journal of International Law*, 28, 2, 2017, 457-481, in part. 479-480.
[13] S. Baldin, *The Concept of Harmony in the Andean Transformative Constitutionalism: A Subversive Narrative and Its Interpretations*, in *Revista general de Derecho público comparado*, 17, 2015, 1-25.
[14] K. Klare, *Legal Culture and Transformative Constitutionalism*, cit., 190.

as of their mutual intertwining, having as ultimate reference Planet Earth as a whole[15]. In order to attain this utterly ambitious goal, it is aware of the need to confront *taboo* arguments, understood as those that underpin and justify the enduring seizure of power by settled *élites*. Transformative constitutionalism, in other terms, dares to challenge the *narrative of truth* that such *élites* have coined to back their *status*: borrowing the words from Michel Foucault, it goes to question the *alethurgy* that they endorse[16].

Accordingly, Latin American constitutional documents are well-meditated, sophisticated products of intellectual *élites* who, bearing in mind the promises of peace and prosperity drawn by *post*-WWII international instruments, imagined a better future for their communities as inhabitants of the American continent and of the Earth as a whole. These intellectual *élites* have tried to design the tools for that future to be a material possibility in the hands of their citizens. Nonetheless, it is understood that such profound social changes are highly conflictive because of the established political-economic *élites* reluctance to accept the consequent decrease of their power. It is assumed that, in order to preserve their inherited pedestal, such *élites* are ready to look for allies wherever they can, even abroad – *i.e.*, even at the cost of breaking up the State-based cleavage and treating as *enemies*, in Carl Schmitt's terms, their own nationals[17]. In this view, the project has a cosmopolitan ambition; not as a rather simplistic call for global constitutionalism[18], but because it is grounded on, and leads to, ever-more accurate considerations and reflections on geopolitical and economic issues that interfere with the national constitutional experiences[19].

Thus, the transformative clue not only involves all national groups, but transcends the domestic frontier, as both States and private corporations are understood as actors of a broader scenario[20]. It is acknowledged that internal conflicts are tiles of a broader mosaic, and that national groups routinely rely on non-national actors to strengthen their positions in the domestic arena. In this regard, some overtly point to the existence of a subterranean network related with secret agencies[21] whose action has consisted in the deployment of violence to support some groups while ruling out others in the national battle for power[22]. Others, likewise, speak of Latin American transformative constitutionalism as laying the foundations of a «counter-narrative» – a Southern discourse[23] that challenges the Northern «globalist» *mainstream* and unveils the dark sides of (neo-)liberal capitalism[24]. Others,

[15] *Ex multis*, C. Gregor Barié, *Nuevas narrativas constitucionales en Bolivia y Ecuador: el buen vivir y los derechos de la naturaleza*, in *Latinoamérica – Revista de Estudios Latinoamericanos*, 59, 2014, 9-40.

[16] M. Foucault, *Subjectivité et vérité – Cours au Collège de France*, *Leçon du 23 janvier 1980*, and *Le courage de la vérité. Du gouvernement de soi ed des autres*, *II*, *Leçon du 23 mars 1984 – première heure*, F. Ewald, A. Fontana, F. Gros, «Hautes Études» (eds.), Paris, 2014, 3-338. See J.C. Suntrup, *Michel Foucault and the Competing Alethurgies of Law*, in *Oxford Journal of Legal Studies*, 37, 2, 2017, 301-325.

[17] C. Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corrolarien*, 1963, It. ed. (G. Miglio, P. Schiera) *Il concetto di politico*, in *Le categorie del 'politico'. Saggi di teoria politica*, Bologna, 1972, 100-165, in part. 108 ss.

[18] M. Rosenfeld, *Is Global Constitutionalism Meaningful or Desirable?*, in *European Journal of International Law*, 25, 1, 2014, 177-199.

[19] B. de Souza Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur*, Lima, 2010, 25 ss., 67 ss.

[20] See J. Arato, *Corporations as Lawmakers*, in *Harvard International Law Journal*, 56, 2, 2015, 229-295.

[21] Among historians, D. Ganser, *NATO's Secret Armies: Operation GLADIO and Terrorism in Western Europe*, London, 2004.

[22] See C. Cyrillo, É. H. Fuentes-Contreras, S. Legale, *The Inter-American Rule of Law in South American constitutionalism*, *in Sequência (Florianópolis)*, 42, 88, 2021, 1-26, in part. 12 ss.

[23] M. Carducci, *Epistemologia del Sud e costituzionalismo dell'alterità*, in *Diritto Pubblico Comparato ed Europeo*, 1, 2, 2012, 319-325.

[24] B. de Souza Santos, *Refundación del Estado en América Latina*, cit., 55 ss.

eventually, detects signs of an ongoing downfall for (neo-)liberal capitalist regimes and tie such a regression to a scarce self-awareness and self-limitation capacity, including, *inter alia*, a (lack of) due consideration for the limited resources made available by Planet Earth – or Mother Nature, as some call it[25].

2.3. A «Strong Constitutionalism» of its own kind. Further distinctive traits of this model emerge in relation to the streams of constitutional thought that Latin American constitutionalism, in general, takes as reference.

The «transformative» label has often been paralleled to another contested trademark that has gained some traction in Latin American constitutional studies: «neo-constitutionalism»[26]. It is hardly an easy task to define what «neo-constitutionalism» amounts to, not least for the reason that many scholars associated with that definition have often rejected the cited association[27]. Thus, one may refer to vague essentials only, as the emergence of a law of principles, the rise of powerful constitutional courts, or a value-based approach to legal issues[28].

Be that as it may, it seems safer to avoid the «*neo*» label and to simply refer to «strong constitutionalism»[29] as a line of constitutional thought arisen in the Western world – USA and Europe, crucially – as opposed to «weak constitutionalism». Among the basic tenets of a strong constitutionalism that are widely accepted as a reference in Latin American studies, one may include: the link between constitutionalism and human-fundamental rights, full jurisdiction for constitutional courts to review national legislation, the duty of constitutionally consistent interpretation for national judges, the defence of democracy and of the rule of law[30].

Pursuant to authors such as John Rawls and Ronald Dworkin, or Robert Alexy and Luigi Ferrajoli – just to quote examples from both sides of the Atlantic Ocean – «strong

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[25] *Amplius*, S. Baldini, *The Concept of Harmony*, cit., 14 ss.

[26] C. Anchaluisa Shive, *El neoconstitucionalismo transformador andino y su conexión con el Derecho Internacional de los Derechos Humanos*, in *Línea Sur*, 5, 2013, 15-133.

[27] M. Atienza Rodríguez, *Ni positivismo jurídico ni neoconstitucionalismo: una defensa del constitucionalismo postpositivista*, in L. Peña, T. Ausín Díez (eds.), *Conceptos y valores constitucionales*, México D.F. – Madrid, 2016, 29-30, 29-58; cfr. J. Bayón, *Democracia y derechos: problemas de fundamentación del constitucionalismo*, in M. Carbonell Sánchez, L. García Jaramillo (eds.), *El canon neoconstitucional*, Madrid, 285-355.

[28] A survey in E. Aldunate Lizana, *Neoconstitucionalismo*, in *Anuario de Derecho Público – UDP (Universidad Diego Portales, Santiago de Chile)*, 1, 2010, 361-369; E. Seijas Villadangos, *Neoconstitucionalismo*, in B. Pendás García, M. Herrero y Rodríguez de Miñón (eds.), *Enciclopedia de las Ciencias Morales y Políticas para el siglo XXI: Ciencias Políticas y Jurídicas (con especial referencia a la sociedad poscovid 19)*, Madrid, 2020, 948-951. *Amplius*, *ex multis*, E. Buriticá Arango, K. Garay Herazo *Neoconstitucionalismo, positivismo y validez*, in *Revista de Derecho* (Valdivia), XXXIII, 1, 2020, 31-52; L. Prieto Sanchís, *Neoconstitucionalismo y positivismo*, in *Crónica Jurídica Hispalense: Revista de la Facultad de Derecho de la Universidad de Sevilla*, 14, 2016, 263-279; P. Comanducci, *Constitucionalización y neoconstitucionalismo*, in P. Comanducci, M. Ahumada Ruiz, J.D. González Lagier (eds.), *Positivismo jurídico y neoconstitucionalismo*, Madrid, 2009, 85-122, and M. Carbonell Sánchez (ed.), *Teoría del neoconstitucionalismo. Ensayos escogidos*, Madrid, 2007, 3-334.

[29] M. C. Melero de la Torre, *Constitucionalismo débil*, in *Eunomía: Revista en Cultura de la Legalidad*, 13, 2017, 198-210, and C.I. Giuffré, *El constitucionalismo fuerte en la encrucijada. El constitucionalismo deliberativo como salida*, in *Revista de Derecho Político*, 118, 2023, 289-314; but see also J. Alvear Télles, *Constitucionalismo "fuerte" y "débil": una mitología de la modernidad*, in M. Ayuso (ed.), *El problema del poder constituyente. Constitución, soberanía y representación en la época de las transiciones*, Madrid, 2012, 85-136. See S. Liebenberg, *Adjudicating Social Rights under a Transformative Constitution*, in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge, 2008, 75-101, and, more recently, R. Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-form* Versus *Weak-form Judicial Review Revisited*, in *International Journal of Constitutional Law*, 5, 3, 2007, 391-418.

[30] *Ex multis*, C.S. Nino, *La constitución de la democracia deliberativa*, Buenos Aires, 1997, 15-17; more bibliography in C.I. Giuffré, *El constitucionalismo fuerte en la encrucijada*, cit., 295 ss.

constitutionalism» has walked two paths. From around the 1970's onwards, constitutional courts gained increasing awareness of their law-making potential, and this coupled with the increasing normativity attributed to national constitutions in the name of an enhanced defence of fundamental rights. These institutional-juridical elements added to one another to attain a twofold effect. On one hand, legislative law-makers had to co-exist with a judicial network of a trans-national nature involved in constitutional adjudication and supported by a rampant, likewise trans-national scholarship[31]. On the other hand, an increasing weight was attributed to values and principles, hence to moral commands «secularized» as elements of law[32] – which placed ethics at the centre of the scene to the detriment of «sovereign will» as elaborated on by representative bodies and formalised in written legal texts[33].

Therefore, debates on the democratic concerns raised by strong judiciaries have become familiar with the idea of a fully-fledged constitutional review as a tool to protect rights, beyond, or against, the will of the legislators. Particularly, the «counter-majoritarian difficulty»[34] has been set aside in the name of a more ductile, *softened* law[35]. Yet, noticeably, this did not happen due to such difficulty being discussed and solved, but in light of what may be called a *superveniens* irrelevance. To be clear: the strong constitutionalism wave has not really managed to successfully respond to the arguments raised by other competing claims[36]. Rather, the victory has come *by default*, or forfeit: such claims have prevailed in the academic dispute[37] as an implicit assumption has gradually surfaced[38], namely, the conciliative, *irenic* role of shared ethics lying at the grounds of constitutional discourses[39]. A common morality stemming from constitutional and international law has been reported to emerge, and to grant social cohesion through the protection of fundamental rights. While operating as a binding limitation to the authority of all actors involved, this common morality offers a single shared ground for solutions to be provided to the conflicts concerned.

Unveiling this *irenic* assumption – the idea that political conflicts are reduced to legal disputes and solved by applying precepts that descend from this common morality – is crucial to understanding the arguments raised by the supporters of strong constitutionalism. Only under such perspective can political bargaining be compared to judicial argumentation[40]; absent this bias, the former, in the name of the «sovereign will», could offer solutions that would be precluded to the latter. But, if politics are morally bounded as much as jurisdiction is, political questions turn neutralised: law, as vehicle of a morality that all actors are supposed to accept, would suffice, alone, for the purpose of keeping society in peace. (Re-)politicising

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[31] See, for example, F. Balaguer Callejón, *Un jurista europeo nacido en Alemania. Conversación con el Profesor Peter Häberle*, in *Anuario de derecho constitucional y parlamentario*, 9, 1997, 9-52; more recently, I. Gutiérrez Gutiérrez, *El Jurista Europeo*, in *Revista de Derecho Constitucional Europeo*, 23, 2023.

[32] T. A. Aleinikoff, *Constitutional Law in the Age of Balancing*, in *The Yale Law Journal*, 96, 5, 1987, 943-1005.

[33] *Ex multis*, M. Luciani, *L'antisovrano e la crisi delle costituzioni*, in *Rivista di diritto costituzionale*, 1, 1996, 124-188.

[34] O. Bassok, *The Two Counter-Majoritarian Difficulties*, in *Saint Louis University Public Law Review*, 31, 2, 2012, 333-382.

[35] G. Zagrebelsky, *Il diritto mite*, Torino, 1992, 15 ss.

[36] G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Torino, 2006, 277 ss.

[37] See the dialogue between R. Guastini, *Sostiene Baldassarre*, and A. Baldassarre, *Una risposta a Guastini*, in *Associazione dei costituzionalisti – Archivio*, 2007.

[38] A. Baldassarre, *Miseria del positivismo giuridico*, in *Studi in onore di Gianni Ferrara vol. I*, Torino, 2005, 201. ss. Cfr. L. Mengoni, *Ermeneutica e dogmatica giuridica*, Milano, 1996, 40 ss.

[39] A. Baldassarre, *Costituzione e teoria dei valori,* in *Politica del diritto*, 1, 1991, 639 ss.; cfr. G. Bongiovanni, *Dalla 'dottrina della costituzione' alla 'teoria dei valori': la ricerca di un difficile equilibrio*, in *Democrazia e diritto*, 1, 1997, 73-110, and A. Ruggeri, *"Balances" entre valores constitucionales y teoría de las fuentes*,in *Teoría y realidad constitucional*, 12, 13, 2003, 155-180.

[40] As in R. Alexy, *Balancing, constitutional review, and representation*, in *International Journal of Constitutional Law*, 3, 4, 2005, 572-581, in part. 579 ss.

such questions would be redundant instead, meaningless, or even counter-productive: a comeback of politics could reignite latent conflicts and put that peace in jeopardy.

2.4. «Polemic». In this light, another trait of Latin American transformative constitutionalism emerges with some clarity. Latin American transformative constitutionalism is well aware of the differences in the values underpinning societal groups whose mutual distance is obvious and can be measured by objective indicators including wealth, education, ethnicity, geography. As society cannot be considered as resting on a common moral platform, political questions are far from neutralised. From a Latin American viewpoint, therefore, the divide between law and politics, will and morality/*ratio* as heterogeneous components of law, is still discernible, a mixture of both being necessary and instrumental to social peace.

As a result, Latin American scholars endorsing a transformative approach struggle to dialogue with fellow European/North-American colleagues who still offer arguments for courts to perform a «transformative», *lato sensu*, function. Just as one example, in a recent paper Carlos Ignacio Giuffré notices that some of the best-known supporters of a «strong constitutionalism» favour deliberative democracy but construe it by seemingly «inconsistent» arguments[41]. Rawls, Dworkin and Alexy – those he analyses; but his reasoning, *mutatis mutandis*, is applicable to others, too[42] – explicitly side with deliberative democracy. Yet, if one looks closely into their arguments, their proposals are only in vague accordance with the conception of justice, as well as of constitutional review as an instrument to attain it, that they support. As they back deliberative democracy – one may contend – they should build it up in line with the same views that give structure to «strong» judicial review[43]; yet, they somehow take it for granted, as political deliberation came smoothly, with no need to provide room for it to actually take place.

In fact, one can say, the *irenic* assumption is proper to the European and Northern American advocates of strong constitutionalism, but hardly persuades their Latin American colleagues. If understood in the perspective of a common morality that restricts the possible outcomes while limiting the behaviours of the actors involved, political deliberation looks like a duplicate of judicial argumentation, and hardly needs to be construed in its own fashion. Conversely, Latin American transformative constitutionalism has a crucial attention for the twofold dimension of democracy – political deliberation and judicial adjudication – for its advocates are fully aware of the tremendous conflict they are confronted with – one that no alleged common morality can attenuate nor reduce to a judicial application of the precepts it allegedly generates. In their view, such a morality is non-existent, invisible, or, anyhow, ineffective in that regard: diverse groups pursue their own interests with the utmost tenacity regardless of the unbearable consequences it would entail for some of their fellows. This allegedly common morality may not be deployed as a *jurisgenerative* tool: if construed as a product thereof, law would just endorse the claims of one part, or group, to the detriment of the remainder of the society, and would never work for the latter's pacification – it would rather pave the way to chaos[44] and possibly war[45].

Following this assumption, the oft-quoted *manifesto* of the transformative concept – to turn

[41] C.I. Giuffrè, *Constitucionalismo fuerte y democracia deliberativa: Inconsistencias en Rawls, Dworkin, y Alexy*, in *International Journal of Constitutional Law*, 21, 5, 2023, 1273-1301.
[42] Cfr. L. Ferrajoli, *I fondamenti dei diritti fondamentali*, in Id., *Diritti fondamentali. Un dibattito teorico*, *I*, Roma-Bari, 2001, 277-370.
[43] Cfr. C.F. Zurn, *Deliberative Democracy and Constitutional Review*, in *Law & Philosophy*, 4-5, 21, 2002, 467-542.
[44] M. Luciani, *Dal cháos all'ordine e ritorno*, in *Rivista di filosofia del diritto*, VIII, 2, 2019, 349-378.
[45] G. Agamben, *Homo Sacer, II.2 – Stasis. La guerra civile come paradigma politico*, Torino, 2005, 22 ss.

into reality the promises of social change contained in Latin American constitutions – serves both as an objective and as a methodological tip. At a closer look, this assumption rests on four steps. One, recognition of a conflict among social layers with radically different moral backgrounds and needs. Two, acknowledgement of the urgency to construe more «acceptable» solutions for society as a whole. Three, recognition of the political nature of these solutions, as they pursue a substantial modification of the current interpretations of constitutional norms. Four, indication of a specific aim related to the political nature of these solutions: their direction towards a more egalitarian accommodation of diverse social groups.

2.5. «Inclusive». As a result, transformative constitutionalism is aware that the interpretive solutions advanced are meant to bring about social change through law, that is, to openly challenge the *status quo* with the intention to modify it toward further egalitarianism[46]. Likewise, it understands that such solutions will most likely be perceived as contrary to law, morality and personal interest by some of the recipients, who will show reluctance to obey them as much as they can afford it – to be clear: as much as they possess the means to oppose the solutions they dislike with the necessary force.

Therefore, the application of such solutions cannot be pursued as a straightforward imposition of a well-established rule[47]. Such an imposition would likely generate further inequalities: the new norm would be applied effectively only to those who lack the means to escape it – it would entirely miss its egalitarian objective while producing instead further inequality. Conversely, the solution sought must have due regard for the utmost political sensitivity of the issues involved: it will have to mediate between opposites and take into due consideration the rights and interests of all the persons affected[48].

Following this path, transformative constitutionalism engages with politically sensitive negotiations and paves the way for the respective arguments to rest on constitutional grounds, and to be phrased as juridical claims. It does so in view of a twofold goal. One, that nobody is radically excluded from the to-be-construed arrangements. Two, to induce the settled *élites* to accept a compromise: a certain *deminutio* in their wealth and «power» – understood as pure *Macht* – in exchange for enhanced social security and prosperity. *D'ailleurs*, one may say, a billionaire in the middle of a civil war is less happy than a fairly wealthy person in a peaceful society; or, anyhow, such an idea makes this bargaining of constitutionally relevant positions feasible, or, at least, conceivable.

It is worth noting that, under this approach, law – *transformative constitutional law* – is the counterpart of a settled authority and, at the same time, the instrument to endorse a rising authority with the necessary legitimacy; this new authority, then, derives its legitimacy from the former with no breach of the reciprocal continuity[49]. In this respect, transformative constitutionalism calls for non-revolutionary, but evolutionary change[50]; it aims to foster a revolution through law,[51] or, else – borrowing a terse definition once coined for the primordial North American constitutionalism – it is a project of «constitutional revolution»[52].

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[46] B. de Sousa Santos, *Derecho y Emancipación*, Quito, 2012, 42 ss, 100 ss.
[47] S. Colloca, *Sul limite del diritto. Studio di filosofia dell'ordinamento giuridico*, Bari, 2023, 61 ss.
[48] R. Gargarella, *Recuperar el lugar del pueblo en la Constitución*, in R. Gargarella, R. Niembro Ortega (ed.) *Constitucionalismo progresista: retos y perspectivas*, México D.F., 2016, 15-55.
[49] D. Zolo, *Teoria e critica dello Stato di diritto*, in P. Costa, D. Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milano, 2003, 17-88.
[50] B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*, Cambridge (Massachusetts), 2019, 1, 27 ss.
[51] B. de Sousa Santos, *Derecho y Emancipación*, cit., 91 ss., 110 ss.
[52] N. Matteucci, *La Rivoluzione americana: una rivoluzione costituzionale*, Bologna, 1987, 137 ss.

This law must operate so that the divide between *rule of law* and *Rechtsstaat*[53]– the former born to *oppose* the established power, the latter raised to *defend* it – blurs in a single construct of a political-juridical nature, which would operate both as an external limit to the settled power and as an internal limit for an emerging one[54].
These peculiar arrangements require *inclusiveness*: capacity of driving the transformation by internalizing and institutionalising the rights and interests of further and further layers of the population, while excluded rights and interests never surpass the limits of the «acceptable» for the society as a whole to live in peace. Noticeably, such limits, one may say, draw the boundaries of a prospective common morality to be achieved as the result of the negotiation. Such a moral commonality, therefore, is looked at as a desired goal, rather than as an *a-priori* assumption: it does not generate law, but is rather the prospected, and somehow expected product of the generated law.
In the same vein, Latin American transformative constitutionalism is designed to let citizens in «*la sala de máquinas de la constitución*» – as Roberto Gargarella calls it[55]. It questions the «form of the power»[56] in all its articulations, *in primis* as regards the courts entrusted with the transformative task[57]. In this view, constitutional adjudication ceases to be a «last word» instance and turns a chamber of compensation for a broader, unterminated law-making process whose objective is the never-ending inclusion of the multiple layers of a plural society towards egalitarianism[58].

2.6. «Collective». Built on recognition of the settled authority, the challenge raised by transformative constitutionalism, though severe and profound, comes with maintenance, not demolition, of the structures of that authority. Transformative constitutionalism is *constructivist* in a fully-fledged, wide-ranging sense, and would not remain sterile – quite the opposite – as it comes to strengthen the participative, deliberative side of the society concerned.
In this perspective, Latin American transformative constitutionalism endorses a *collective* dimension of the rights and interests at stake. It is not content with the sole establishment of human rights as such, but is extremely concerned with the collective dimension of such rights in view of a restoration and fine-tuning of the balance between all the groups composing a plural society.
This assumption is clear in the *arrêts* most often quoted as emblematic of the transformative approach, at both national and supranational level. Two lines can be taken as paradigmatic.
As a reference, one can look at the cases of gross human rights violations perpetrated by authoritarian regimes – for instance, at the «transitional justice» case-law pursued in

[53] D. Zolo, *Teoria e critica dello Stato di diritto*, cit.; R. Bin, *Lo Stato di diritto*, Bologna, 2004, 7 ss.
[54] B. Ackerman, *Revolutionary Constitutions*, cit., 5 ss., *passim*. On the dialectic, «apparently oxymoronic» relationship between «Tradition» and «Revolution» in the legitimation of political authority, A. Lucarelli, *Tradition and Revolution: Law in Action*, Lausanne, 2024, 13 ss., *passim*.
[55] R. Gargarella, *Latin American Constitutionalism 1810-2010. The Engine Room of the Constitution*, Oxford, 2013.
[56] As in the *opus magnum* by F. Rubio Llorente, *La forma del poder. Estudios sobre la Constitución*, Madrid, 1993.
[57] J.E. Roa Roa, *Control de constitucionalidad deliberativo. El ciudadano ante la justicia constitucional, la acción pública de inconstitucionalidad y la legitimidad democrática del control judicial al legislador*, Bogotá, 2019, 37 ss., 309 ss., 449 ss.; recently, A. Cannilla, S. Suteu, *Ciudadanía y justicia. El control de constitucionalidad desde la democracia deliberativa*, in *Revista Derecho del Estado*, 55, 2023, 191-205.
[58] R. Gargarella, *La justicia frente al gobierno. Sobre el carácter contramayoritario del poder judicial*, Buenos Aires, 1996.

Argentina after Videla's demise[59]; or at cases such as *Barrios Alto* v *Peru*[60] decided by the *Corte Inter-Americana de Derechos Humanos*. Systematic violations of individual human rights are considered in the framework, and as a consequence, of a political collapse, and the *pars construens* – the objective to restore peace through justice and, crucially, promotion of democracy – is present at any height of the reasoning. Not only personal responsibilities are established, and persons *uti singuli* are sentenced, but a clear-cut evaluation is expressed as regards the concrete practice of the power as it stems from the circumstances of the case, and conditions are figured out for this practice to take an opposite evolutionary path.

In the same vein, one can look at the cases on the rights of Indigenous peoples and Afro-descendants, as those decided by the Colombian Constitutional Court[61]. These cases, in the perspective of this work, pave the ground for a threefold reflection. First, the victims belong to *excluded* groups – *i.e.*, groups suffering violations of rights and interests without being able to exercise commensurate rights to voice[62]. Second, the remedy is the so-called «binding consent» that such minorities are entitled to, which consists precisely in restoring their participative, *political* right to voice that they have not been effectively granted[63]. Third, such remedy is not presented as a right to veto, but more as a card to be spent in the course of a process aiming at «the most balanced» – not the «best», as it would be defined under an assumedly single common morality; but, crucially, «the most balanced» – protection of the rights and interests at stake[64].

Thus, a clearer word can be said on the essentials of Latin American transformative constitutionalism, which is, in essence, *polemic*, *inclusive*, and *collective*. «Polemic» for it is aware of the span, intensity and radicality of the political conflict it must confront and does not aim to conceal it behind an alleged moral commonality[65]. «Inclusive», because it paves the way for this conflict to be solved through enhanced, more effective institutionalisation of

[59] Cfr. A. Barahona de Brito, *Verdad, justicia, memoria y democratización en el Cono Sur*, in *Las políticas hacia el pasado: Juicios, depuraciones, perdón y olvido en las nuevas democracias*, Madrid, 2002, 195-246; J.M. Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in P. de Greiff (ed.), *The Handbook of Reparations*, Oxford, 2006, 21-54; more recently, L. Schneider, *La reparación de los crímenes de Estado en Argentina. De la justicia transicional a las prácticas reparatorias*, in *Estudios de Derecho*, 80, 175, 2023, 7-33. For a comparison with Peru, see A. Serranò, *El derecho de acceso a la justicia de las víctimas de violaciones de derechos humanos en Perú. La Corte Interamericana de Derechos Humanos ante el indulto de Alberto Fujimori*, in *Anuario iberoamericano de justicia constitucional*, 25, 2, 2021, 485-511.

[60] IACHR, *Barrios Altos* v. *Peru*, March 14, 2001, www.corteidh.or.cr/docs/casos/articulos/seriec_75.

[61] A thorough survey in J.C. Herrera, *Judicial Dialogue and Transformative Constitutionalism in Latin America*, cit., 222 ss.

[62] *Ibid.*, 200 ss.; see D. Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, in *George Washington International Law Review*, 37, 3, 2005, 687-744, in part. 736 ss.

[63] M. Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, in *The International Journal of Human Rights*, 16, 1, 2012, 1-24.

[64] J.C. Herrera, *Judicial Dialogue and Transformative Constitutionalism in Latin America: The Case of Indigenous People and Afro-Descendants*, cit., 211 ss.; see C.E. Salinas Alvarado, *La consulta previa como requisito obligatorio dentro de trámites administrativos cuyo contenido pueda afectar en forma directa a comunidades indígenas y tribales en Colombia*, in *Revista Derecho del Estado*, 27, 2011, 235-259; W.Y. Vivas Lloreda, *Prior consultation as a fundamental right of collective ownership of indigenous, afro-descendant, rum and tribal peoples and its ineffectiveness in the protection of protected territories*, in *Cathedra*, 10, 16, 2021-2022, 39-59, and H. Cantú Rivera, *Towards a global framework on business and human rights, Indigenous Peoples, and their right to consultation and free, prior and informed consent*, in C. Wright, A. Tomaselli (eds.) *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap*, London – New York, 2019, 27-40.

[65] M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico*, in *Giurisprudenza costituzionale*, 51, 2, 2006, 1644-1669; see A. Lucarelli, *Diritto e conflitti nell'incertezza della produzione giuridica*, in *Rivista AIC*, 3, 2024 (17 July) 77-87.

social diversity among equals[66]. «Collective», as it claims that a sufficiently profound rearrangement of the society can only be achieved by strengthening rights to voice in a manner that is commensurate to the material rights at stake. Only if all voices are sufficiently taken into account on an equal footing at all heights of the law-making, then there will be a chance to achieve a fairer distribution of resources; and this is all the more urgent as it is understood that a single-handed right-based approach is untenable in a world of finished means[67]. Against this background, Latin American *constitucionalismo transformador* aims to bind together rights and duties, the individual and the collective dimension, into a single theoretical structure.

3. Constitutionalism and the European Union: a problematic evolution. Constitutionalism, as a stream of thought and as an ideal, has inspired the European Union since the very beginning: a look at the ECSC and EEC Treaty Preambles would suffice to get acknowledged with the robust constitutional ambitions of the overall project. For the limited scope of this work though, a drastic selection of topics and arguments is required to briefly outline the basic traits of a 70year-long trajectory, which may be associated, *prima facie*, with the evolutionary journey of a European model of transformative constitutionalism.

3.1. Purpose & Scope. Following the Latin American path, it seems sound to ask, as a first question, whether European constitutionalism is provided with single, well-defined purpose and scope.

The answer is in the affirmative. On one hand, European constitutionalism aims at a specific objective, the pursuit of an «ever closer union»[68]: this ambiguous, though renowned formula points to the replacement of Nation-States with a federal-like entity, yet of an indefinite, unterminated nature[69]. On the other hand, it has gradually broadened its applicative scope from a strict reading of legal bases to a teleological approach aiming to uniformity in all sectors in which the Union has a regulatory interest[70]. Crucial to such expansion is the rise of its key concept: *primacy*, that is, prior application, however phrased, of Union law *vis-à-vis* national laws[71]. Such a priority, in fact, is decisive to further the integration through the well-known *functionalist* mode[72], which relies on *dual supranationality*[73] and gives law an openly constructive role in the accomplishment of the process.

It may look surprising that a European transformative constitutionalism is not directly concerned with the defence of democracy, human rights and the rule of law as the Latin

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[66] J. Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt, 1996, 65 ss.

[67] Cfr. R. Bin, *Critica alla teoria dei diritti*, Milano, 2019, 33 ss.

[68] R. Bieber, J.-P. Jacqué, J.H.H. Weiler, *An Ever Closer Union. A critical analysis of the draft Treaty establishing a European Union*, pref. A. Spinelli, *EC Official Publications: The European Perspectives*, Luxembourg-Bruxelles, 1985, in part. 7-16.

[69] J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in *European Law Journal*, 1995, 1, 3, 219-258.

[70] M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali*, Napoli, 2018, in part. 59 ss.

[71] K. Lenaerts, T. Corthaut, *Of birds and hedges: the role of primacy in invoking norms of EU law*, in *European Law Review*, 31, 3, 2006, 287-315. Most recently, L. S. Rossi, C. Tovo, *Il principio del primato del diritto dell'Unione Europea*, in *Enc. Treccani,* Roma, 2023, 97-109.

[72] A survey in A. Hayrapetyan, *Federalism, Functionalism and the EU: The Visions of Mitrany, Monnet and Spinelli*, in *E-International Relations*, 21 September 2020, 1-5; see G. de Búrca, *Rethinking Law in Neofunctionalist Theory*, in *Journal of European Public Policy*, 12, 2, 2005 – *Special Issue: The Disparity of European Integration: Revisiting Neofunctionalism in honour of Ernst Haas*, 310-326.

[73] J.H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, in *Yearbook of European Law*, 1, 1, 1981, 267-306.

American one is. In fact, an express mention of European common values and principles features in the Treaties from relatively late, whereas a Charter of fundamental rights only appears in late 2000 to acquire binding value by the Treaty of Lisbon. Yet, this does not mean that such objectives are extraneous to European constitutionalism. Rather, though rights, values and principles have been present since the very beginning, the way they enter the European integration process is peculiar to the latter.

3.2. Moral commonality, and moral «superiority», as «a-priori». In fact, instrumental to the construction of European values such as the defence of human rights, democracy and the rule of law is the assumption that, pursuant to the constitutional documents adopted across Europe in the war's immediate aftermaths[74], a common moral background emerges in reaction to the evils perpetrated. This background, in accordance with the international law instruments ratified in the same period, keeps Europe's *post*-WWII States aligned on a single constitutional line.

The cornerstone of this moral commonality is the centrality of the human person[75] and of her dignity[76]. This concept rests on two pillars: general universal suffrage and constitutional protection of fundamental rights. Though construed in various ways by each national constitution, this passage seems to work as a common ground for the constitutional edifices of the Founding Member States: Republican Italy (1948) Federal Western Germany (1949) and France (both the IV and V *République*, the latter dating back to 1958).

By corollary, it seems safe to affirm that such concept forms a constitutional *acquis* for Europe: a non-regression point, a forever possession in the course of history, the preservation of which is supremely necessary in order not to get back to the horrors of the previous decades.

In principle, this *acquis* aligns with the legal-philosophical grounds underpinning Latin American transformative constitutionalism and has potential to cohere with the latter's cosmopolitan ambitions accounted for above. However, the following two characteristics can be considered as peculiar to the European context.

First, the common moral background undergirding national constitutions works as an *a priori* to the development of the European constitutionalism. In this light, «European transformative constitutionalism», yet not directly referring to values, possesses a solid ethic pedestal: this moral commonality is more than a desired goal to achieve, or the embryo of a promise to be maintained. Rather, it is an *a-priori*, a given condition whose axiological potential fosters, and modifies, the course of the integration.

Second, by virtue of this moral commonality, the European project is presented as the natural follow-up of *post*-WWII national constitutions, and the coherent development of the values they enshrine[77]. More precisely, the European project is presented as the best option to

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[74] See F. Bonini, S. Guerrieri (eds.), *La scrittura delle costituzioni. Il secondo dopoguerra in un quadro mondiale*, Bologna, 2020. Shifting the focus to the present day, cfr. A. Patroni Griffi, *L'identità plurale dell'Unione europea – Editorial* for the *Special Issue E pluribus unum: le identità in Europa* (ed. A. Patroni Griffi) *Diritto pubblico europeo – Rassegna online*, 23, 1, 2024, 1-8, in part. 2.

[75] A. Ruggeri, *Il principio personalista e le sue proiezioni*, in *Federalismi.it*, 17, 2013 (28 August), 1-34; see also E. Caterina, *Personalismo vivente. Origini ed evoluzione dell'idea personalista dei diritti fondamentali*, Napoli, 2023, 165 ss.

[76] *Ex multis*, P. Ridola, *La dignità dell'uomo e il "principio libertà" nella cultura costituzionale europea*, in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, 77-137, in part. 102 ss. and Y. Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights*, in D. Kretzmer, E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse*, The Hague, 2012, 1-18.

[77] As it is apparent from a comparative reading of the Preambles of the ECSC and EEC Treaties. On the role and value of Preambles, J.O. Frosini, *The making of constitutional preambles*, in D. Landau, H. Lerner (eds.), *Comparative Constitution Making*, Routledge, London-New York, 2019, 341-361.

endow such values with an enduring protection, as the integration would preserve the European society from the rise of totalitarian nationalist regimes whose aggressivity had triggered the World War.

This peculiar relation tying values, and fundamental rights, to the European project rests on a robust irenic postulate, which goes as follows: as instrumental to the consolidation and enduring defence of the States' constitutional projects and their common morality, Europe's ever-growing integration is assumed as an end *per se* – something that invariably brings benefits for all Member States – which must be promoted and pursued as such[78].

This overall background explains why Europe's law, as instrumental to ever-growing integration, enjoys an implicit *moral superiority*. This positive bias emerges in the arguments of early «Community lawyers»[79] supporting «the application of Community law over national law no matter what, in conformity with the teaching of the Court of Justice»[80]. In fact, due to the cited value commonality, Community law is reportedly capable of protecting rights and interests on a European-wide scale while staying within the margins of a prospective equivalence with national law[81]. It is, therefore, an equivalent but Europe-wide, hence, «better» (as presumptively avoiding the comeback of aggressive authoritarianisms) concretisation of the national constitutional projects.

Noticeably, the pair «moral superiority & perspective equivalence» neutralises constitutional conflicts between national and Community's laws. The formal question of «which law applies» turns irrelevant: what acquires centrality is the material question of which law protects the rights and interests at stake in a way perceived as «better»[82]. This value judgment, yet resting on a twofold presumption – the moral commonality and the perspective equivalence with the will of the peoples and States to which that very law will apply – leaves the Court of Justice with the task of selecting national laws to pick up a «better» solution. As a result, national sovereignty is not formally attacked but simply replaced, as all Union's measures furthering integration are presumed to be coherent with each Member State's own self-determination.

The same pair – «moral superiority & perspective equivalence» – is also crucial to the understanding of the whole constitutional conceptual toolkit designed to implement primacy. Such an evolution, in fact, occurs through an evolutionary development of legal hermeneutics, which depart from «classic» inter-State public international law to enter the yet-uncharted *after-State* waters.

If looked at in this perspective, primacy is the tool by which the Community is to defend and perpetuate the cited common constitutional *acquis*. In fact, primacy is instrumental to

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[78] See, *ex multis*, P. Gori, *La progressiva affermazione giudiziaria del diritto europeo*, in *Rivista di diritto civile, I,* 1969, 198-213.

[79] «Authors who gravitate around the Communities» in the definition offered by R. Treves, *Introduzione generale*, in Id. (ed), *Diritto delle Comunità europee e diritto degli Stati membri*, Roma, 1969, 15, who sarcastically exposes both their active partisan engagement and their tendency to present as law what is rather a concretisation of their political auspices.

[80] N. Catalano, *Portata dei Trattati istitutivi delle Comunità europee e limiti dei poteri sovrani degli Stati membri*, in *Foro Italiano*, 1964, IV, 153.

[81] A standard that echoes a wider-ranging equivalence with general principles of international law enshrined in the UN Charter. *Ex plurimis*, see S. Platon, *The 'Equivalent Protection Test': From European Union to United Nations, from Solange II to Solange I*, in *European Constitutional Law Review*, 10, 2, 2014, 226-262, and L.I. Gordillo Pérez, *Interlocking Constitutions: Towards an Interordinal Theory of International, European and UN Law*, Oxford, 2012, 20 ss., 41-42. More recently, see A. Bobić, *Constitutional Courts in the Face of the EU's Reconfiguration*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 85, 1, 2025, 523-545.

[82] J.H.H. Weiler, *A Quiet Revolution. The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 26, 1994, 510-534.

pursuing the ever-closer union objective by an ever-expanding application of Community law; and this objective is instrumental to defending and perpetuating the national constitutions' legacy against the comeback of authoritarianism.
This construction is one of the many theoretical accounts crafted to justify primacy. However, as far as this work is concerned, it seems preferable to all others due to its historical depth. Other accounts, in fact, point to a constitutional rupture, in the methodology as well as in the contents credited with constitutional relevance[83]. Thus, such accounts describe Community law along a line of discontinuity, and its application, ultimately, as a breach of national constitutions. This invariably leads to a *radicalization* between opposite poles – those who accept the new European order yet to be established, and those who defend the old inter-State order despite its rarefied effectiveness – the solution of which cannot be a matter of law but one of pure force.
In this line, one can say, there is a strong juridical link between primacy and the national constitutional legacy. Questioning this link is mandatory to preserve the binding value of Community law without coming to a rupture with national constitutions, which would be the demise of the *post*-WWII constitutional *acquis* and open to possible comebacks of bellicose authoritarian regimes.
This question leads to scrutinising the evolution of the Union law's hermeneutical criteria, as regards both the relentless, teleological and systematic expansion of the applicative scope of Union law and the applicative priority the latter enjoys *vis-à-vis* national law. Although sharp divides are hardly detectable throughout such a tortuous path, four stages may be roughly described as explicative of remarkable turns in the interpretation of Union law.

3.3. Supranationalisation. Six States decide to freely commit to an ever-closer union: they agree to gradually put in common entire sectors of their national economies and legal orders. They formalize such an agreement by means of *ad hoc* Treaties, which makes their will explicitly aimed at furthering integration – *functionally*, gradually, but relentlessly.
Such a *special will* entails a shift in legal interpretation. The intent of sovereign States is no longer understood as reflected in the wording of the Treaties – where there is States' will, there is law – but as supporting a teleological-systematic interpretation of all measures based on those Treaties[84]. The underlying rationale is that such an interpretation, while broadening Community law's scope, would translate their initial will into reality. Thus, Community law's moral preferability is justified in voluntarist terms, precisely as the positivist inter-State law's methodology required. This decisively strengthens Community law's claim to «special autonomy» *vis-à-vis* national/international law, as that claim is rephrased in hermeneutical terms that are immediately applicable: on one hand, the de-coupling of textualism and voluntarism; on the others, the latter's coupling with moral teleologism, for the will of the States comes to coincide with the boundaries of a teleological and systematic reading of Community law.

[83] The model accounts for the so-called «self-rupture of the constitution», or *Selbstverfassungsdurchbrechung* it comes from Carl Schmitt's theory of the emergency powers and goes as far as to figure out zones of «a-constitutionality» within a constitutional order. See C. Schmitt, *Diktatur und Belagerungszustand: Eine staatsrechtliche Studie*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 38, 1916, 138-161, in part. 148 ss.; cfr. W. Scheuerman, *States of Emergency*, in *The Oxford Handbook of Carl Schmitt*, Oxford, 2016, 547-569, in part. 548 ss. Some Spanish scholars use this concept with regard to the European integration: see Á. Figueruelo Burrieza, *Acotaciones al tema de las relaciones entre el Derecho comunitario y el Derecho interno*, in *Revista de Estudios Políticos*, 51, 1986, 191-212, in part. 196 ss., and A. Ruiz Robledo, *El ordenamiento jurídico europeo y el sistema de fuentes español*, in *Revista de Derecho Político*, 32, 1991, 29-54, in part. 38 ss.
[84] See G. Vosa, *Il principio di essenzialità. Profili costituzionali del conferimento di poteri tra Stati e Unione europea*, Milano, 2020, 35 ss.

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In fact, immediately applicable consequences have indeed stemmed from that shift. The numerous tools appeared in the Court of Justice's case law to give Community law prior application in an ever-expanding array of cases – such as direct effect, *pre*-emption, *effet utile*, and the like – rest on a fundamental assumption: Community law, as special and autonomous, is to be preferred to national law due to the moral necessity to attain its specific objective. Clearly, this entails a subversion of ordinary positivist logics, under which norms are allowed to attain their purpose *if, and only if*, they can apply to the case concerned – not really the other way round. Cause and effect are now reverted as a result of the alleged moral preferability attached to whatever norm may contribute to the ever-closer union objective.
This turn opens the realm of *teleologics*, that is, the logics of the prevalence of the *telos* on the wording of the legal texts that represent the formal will of the States (that is, the product of general universal suffrage). Community law's correspondence with this will is taken as implicit in light of the involvement of the States in the supranational political process. Noticeably, this process, in the first place, is only intergovernmental; later on, instead, it is allegedly backed by the European Parliament whose empowerment is instrumental to the abandonment of the unanimity rule in the Council[85].

3.4. Constitutionalisation. Following the *teleologics* scheme, Community law knocks at the door of constitutional law, too, as it claims priority not only on ordinary State legislation but also on constitutional laws and fundamental rights[86]. The interpretive strategy the Court of Justice deploys in the first place amounts to an irenic European constitutionalisation of such rights[87]. The Kirchberg judges undertake to grant them a protection that is equivalent, or even identical, to the best national constitutional standards[88]; but they claim to do so under Community law. Particularly, general principles of Community law stemming from «national constitutional traditions» – a name echoing the link with national constitutions and their *acquis*[89]– are held to exist and recognized as belonging to European citizens, via some sort of *inventio juris*[90], by the Court of Justice. The result goes as follows: Community law enjoys primacy, but only to the extent that it replicates, or at least does not fall too far from, the solutions offered by the Member States[91]. The underlying assumption is, as mentioned above,

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[85] See D. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, in *Common Market Law Review*, 30, 1, 1993, 17-69, and D. Grimm, *Il significato della stesura di un catalogo europeo dei diritti fondamentali nell'ottica della critica dell'ipotesi di una Costituzione europea*, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell'Unione europea*, Roma-Bari, 2003, 5-21, in part. 18.

[86] J.H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, in *Washington Law Review*, 67, 1986, 1103-1143. A broad survey in S.P. Panunzio, *I diritti fondamentali e le Corti in Europa: un'introduzione*, in Id. (ed.) *I diritti fondamentali e le Corti in Europa*, Napoli, 2005, 3-104.

[87] K. Lenaerts, *Le respect des droits fondamentaux en tant que principe constitutionnel de l'Union européenne*, in M. Dony (ed.) *Mélanges en l'honneur à Michel Waelbroeck*, Bruxelles, 1999, 423-457.

[88] Add G. Repetto, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale*, Napoli, 2011, 207 ss., and S. Ruiz Tarrías, *Las "tradiciones constitucionales comunes" en el ordenamiento Europeo. Su valor jurídico en el Tratado de Lisboa*, in F.J. Matía Portilla (ed.) *Estudios sobre el Tratado de Lisboa*, Granada, 2009, 95-112.

[89] M. Fichera, O. Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, in *German Law Journal*, 20, 8, 2019, 1097-1118.

[90] Cfr. P. Grossi, *L'invenzione del diritto*, Roma-Bari, 2017, 90 ss.

[91] P. Cruz Villalòn, *La identidad constitucional de los estados miembros: dos relatos europeos*, in *AFDUAM*, 17, 2013, 501-514, and V. Constantinesco, *La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales: convergence ou contradiction? Contrepoint ou hiérarchie?*, in *L'Union européenne: Union de droit, union des droits. Mélanges en l'honneur du Prof. Philippe Manin*, Paris, 2010, 79-94. See J. de Poorter, G. van der Schyff, M. Stremler, M. De Visser, I. Leijten, C. van Oirsouw (eds.), *European Yearbook of Constitutional Law 2022: A Constitutional Identity for the EU?*, Berlin, 2023, with multiple works maintaining conflicting views on the topic.

perspective equivalence: pursuant to the moral background common to the States' constitutions and proper to the Community as a perpetuation thereof, the provided solutions would be equivalent to, or at least *tolerably* different from, one another. Thus, Community law, though absorbing, or anyway taking into due account, the solution offered by national law, can apply with priority on the latter to virtually coincide with the «the law applicable in the European space» in a *de facto* monism.

As a corollary, the question of formal separation between legal orders turns into the material question of the *better protection* for the rights at stake – a protection that, via the judicial dialogue coordinated by the Court of Justice, Community law would make its own and raise to the *status* of a European constitutional standard[92]. This interpretive shift has a twofold effect. One: it helps concealing the sovereignty knot in order to skip the question on the allotment of ultimate authority. Two: it suggests that this knot be disentangled only in an indefinite future, as indefinite as the horizon that the ever-closer union concept points to.

In this vein, the evolution of the common values enshrined in national constitutions is reported to tie the Member States into a single constitutional stream, which removes the boundaries among States and leads to a European constitutional law[93].

Within this single stream, the «strong constitutionalism» born at State level adds to the supranational experiment to foster the emergence of a «law of principles» as opposed to a law of (written-positive) norms[94], the judicial and doctrinal formants taking priority on legislation as components of law[95]. In the same line, the ratification of the Nice Charter – later the Charter of Fundamental Rights of the Union, enjoying, under Lisbon, the same legal value as the Treaties – seems to pave the way for a European constitutional law[96], the failure of the *Constitutional Treaty* notwithstanding[97]. This remarkable hiatus between the political and the juridical dimensions of the process, nevertheless, exposes the tensions undermining the European edifice. The twofold ambiguous relationship between political and legal integration, on one hand, and judicial-doctrinal *versus* positive law, on the others, leads to a paradox: a Community of sovereign States with a single constitutional law of principles whose wan-to-be written reference had been expressly rejected. This short-circuit contributes to explaining the numerous problems that have surfaced in the aftermaths of the Lisbon Treaty.

3.5. Identity. From Maastricht onwards, the issue of the mutual legal boundaries between the Union and the States is spelt out in the identity vocabulary[98]. Again, the key reason was to get rid of the sovereignty concept, which would have reignited the formal question of

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92 A. Ruggeri, *Lo Stato costituzionale e le sue "mutazioni genetiche"*, in *Quaderni costituzionali*, 4, 2014, 837-854.

93 A. von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, in *Columbia Journal of European Law*, 6, 2000, 27-54, in part. 28 ss.

94 C. Amalfitano, *General principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, 2015, 28 ss.

95 R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in *The American Journal of Comparative Law*, 39, 1, 1991, 1-34.

96 A. von Bogdandy, J. Bast (eds.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, Berlin, 2003. 75 ss., and K. Lenaerts, P. Van Nuffel (eds.) R. Bray (rev.) *Constitutional Law of the European Union, II ed.,* London, 2004. More recently, see P.T. Tridimas, *The General Principles of Law: Who Needs Them?*, in *Les Cahiers de Droit*, 52, 1, 2015, 419-441 ; A. Viala, *Le droit constitutionnel européen, un nouvel objet pour une nouvelle discipline?*, in *Revue française de droit constitutionnel*, 120, 4, 2019, 929-947, and F. Balaguer Callejón, *Derecho Constitucional Europeo*, in Id. (ed.) *Manual de Derecho constitucional*, I – *Constitución y fuentes del derecho. Derecho constitucional europeo. Tribunal Constitucional. Estado autonómico*, Madrid, 2020, 202-275.

97 J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space*, in R. Kastoryano (ed.) *An Identity for Europe. The Relevance of Multiculturalism in EU Construction*, London, 2009, 73-101.

98 L. Besselink, *National and constitutional identity before and after Lisbon*, in *Utrecht Law Review*, 6, 3, 2010, 36-49.

boundaries, hence hindered the assimilation of national constitutional laws into a single European one. One may ask whether this trade-off has been convenient, or appropriate, as the identity's background rests on the likes of Fichte, Schmitt and others in this line[99]. However, particularly in the post-Lisbon era, «identity» became *à la mode*[100] or, to say it better, it turned the privileged concept to grasp the relation of national and Union law[101]. While in the first place this seemed to reinvigorate the national perspective[102], in the long run it has furthered a marginalization of the conferral and of the textual-voluntarist element it enshrines. The rapidly-diminishing constitutional relevance of the principle of attributed competences, yet sanctified in numerous Treaties' provisions, attacks the idea that the «will» of the peoples and the States is the main legitimation source for the Union's development or, at least, a key source thereof: the argument of original consent is held to cover whatever evolutionary path Union law will take. In this vein, the Court of Justice tends to make use of the Charter as a support for general principles of Union law[103]: and it does so with a twofold intention. First: to pursue legal uniformity within the Union's space. Second: to broaden Union law's scope to a virtually indefinite end. In this regard, the national identity concept laid down in Art. 4, par. 2 TEU, in principle designed as the ultimate bulwark for national jurisdiction, struggles to provide guidelines for reciprocal dialogue as it is either bypassed or reinterpreted in a monist, fully-fledged European fashion.

Four lines offer good examples of this shift.

First, the evolution of the «incorporation» doctrine[104]. Already present in the Court of Justice's case law prior to the adoption of the Charter, this doctrine was furtherly pursued in the follow-up of Lisbon to serve the twofold intention mentioned above[105]. The Court's line contradicted scholars like Robert Schütze, who had called for a collective foundation of the incorporation based on the European citizenship, in the like of the US Supreme Court[106]. As an effect, «purely internal situations» are reduced to marginal cases only[107] and the «competence-creep»[108] expands to the extent that it comes to be understood as physiological, rather than as a breach of the wording of the Treaty.

Second, the application of the non-discrimination principle as regards the worker, yet offering «better protection» to the latter's rights, overwhelms the «self-executing doctrine» as once coined by the Court itself, which, again, ousts the principle of conferred competences and pursues the prior application of Union law *vis-à-vis* any other rights and interests at

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[99] See G. Azzariti, *Critica della democrazia identitaria*, Roma-Bari, 2005, 13 ss., 26 ss.

[100] J.H.H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, in *International Journal of Constitutional Law*, 3, 2-3, 2005, 173-190, in part. 184.

[101] M. Claes, J.H. Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the* Gauweiler *Case*, in *German Law Journal*, 16, 4, 2015, 917-970; P. Faraguna, *Constitutional Identity: A Shield or a Sword?*, in *German Law Journal*, 18, 7, 2017, 1617-1640.

[102] A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, 48, 5, 2011, 1417-1453.

[103] A. Aguilar Calahorro, *La aplicación nacional de la Carta de Derechos Fundamentales de la UE: una simple herramienta de interpretación de la eficacia de las directivas*, in *Revista de Derecho Comunitario Europeo*, 61, 2018, 973-1011.

[104] Recently, C.I. Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation* à l'européenne, in *German Law Journal*, 21, 5, 2020, 838-866.

[105] S. Weatherill, *Competence Creep and Competence Control*, in *Yearbook of European Law*, 23, 1, 2004, 1-55.

[106] More details and bibliography in A. Antonuzzo, G. Vosa, *Il diritto dell'Unione come fattore geopolitico regionale: intorno alla "tutela" della rule of law*, in *Il Filangieri – Quaderno 2022 – Costituzione e relazioni internazionali,* 2022, 137-174.

[107] A. Arena, *Le "situazioni puramente interne" nel diritto dell'Unione europea*, Napoli, 2019, 99 ss.

[108] S. Weatherill, *Competence Creep and Competence Control*, in *Yearbook of European Law*, 23, 1, 2004, 1-55.

stake[109]. Cases from *Mangold*[110] to *D.I.*[111] – the latter countered by the Danish Supreme Court in *Ajos* – are emblematic in this regard, as they unveil the likely threats to legal certainty that such an approach entails[112].

Third, Union law has been claimed to apply in cases of implementation of national «*austerity* measures» based on a *Memorandum of Understanding* or on similar instruments adopted in the framework of the crisis. Set aside cases such as *Pringle* and *Gauweiler*[113], in which the Court admits the purely political, and utterly precarious, nature of the conferral, two key *arrêts* deserve a mention. In *Florescu*[114], national laws have been scrutinized on a Union law's yardstick despite the recognition of a national competence, and of a parallel lack of a Union competence, in the concerned domains. In *Rimševičs*[115], the State competence on criminal proceedings in a case of bribery involving the Latvian Central Bank's Governor has been denied due to the latter's crucial position in the EMU's architecture: according to the Court, to put it roughly, EMU law's is more special than «ordinary» Union law, hence been entitled to a broader applicative scope *vis-à-vis* national law than the latter.

Four, the «best» paradigm as regards the protection of the rights concerned is overwhelmed by the need of a uniform application of Union law. *Melloni* is the paradigmatic manifesto of the irenic demise: what was priorly accounted for as a dialogue in the best interest of the person's right turns a straightforward imposition of Union law to the detriment of the individual right at stake – the protection of which, under national law, would have been the highest[116]. Since then, the increasing application of the Charter couples with the enforcement of general principles to build up a Euro-constitutional yardstick for national rights to be scrutinized and, eventually, (re-)interpreted consistently.

Not surprisingly, apical national courts have repeatedly raised the issue of compatibility between certain measures of Union law and their national constitutions. These claims, dubbed «identitarian» as long as they appeal to the political-constitutional structure of the State concerned, rest on Art. 4, par. 2 TEU[117]; however, the meaning of this provision is still highly controversial[118].

Hence, the constitutional conundrum needs to be re-phrased in terms of alternative readings of this latter provision, which would stand as the ultimate clause securing the protection of the national *acquis* when a *collision* with Union law is at stake[119]. In brief, «respect for national identity» under Art. 4, par. 2 TEU can be interpreted in two ways.

First. The Court of Justice has to consider the national peculiarity; however, it is free to decide alone whether, and to which extent, such peculiarity deserves to be part of Union law, which is still the sole law applicable in the Union's constitutional space.

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109 S. Robin-Olivier, *The evolution of direct effect in the EU: Stocktaking, problems, projections*, in *International Journal of Constitutional Law*, 12, 1, 2014, 165-188.

110 ECJ, C-114/04, *Mangold* v *Helm*, 22 November 2005, ECLI:EU:C:2005:709.

111 ECJ, C-441/14, *D.I. – Dansk Industri* v *Estate of K.E. Rasmussen*, 19 April 2014, ECLI:EU:C:2016:278.

112 *Højesteret*, Judgment No. 15/2014, *Ajos*, 6 December 2016.

113 ECJ, C-370/12, *Pringle* v *Ireland*, 27 November 2012, ECLI:EU:C:2012:756; ECJ, C-62/14, *Gauweiler* et alt. v *Deutscher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400.

114 ECJ, C-258/14, *Florescu*, 13 June 2017, ECLI:EU:C:2017:448.

115 ECJ, Joined Cases C-202/C-238/18, *Rimševičs & European Central Bank* v *Republic of Latvia*, ECLI:EU:C:2019:139.

116 ECJ, C-399/11, *Melloni* v *Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107.

117 D. Lustig, J.H.H. Weiler, *Judicial review in the contemporary world—Retrospective and prospective*, in *International Journal of Constitutional Law*, 16, 2, 2018, 315-372.

118 G. Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE*, Napoli, 2017, 20 ss., *passim*;

119 C. Joerges, *Kollisionsrecht als Form der Verfassung Europas*, in Id., *Konflikt und Transformation: Essays zur Europäischen Rechtspolitik*, Baden-Baden, 2022, 463 ss.

Second. The Court of Justice must admit that national courts retain jurisdiction on the cases involving such peculiarity[120] – then, it remains to be understood when, and on which grounds, it may decide to leave national courts with such powers.

3.6. The community of values […] and beyond? While Art. 4, par. 2 TEU still occupies the centre of the scene despite the obscurity surrounding «identity», another norm enters the primacy debates: Art. 2 TEU, that is, the provision enlisting the common values of the Union. Particularly, one of them – the fifth in the list: rule of law – quickly gains an unprecedented traction[121].

The circumstances are well-known and can be summarized as follows. In the most conflictive cases, namely those involving the backsliding of the rule of law, the Court of Justice, in light of Art. 49 TEU (providing the requirements for candidate Member States to adhere to the Union) derives from Art. 2 TEU a special obligation to respect the rule of law[122]. From this obligation, the Court infers the existence of a wide-ranging principle – «non-regression» as regards the respect for Union values, namely, for the rule of law[123] – and a more specific one, *i.e.*, the principle of effective judicial protection, laid down in Art. 19 TEU[124]. Particularly, this principle applies to all cases in which the requirements of such an effective protection – autonomously crafted by the Court of Justice, albeit such a Union's competence is nowhere to be found in the Treaties – are allegedly infringed in the view of the Court itself.

Then, building on the principle of loyal cooperation laid down at Art. 4, par. 3 TEU, from the conjunction between Artt. 2 and 19 TEU the Court derives a specific norm of Union law potentially affecting national legislation in at least two ways. First, if violated, it may be sanctioned via the infringement procedure under Art. 258 TFEU[125]. Second, in certain occasions, it may be enforced through consistent interpretation, or directly applied with priority on incompatible national constitutional law[126].

The reasoning of the Court originates from the following threefold passage.

First: the Union «is composed of States which have freely and voluntarily committed themselves to the common values referred to in Art. 2 TEU, which respect those values, and which undertake to promote them».

Second: Union law «is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values».

Third: that «premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts, that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected»[127].

Noticeably, in this last passage, the identity question is overwhelmed by the axiological force of the rule of law whose «respect» the Court of Justice imposes on the Member States under

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[120] J. Komárek, *National constitutional courts in the European constitutional democracy*, in *International Journal of Constitutional Law*, 12, 3, 2014, 525–544.

[121] L.D. Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks*, Oxford, 2023, 33 ss., *passim*.

[122] L.S. Rossi, *'Concretized', 'Flanked', or 'Standalone'? Some Reflections on the Application of Article 2 TEU*, in *European Papers*, 10, 1, 2025, 1-24.

[123] ECJ, C-896/19, *Repubblika* v *Il-Prim Ministru*, 20 April 2021, ECLI:EU:C:2021:311, para. 64.

[124] ECJ, C-619/18, *Commission* v *Poland*, 24 June 2019, paras. 42 ss., 49 ss.

[125] *Ibid.*; see M. Rodríguez-Izquierdo Serrano, *Los derechos fundamentales en el procedimiento por incumplimiento y la adecuación constitucional de las actuaciones de los Estados miembros*, in *Revista de Derecho Comunitario Europeo*, 61, 2018, 933-971.

[126] ECJ, C-357/19, *Euro Box Promotion* et alt., 21 December 2021, paras. 140, 257.

[127] ECJ, CJEU, C-619/18, *Commission* v *Poland*, 24 June 2019, paras. 42-43.

the form of specific rules directly derived from that value. Art. 2 TEU, as a result, prevails on Art. 4, par. 2 TEU and conforms the latter's interpretation so that Member States are left with no legal tools to oppose the Court of Justice when the latter, by reference to Art. 2 TEU, calls the rule of law into question.

Hence, the evolution of the fourth stage may lead to a fifth one, the candidate name of which could be the «mutual trust society»[128]. The main traits of this latter step, yet unfinished and far from being in force, can be roughly accounted for as follows.

In light of the arguments deployed above, Union law is said to no longer rest on respect for national constitutions and perpetuation of their *acquis*, however phrased; but on «mutual trust» among Member States and their courts, who loyally cooperate with each other. Thus, such duty of loyal cooperation comes to apply as a fully-fledged general clause for every institution, *transversally* – regardless of whether legislators, administrations, or courts are involved, and in what way; furthermore, it is not clear whether it is the cause, or the effect, of the expansion of the principle of effective judicial protection[129]. Put in these terms, «trust» exceeds the categories of mutual recognition and seems to better refer to persons, rather than to institutions whose expression is highly formalized and articulated in accordance with key constitutional principles – chief among them, the separation of powers.

In this light, at the time being, numerous doubts shroud the relation between «mutual trust» among the *élites* who seized power, and «respect for values» as the ground for Union law's normative force. In the words of the Court, the latter «entails and justifies» the former. Yet, as the latter's perimeter is entirely in the hands of the Court, the cause-effect link between the two proves less obvious than expected. More precisely, two are the possible options.

If the mutual trust is the consequence, or the effect, of the respect for common values, then a core of common European values, in principle, exists as an *a-priori*: it can be *objectively* ascertained, and challenged, at any time. Hence, the normative force of Union law, yet derived from the straightforward application of a value-directly-derived rule to a specific case – absent any supplementary «balancing» operation – is still anchored to an allegedly objective element. Thus, it preserves a simulacrum, although evanescent, of legal security, which is for the Court to protect.

If, conversely, the mutual trust turned to be the cause of the respect for common values, and not the consequence, or the effect thereof, then the mutual accommodation among national *élites* would become the *a-priori* for the boundaries of the European common moral core to be defined, this definition being a purely political one. Were it so, the normative force of Union law *vis-à-vis* national law would openly depend on the affinity among European *élites* who could blame as contrary to common values anything that impairs their goals. Nor could the Court do much to prevent this drift, as it is working to dismantle the legal ties which would be needed for that aim[130]. The Union would turn a genuine political alliance, rather

[128] See G. Vosa, *Sulla problematica tutela dello Stato di diritto nell'Unione europea: spunti di diritto costituzionale e comparato a partire dal "caso Romania"*, in *DPCE Online*, 55, 4, 2022, 1983-2025.

[129] M.E. Bartoloni, *La natura poliedrica del principio della tutela giurisdizionale effettiva ai sensi dell'art. 19, par.1, TUE*, in *Il Diritto dell'Unione Europea*, 2, 2019, 245-264.

[130] More in G. Vosa, *All This for Primacy? Quos Vult Deus Perdere, Dementat Prius,* in *Verfassungblog.de*, 1 May 2025.

than an «alliance of constitutions»[131] and «of constitutional courts»[132], which would signpost the passage from a *tolerant* to a *militant* community[133] until the final stage of a *military* community – restrictive towards domestic diversity as much as aggressive towards external diversity.

Conclusively, the Union's constitutionalism is walking on a slippery path. Born to defend the core values enshrined in State constitutions against authoritarian nationalisms, it suffers from a problematic evolution, especially as the link with those constitutions, and with the actual will of peoples and States, is severed. An increasing number of rights and interests is excluded, with little or no care for the enduring peace of the European society as a collective whole. Primacy stands as unrestrained – *i.e.*, its sole boundaries are internal, in the hands of the Court of Justice alone – and it looks more and more like an end *per se*, rather than an instrument to make more valuable goals an effective reality. Thus, the European constitutionalism, yet understood as the last bulwark against the rule of law's backsliding and the populist menace perturbing the Union States[134], is in a moment of utter ambiguity, as a result of which it may well risk endangering those very same values it is supposed to defend.

4. Comparative Insights: A methodological experiment. As the salient traits of the Latin American and the European approaches emerge under a brighter light, the question turns whether «transformative constitutionalism» as arisen in Latin America may be a reference for European constitutionalism. The answer to this question obviously depends from a comparative exam between the two. However, such an analysis is far from being an easy task, for there is hardly an established methodology for comparing streams of constitutional thought that – in light of the results achieved – are, in and by themselves, multifaceted, elusive objects as regards both the content they endorse and the «form» they are vested with. Thus, in order to try to advance on this point, experimentation is needed, yet on the basis of established arguments.

First of all, while resting on the shoulders of giants,[135] two alternative options arise as scholarly references for a comparative analysis.

Who wishes to compare State constitutional orders, even in a Union's perspective[136], finds solace in a well-established, long-lasting methodology that relies on 'forms of government'[137]

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131 J. Habermas, *Zur Verfassung Europas*, (2011) in English (C. Cronin), *The Crisis of the European Union: A Response*, Cambridge, 2012, 1-53; see I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making revisited?*, in *Common Market Law Review*, 36, 4, 1999, 703-750, and cfr. C. De Fiores, *Il fallimento della Costituzione europea. Note a margine del Trattato di Lisbona*, in *Costituzionalismo.it*, 1,1, 2008 (10 April) 1-51, 5 ss., 16 ss.

132 A. Voßkuhle, *Der europäische Verfassungsgerichtsverbund*, in *Neue Zeitschrift für Verwaltungsrecht*, 1, 2010; in English *Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, in *European Constitutional Law Review*, 6, 2, 2010, 175-198.

133 J.-W. Müller, *The EU as a Militant Democracy, or: Are there Limits to Constitutional Mutations within EU Member States?*, in *Revista de Estudios Políticos*, 165, 2014, 141-162.

134 *Ex multis*, M. Dawson, *How can the EU Respond to Populism?*, in *Oxford Journal of Legal Studies*, 40, 1, 2020, 183-213.

135 As in T. Amico di Meane, *Sulle spalle dei giganti? La questione metodologica del diritto comparato e il suo racconto*, Napoli, 2022, 45 ss.

136 See S. Larsen, *Varieties of Constitutionalism in the European Union*, in *The Modern Law Review*, 84, 3, 2021, 477-502.

137 C. Mortati, *Le forme di governo*, Padova, 1973; more recently, S. Siccardi, *Maggioranza, minoranze e opposizione nella teoria dello Stato e delle forme di governo di Costantino Mortati*, in M. Galizia (ed.) *Forme di Stato e forme di governo: nuovi studi sul pensiero di Costantino Mortati*, Milano, 2007, 945-990.

and ventures to explore the action of constitutional courts, hence of authority and citizens[138], in a robustly historical perspective.

On the other hand, who wishes to look at the cases of regional integration through the comparative lens encounters some references, too, more recent, but still stable: the literature on international courts[139], to only cite one, and the manifold studies on the concurring phenomena of constitutional pluralism[140] and on the fragmentation of international law[141], to conclude with the analysis of regional integration in the domain of human rights[142] and in areas of a sectorial nature[143], yet having regard to the perspective of democratization of international organizations[144] and of the economic perspectives on national-regional regimes[145].

However, a comparative analysis of multifaceted constitutional theories that have developed in national and regional contexts whose history, shape and functions differ substantively remains a different issue from all these references, and a quite intricated knot to disentangle. Consequently, what this paper intends to do is to draw an experimental methodological framework to delve into the respective characteristics of both models – taking into account that their qualification as «models» is far from obvious, and has been here only empirically advanced – in such a way as to highlight their respective characteristics. This operation aims to be a surrogate, or an extension, of what comparative analysis does for States, and seeks to do as regards international organizations.

The experiment consists of a selection of certain «choke-points» unveiling these characteristics in a way that respects both an acceptable standard of scientific robustness and the actual peculiarities of the objects concerned.

Five are the chosen ones. As much as real choke-points, they are not univocal, but relational indicators: they enucleate certain passages of constitutional reflection that, like all passages, unravel between two reference points. «Relational», therefore, in that they work in pairs, as opposite poles of a trajectory serving as a trail for the transformative constitutionalism model to be located. In fact, such a «comparison through choke-points» does not pretend to capture the object in its (non-existent) static dimension, but offers a certain flexibility in locating that very object along a path – which leaves the interpreter with the possibility, and the responsibility, of making more complex evaluations.

The first two indicators aim to replace the concept of «form» as for the object analysed. As the focus goes on streams of thought that share the idea of «moving towards a certain end», purpose and scope have attracted attention since the beginning of the analysis; it seems safe to begin with such references, which *lato sensu* highlights the political-institutional direction

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138 M. Cappelletti, *Il controllo di costituzionalità delle leggi nel diritto comparato*, Milano, 1973, 26 ss.; M. García Pelayo, *Derecho constitucional comparado*, Madrid, 1958, 17-22, 219 ss.

139 R. Mackenzie, C.P.R. Romano, Y. Shany, P. Sands (eds.) *The Manual on International Courts and Tribunals* (2nd ed.), Oxford, 2010; cfr. J.R. Crook, *Procedural Convergence in International Courts and Tribunals*, in C. Giorgetti, M. Pollack (eds.), *Beyond Fragmentation Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals*, Oxford, 2022, 87-112.

140 N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-national Law*, Oxford, 2010, 38 ss.

141 M. Koskenniemi, P. Leino, *Fragmentation of International Law? Post-Modern Anxieties*, in *Leiden Journal of International Law*, 15, 2, 553-579.

142 L. Burgorgue-Larsen, *"Decompartmentalization": The key technique for interpreting regional human rights treaties*, in *International Journal of Constitutional Law*, 16, 1, 2018, 187-213.

143 Most recently, the special issue edited and introduced by S. Besson, *The International Law of Regional Organizations*, in *International Organizations Law Review*, 21, 1, 2024, 1-18.

144 D. Chalmers, *The European Union and the re-establishment of democratic authority*, in *European Law Review*, 1, 1 2020, 1-22.

145 G. Frankemberg, *Authoritarian constitutionalism: coming to terms with modernity's nightmares*, in H. Alviar García, G. Frankemberg (eds.) *Authoritarian Constitutionalism: Comparative Analysis and Critique*, Cheltenham, 2019, 1-36.

each model undertakes and suggests a perspective for legal analysis to be carried out. In the same vein, it seems interesting to delve into the relation between the two legal forms – national and international – they are concerned with: as a result, attention is devoted to the relation between the national order(s) and the supranational one in their respective view, which is instrumental to understanding what kind of constitutional space emerged in the minds of their respective advocates.

Thus, purpose and scope of the respective models are the first to be examined in light of their approach to the relations between national and supranational orders. One may say that, by means of these two pairs, an attempt is made to bypass the problem of the lacking single political form as a framework for juridical analysis by «crossing the frontier» of law as an isolated discipline[146].

The third and the fourth pair enter the internal constitutional structure as these two streams of thought figure it out.

One points at the institutional arrangements to measure the relation between legislative-administrative and judicial law-making; it surrogates the «form of government» test, as no form, nor actually a government, can appear under non-statal lens without impoverishing its analytical value[147].

The other goes to investigate the relation between «will» and «ratio/morality» as components of what is deemed to be legally binding. More specifically, two are the possible alternatives.

When «will» prevails, the State's formally expressed *voluntas* is the law's main element: enhanced attention is devoted to the mechanisms for self-determination, *i.e.*, to the participation of the «people» in the processes whose outcome they assume as legally binding – be such processes representative or «direct», or in any form of deliberative democracy.

When *ratio* and morality prevail, certain rights exist that belong to the people regardless of the will of the State concerned, and courts, as well as all other institutions, must recognize and protect these rights. By contrast, minor attention is devoted to *voluntarist* law-making, *i.e.*, to the self-determination mechanisms, including the accountability of independent law-makers – while *expert* administrative agencies and courts play a major role in the fabric of law.

As the latter pair aims to check the relation between the citizens and the power, *sub specie* of how they can influence the authority they are ruled by, it may work as a surrogate for the «form of the State», being, again, neither a form nor State in the context concerned. To be sure, absent a pre-established political form, any analysis needs to be inductive, the results stemming from the latter pair being the most general as a consequence of this approach – it would be ludicrous to copy-paste the categories deployed in States' comparison for objects that are currently navigating the «after-State» *cosmos* and need to be read in a context of mutual influence[148].

Obviously, in light of the experimental nature of the exam carried, only general and, perhaps, superficial remarks can be attempted at this juncture; it remains to be established whether the framework deployed might prove fruitful for further, more in-depth investigation.

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[146] R. Ibrido, N. Lupo, *«Forma di governo» e «indirizzo politico»: la loro discussa applicabilità all'Unione europea*, in R. Ibrido, N. Lupo (eds.), *Dinamiche della forma di governo tra Unione europea e Stati membri*, Bologna, 2018, 9-55; cfr. M. Luciani, *Governo (forme di)*, in *Enc. Dir.*, III (Agg.), Milano, 2010, 538-596.

[147] S. Cassese, *Varcare le frontiere*, in *Rivista trimestrale di diritto pubblico*, LXIII, 3, 2023, 1055-1069; cfr. A. Baldassarre, *Globalizzazione contro democrazia*, Roma-Bari, 2002, XI ss., *passim*, and G. Azzariti, *Diritto e conflitti. Lezioni di diritto costituzionale*, Roma-Bari, 2013, 3 ss., 109 ss., *passim*.

[148] P. Gaïa, L. Burgorgue-Larsen, L. Hennebel, *Les effets réciproques des décisions des juridictions régionales (Cours européenes, Cour interaméricaine) et des juridictions constitutionnelles nationales*, in *Annuaire international de justice constitutionnelle*, 27, 2011, 651-679.

4.1. Purpose & Scope. As a general premise, the purpose and scope are nuanced in a different way. The Latin American approach is committed to making reality the constitutional promises laid down in the State constitutions; it does so by claiming that an Inter-American constitutional *acquis* stemming from national, regional and international documents enhances the defence of democracy and the protection of human rights in States where radical social differences and weak democratic institutions undermine the pillars of a society's pacific coexistence. The European approach, while grounded on the defence of a European constitutional *acquis* enshrined in national *post*-WWII constitutions and confirmed by international and regional documents, presents as its main objective the accomplishment of the European project, that is, the pursuit of an «ever closer union», and takes moral commonality as a postulate. The replacement of former Nation States with a single entity, yet ambiguous in nature, is being pursued via the establishment of a uniform law: primacy, *i.e.*, supremacy of Union law on national laws, is the polar star of the «integration through law» mechanism, and the completion of a single uniform legal order with no outer limitations is the perspective of the whole activity that the Court of Justice pursues, yet seeking cooperation with national courts.

Perhaps, one can say, if compared to the Latin American case, the European model assumes to find itself better positioned in the defence of pluralist democracy and of the rule of law. Nonetheless, it seems to take for granted that a single bulk of common values encompasses the European society as a whole: as a result, it feels it can afford an irenic approach to make this commonality the embryo of a uniform law, which entails attaching a high *jurisgenerative* capacity to values[149]. However, it is pushing this approach quite far, even in the face of manifest conflicts exposing radical divergences in rights, interests, eventually even in the moral background referable to each social layer or group. It seems safe to contend that a similar «blindness» before the increasing conflicts could corrode the vantage position it claims to enjoy with regard to its Latin American counterpart. The alleged superior maturity of the European constitutionalism may turn a disadvantage as far as a profound, fully-fledged understanding of the constitutional issues at stake is concerned. Furthermore, as openly instrumental to establishing a new legal order, Union's constitutional law may risk being deployed to this purpose solely, that is, to legitimize a yet-not-existing order – Europe as a single entity – while losing sight with the protection of constitutional rights and the safeguard of a pluralist-democratic rule of law, yet the prime objectives of the European construction.

4.2. State order v the regional order. The attitude of the Latin American scholars towards the establishment of a uniform law across the continent is generally skeptical, let alone towards the completion of a *political union* – yet surfaced quite regularly in the course of Latin American history[150]. No such a thing as supranational primacy seems to exist; rather, the need for national States to confront with the public morality enshrined in an Inter-American law and derived from the international instruments concerned is claimed with force. But such a need does not entail the loss of sovereignty of the States; rather, it must be read as a political force exercised by means of legally-founded arguments, the objective of which is to enhance

[149] Cfr. P.S. Berman, *Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism*, in *Indiana Journal of Global Legal Studies*, 20, 2, 2013, 665-695; L.D. Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks*, Oxford, 2023.

[150] A survey in F. Aínsa, *La unidad de América Latina como utopía*, in Id., *La reconstrucción de la utopía*, México, 1999, 187-208; cfr. J. Carpizo, *Derecho constitucional latinoamericano y comparado*, in *Boletín mexicano de derecho comparado*, 38, 114, 2005, 949-989.

and enrich the axiological potential of national and supranational laws in view of fine-tuning the balance between the rights and interests concerned[151].
On the other hand, supremacy of the law stemming from the supranational order is means and end in the perspective of the Court of Justice. Rather, in this respect, the Latin-American court can be compared to the ECHR[152], yet endorsing a different approach as regards the equilibrium between rights and powers, the protection of individual positions and the need for collective deliberation. However, Latin American courts have a specific sensibility for the protection of democratic processes, one that European courts seem to lack, or, at least, have tried to exercise within more restricted boundaries. As for the ECHR, one may remind that some attention was paid to the link between human rights and deliberative democracy around the end of the '10s: worth a mention are, among others, the speech delivered by Jean-Paul Costa, the then President of the ECHR, in Helsinki, 5 June 2008[153], and some enlightened scholarly works[154]. Nevertheless, the right to discussion and debate, yet present in the ECHR case law, is understood in a mainly individual perspective[155]. However, lately, advocates of so-called two-tiered bounded deliberative democracy'[156] have relaunched the idea of a third/fourth step[157] for the democratization of international organizations, that is, to construe the legitimacy of international organizations protecting human rights in a way that defends and reinforces national democracy alike[158].

4.3. Courts v legislators as law-makers. This is another salient difference in the transformative approaches hitherto examined. The Court of Justice has hardly shown restraint in crafting constitutional tools aiming at further expansion of supranational law. Quite the opposite: it seems to rely on the (liberal) assumption that an exercise of people's sovereignty entails a totalitarian danger *per se*, and must be opportunely moderated, if not fully ousted, by judicial and administrative-independent activity. This seems to reflect a common, non-new attitude among European *élites*: Christoph Möllers, when talking about the German constitution, nicely captured it by the sentence «we (are afraid of) the people»[159]. Lately, the activity of the European Central Bank has attracted criticism as for their alleged «independence» turning into *unaccountability* before yet sensitive political choices to be made in the course of the recent crises; on the other hand, the strong political flavour of the European judges' ruling as regards the economic and financial crisis, the rule-of-law backslide

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151 L. Burgorgue-Larsen, *El contexto, las técnicas y las consecuencias de la interpretación de la Convención Americana de los Derechos Humanos*, in *Estudios Constitucionales*, 12, 1, 2014, 105-161.
152 See M.L. Ruiz-Morales, *El control de convencionalidad y los sistemas de protección de los derechos humanos americano y europeo. Su recepción en el caso argentino y español*, in *Anuario iberoamericano de justicia constitucional*, 21, 2017, 129-160.
153 J.-P. Costa, *The links between democracy and human rights under the case-law of the European Court of Human Rights*, 1-8, www.echr.coe.int.
154 M. Starita, *Democrazia deliberativa e Convenzione europea dei diritti umani*, in *Diritti umani e diritto internazionale*, 4, 2010, 245-278.
155 See J.-F. Flauss, *The European Court of Human Rights and the Freedom of Expression*, in *Indiana Law Journal*, 84, 3, 2009, 809-849, in part. 815 ss.
156 H. Takata, *Reconstructing the Roles of Human Rights Treaty Organs under the 'Two-Tiered Bounded Deliberative Democracy' Theory*, in *Human Rights Law Review*, 22, 2, 2022, 1-25.
157 A. Peters, *Constitutional Theories of International Organisations: Beyond the West*, in *Chinese Journal of International Law*, 20, 2021, 649-698.
158 A summary in G. Vosa, *In difesa di un costituzionalismo olistico: sull'inciso «in condizioni di parità con gli altri Stati» di cui all'articolo 11 della Costituzione*, in *Diritto pubblico europeo – Rassegna online*, 2, 2023, 461-511, in part. 502 ss.
159 C. Möllers, '*We are (afraid of) the People': Constituent Power in German Constitutionalism*, in M. Loughlin, N. Walker (eds.), *The Paradox of Constitution. Constituent Power and Constitutional Form*, Oxford, 2007, 87-105, in part. 93 ss.; see J. Přibáň, *Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner's Constitutional Fragments and Thornhill's A Sociology of Constitutions*, in *Journal of Law and Society*, 39, 3, 2012, 441-471.

and even the military crisis in the relation with the Russian Federation has turned utterly consistent.

This assumption plainly contradicts what the Latin American courts endorsing a transformative approach have repeatedly maintained. The centrality of the self-determination as conducive to democratic deliberation is constantly present in the Latin-American case-law, and even the cases of protection of rights against the actions of autocratic States do not forget to provide for a *pars construens* towards the re-establishment of a fully-fledged democratic regime.

However, it is worth to mention that, albeit more silently, this latter road is not alien to the approach of the Court of Justice, which has demonstrated to be able to walk it at least in two main respects. First, in the prohibition of atypical secondary legal bases and the imposition of the «essential elements» boundary to the *jurisgenerative* potential of Treaty legal bases[160]. Second, in the idea that, when the European institutions are called on to perform tasks outside the Union framework, they have to respect «their essential character» and the fundamental rights as enshrined both in the Charter and in the Treaties[161].

However, this is only a weak defence of democracy understood as self-determination; much more has been done by national supreme and constitutional courts (Germany, Denmark, Rumania, among others) yet, sometimes, encountering the Court of Justice's harsh opposition[162].

4.4. «Morality» v «will» as elements of law. As a result, European transformative constitutionalism would conceive of law as de-politicised and moralized, only a liminal position being reserved for the will of the peoples and the States as eventually the law-recipients. Conversely, Latin American transformative constitutionalism tends to a more balanced co-existence of morality and will. The former aims to impose a superior constitutional law on the will of the States, the latter contradicts the will of the States only to the extent that undisputedly crucial fundamental rights are at stake – the very existence of individuals as such and of minorities – and it does so with all the abovesaid *caveat* for the reconstruction of a political society. Such an attention towards the political, self-determining dimension apparently lacks in the European jurisdiction[163].

Also, in comparison to the Western/European approach, Latin American constitutionalism reflects a different self-perception as for the global arrangements of power[164]. It is aware that external interferences to State deliberations can harm the functioning of a democratic polity: the formation of transnational *élites*, whatever the material position endorsed, is all the more

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[160] See ECJ, 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster*, 17 December 1970; Cfr. ECJ, C-133/06, *Parliament* v *Council*, 6 May 2008, ECLI:EU:C:2008:257, commented by P. Craig, in *Common Market Law Review*, 46, 4, 2009, 1265-1275.

[161] See ECJ, Joint Cases C-8-9-10/15, 20 September 2016, *Ledra Advertising & Mallis* v *Commission & ECB*, ECLI:EU:C:2016:701, commented, among others, by A. Poulou, *The Liability of the EU in the ESM framework*, in *Maastricht Journal of European and Comparative Law*, 24, 1, 2017, 127-139; P. Dermine, *The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework*, in *European Constitutional Law Review*, 13:2, 2017, 369-382, and R. Repasi, *Judicial Protection against Austerity Measures in the euro area:* Ledra and Mallis, in *Common Market Law Review*, 54, 4, 2017, 1123-1156.

[162] A survey in G. Vosa, *'Questioning primacy': A proposal for a systematic understanding of "identitarian arguments' in national constitutional case-law*, in *Anuario Iberoamericano de Justicia Constitucional*, 27, 1, 2023, 11-49; see, *ex multis*, A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, 2022, 9 ss. *passim*.

[163] P. Ridola, *I diritti di cittadinanza, il pluralismo e il tempo dell'ordine costituzionale europeo*, in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, 2009, 51-75.

[164] L.A. Nocera, *Los tres ciclos del constitucionalismo iberoamericano y el parámetro indígena como una construcción jurídica contrahegemónica*, in *Anuario Iberoamericano de Justicia Constitucional*, 27, 1, 2023, 121-150.

delicate in this regard, as it breaks the State-based cleavage and strengthen transnational cleavages. This is an outcome that European constitutionalism looks quite at ease with – better: trans-nationalisation seems one of the effects it aims to trigger as a result of unrestrained primacy. Conversely, from the Latin American perspective – as well as from a secondary, yet existing, European view – there are numerous risks attaching to trans-nationalisation. Suffice it to just cite, in brief, the most obvious in regard to law-making: the State-based cleavage ultimately builds on general representation of equals as it refers to people's sovereignty embedded in a parliament, while trans-national cleavages usually rely on personal/elitist *status* and produce inequality as a consequence thereof. This would impair, rather than pursue, the declared aim of the constitutional transformation, *i.e.*, the accomplishment of constitutional promises through pro-egalitarian social change: it would make such change more difficult as entirely resting on social, political and economic dynamics that fall outside the representative powers' operational range. Again, such a profound awareness seemingly lacks in Europe, as legal de-formalisation phenomena are generally contemplated as favourable[165] – perhaps explicitly sought[166] – to the extent that they result in furthering the supreme objective of the ever-closer Union.

5. Concluding Remarks. Whether EU constitutionalism can be labelled as «transformative» label without betraying the legacy that this latter concept carries, with special regard to the Latin American context, is the research question looking for an answer.

In fact, as the analysis highlights, both European and Latin American constitutional streams of thought stem from a common background, but many differences arise as for the way they unfold it – differences that involve, eventually, the very concepts of rule of law and democracy each of them underpins.

As far as this investigation is concerned, to make use of the «transformative constitutionalism» concept for both Latin America and Europe would be, at the present state of the things, rather imprecise. Although common features are many, and the constitutional *humus* they originate from is the same, the remarkable differences highlighted advice not to call for a European transformative constitutionalism without clearly specifying (and accounting for) what is to be sought by such an instrument.

Such a tool, at least as far as the hitherto attempted analysis is concerned, may be deployed in a direction which is at polar opposites of the Latin American model. To put it clearly: whereas the Latin American transformative constitutionalism points to making reality the promises enshrined in national constitutions, the same model, understood as a tool to push further ahead the European constitutionalism on the current evolutionary path, would produce opposite results. It would operate to severe the link between national constitutions and the Union institutional arrangements – that is, to marginalise once and forever the promises of social egalitarianism that those constitutions enshrine. In terms of social, political and economic balance within the society concerned, the effects of this new constitutional arrangement – all consideration on political merits and personal opinions aside – may not be in line with the initial content of such promises; at least, this consistency would not be checked by others than the Court of Justice, *i.e.*, by those who have hitherto invariably advocated for this very same consistency to be present and beneficial for Europe as a whole.

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[165] Cfr. L. Senden, *Soft Law in European Community Law*, Oxford, 2004; F. Terpan, *Soft Law in the European Union—The Changing Nature of EU Law*, in *European Law Journal*, 21, 1, 2015, 68-96. More recently, M. Eliantonio, E. Korkea-aho, O. Stefan (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, Oxford, 2021.

[166] Cfr. M.A. Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, in *European Law Journal*, 21, 3, 2015, 313-339, in part. 324 ss.

Conversely, one may say, there are several features that a fully-fledged, self-aware discourse on a European transformative constitutionalism could bring to the debate on the Union's constitutional arrangements. Two, in brief, could be the main insights.

First, the idea that no commonality of values, no matter how profound it be, can be used as a source of directly applicable norms in a straightforward way, with little or no balancing operation. In a plural society, it seems more correct to think of such a commonality as an ideal, something that exists *in potentia* but is yet to be achieved through respectful judicial dialogue and consistent political-administrative practices.

Second, the attention for the political side of contemporary constitutionalism, which can be declined along two different paths.

One: the abandonment of the irenic temptation before ignited constitutional conflicts, that is, the idea that unrestrained primacy in a *de facto* monist legal order must be abandoned as fundamental rights, chief among them people's sovereignty, come at stake. When proportionality, in both its vertical and horizontal dimensions, does not suffice for the knot to be disentangled from within the European judicial network, then a reasonable halt is compulsory to leave political authorities with the time and space that are needed for them to exercise their own responsibility. The current reasoning inclines to the routinary presumption «if primacy can be granted, then there is no radical conflict»: it must be turned into the opposite scheme, «if there is a radical conflict, then primacy cannot be granted».

Two: the departure from the right-based approach to constitutional matters, that is, the recovery of a strong collective dimension that is needed for a fairer redistribution of (scarce) resources[167]. The functional, liberal stance underpinning Poiares Maduro's enlightening «We the Court»[168] needs being revised in the current times. «Forceful rights» – in the words of Gustavo Zagrebelsky[169] – push the individual claim to such an extent that no collective rationality can intervene any longer to soundly manage scarcity – that is, to avoid the irreversible impoverishment of those who have no access to the resources concerned, or cannot afford it due to the initial gaps they suffer (including: cannot afford a good lawyer to prevail before a court).

Looked at from this angle, transformative constitutionalism would work as a mirror for the current European constitutionalism to perform a meaningful self-check-up. A «polemic», «inclusive» and «collective» yardstick would perhaps be of great help for the inconsistencies of the Union's constitutional discourse to emerge with clarity. In this sense, transformative constitutionalism in Europe would trigger a step back on the way that the transformations of primacy are paving: a more prudent approach towards the hegemony of values and mutual trust as pillars of a want-to-be uniform Union constitutional law.

If von Bogdandy's speech is to be understood as conducive to such a process, then the lesson from Latin America can be profitably received as such by Europeans. If, conversely, the transformative tool is to be deployed to finalize the ongoing structural transformation of public law – one that von Bogdandy himself accounts for in a recent book[170] – and to accomplish it forever, it would foster a regressive transformation as far as *post*-WWII constitutions' legacy is concerned, and this *value constitutionalism* would turn into dust the

[167] Cfr. A.J. Menéndez, *«False Friends» costituzionali: l'irresistibile ascesa dei conflitti fondamentali tra il diritto europeo e quello nazionale*, in *Diritto pubblico*, 3, 2019, 887-904.

[168] M. Poiares Maduro, *We The Court: The European Court of Justice and the European Economic Constitution*, Oxford, 1998, 100 ss., *passim*.

[169] G. Zagrebelsky, *Diritti per forza*, Torino, 2017, 79 ss.

[170] A. von Bogdandy, *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft*, Suhrkampf Verlag, Frankfurt, 2022, 119 ss., 421 ss.

promises that once those constitutions made[171].

Abstract. According to a rising narrative, the European constitutionalism should think of itself as a transformative one to counter the drifts towards authoritarian nationalisms both within and outside the EU. Yet, labelling the EU constitutionalism as «transformative» leads to borrowing the conceptual toolkit and imaginary of those stream of constitutional thought already labelled as «transformative», chief among which is the Latin American constitutionalism. Hence, this work wonders what consequences may arise as a result of such borrowing; particularly, whether a sufficient degree of commonality is detectable between the European and Latin American experiences which may justify deploying the «transformative» concept to account for, and provide legitimacy to, the profound changes that have hit the constitutional law of the Union in the last decades.

Abstract. Secondo una narrazione che va facendosi largo con una certa forza nel contesto europeo, il filone di pensiero costituzionalistico che accompagna l'evoluzione dell'Unione europea dovrebbe concepirsi come «trasformativo». Quest'etichetta, nelle intenzioni dei suoi promotori, meglio renderebbe la lotta che l'Unione ha intrapreso, e – nelle loro opinioni – ha da intraprendere con maggior vigore, contro l'autoritarismo nazionalistico, sia all'interno dei confini europei, sia all'esterno di essi. Tuttavia, definire il costituzionalismo europeo come «trasformativo» implica il trapianto, nel contesto dell'Unione, di quei concetti tipici del costituzionalismo trasformativo, in specie, latino-americano, e della narrazione che su di essi è venuta costruendosi. In quest'ottica, il lavoro si chiede quali conseguenze deriverebbero da un tale «prestito»»; in specie, se esista un livello di comunanza tra l'esperienza costituzionale europea e quella latino-americana tale da giustificare l'uso del concetto di «costituzionalismo trasformativo» per offrire spiegazione, e legittimazione, ai profondi cambiamenti cui il diritto costituzionale dell'Unione è stato sottoposto negli ultimi decenni.

Parole chiave. transformative constitutionalism; European Union; Latin American constitutionalism; comparative constitutional law; constitutional transformation; democracy; rule of law.

Key words. costituzionalismo trasformativo; Unione europea; costituzionalismo latino-americano; diritto costituzionale comparato; trasformazione costituzionale; democrazia; Stato di diritto.

[171] F. Schorkopf, *Value constitutionalism in the European Union*, in *German Law Journal*, 21, 5, 2020, 956-967; cfr. A. Guazzarotti, *Tutela dei valori e democrazie illiberali nell'UE: lo strabismo di una narrazione "costituzionalizzante"*, in *Costituzionalismo.it*, 2, 2022, 1-59.