Cambridge Yearbook of European Legal Studies, 21 (2019), pp. 273–296
doi:10.1017/cel.2019.16

Securing the European Project: From Self-Referentiality to Heterarchy

Massimo FICHERA*
University of Helsinki

Abstract
Security is the meta-constitutional rationale of the European liberal project and is expressed by two tendentially self-justificatory discourses of power, which are two sides of the same coin: security and rights. The political, inherently conflictual nature of EU constitutional claims has been variously disguised through such discourses. Yet, as the process of constitutionalisation reaches a more advanced stage, in which the probability of high-intensity legal-political conflict as regards key issues of EU integration is growing, the moment has come to address conflict directly, rather than conceal it behind a veil of neutrality. Being ready for actual confrontation means dismissing the straitjacket imposed by the European liberal project. A move from self-referential to heterarchical security is thus advocated. As a result, the constellation of nation states should not be sidelined too easily and the needs and claims of the local level should be considered more carefully. In other words, the principles of primacy, autonomy, uniformity, and effectiveness of EU law ought to be conceived in relative, rather than in absolute terms. One possible way of addressing conflict is to simultaneously permit the CJEU (as well as other EU institutions) to engage more proactively with national courts *and* identify a common epistemic core, which ought to be upheld whenever the liberal-democratic premises of the European project are threatened.

Keywords: liberalism, constitutional pluralism, democracy, EU judiciary, rule of law

I. INTRODUCTION

This Article claims that the relationship between the European Union and its Member States is crucial for an appropriate understanding of the challenges associated with EU constitutionalism in an epoch of crisis. The best way to examine this relationship is through the meta-constitutional rationale of security as a form of interplay between change and permanence.[1] The idea of security is always tightly connected to insecurity, for a polity always pursues, in one way or another, its own survival. The EU polity is especially fragile; exposed to 'threats' of different natures. Yet pursuing security

* I would like to thank the anonymous reviewer for comments on an earlier draft. The usual disclaimer applies.

[1] The concept employed in this work is akin to the idea of "*raison d'état*" employed by Machiavelli, although the legal and historical context is very different. See N Machiavelli, *The Prince* (Clarendon Press, 1891).

may itself undermine the European project. From this perspective, the phenomena of populism and Euroscepticism and the obstacles in the implementation of EU law should be viewed as a warning sign, pointing to a deep existential *malaise* of the European liberal project.

Conceptualising the EU as a legal system and a polity through the prism of security allows us to evaluate several so-called 'crises' of European integration jointly, and to argue that the European project should be pursued not by means of the hierarchical paradigm, but through a renewed vision of the heterarchical paradigm. Two 'crises' are analysed here specifically: the constitutional identity crisis and the rule of law crisis.

For too long the possibility of conflict in the EU has been either denied or concealed behind a veil of neutrality. Instead, as European integration reaches an advanced stage, legal-political conflict should be exposed as openly as possible and addressed accordingly. This Article advocates a move from self-referential security to heterarchical security, which requires that the principles of primacy, autonomy, uniformity, and effectiveness be viewed in relative, not absolute, terms. The EU judiciary thus plays an important role in this context.[2] The reconfiguration of European integration suggested in this Article navigates the murky waters between the authority of the EU, which may sometimes emerge as coercive and undemocratic, and the pressing demands of its Members States.

The Article begins by illustrating the notion of security and focusing on two particular dimensions, popular and epistemic (Part II). Next, it emphasises the need for the EU to move from self-referential to heterarchical security (Part III). Then, it provides an overview of the constitutional identity (Part IV.A) and rule of law (Part IV.B) crisis, as emblematic of the waves of Euroscepticism and populism that are deeply affecting the process of European integration, and then (Part IV.C) reflects on the role of the national judiciary in the European project.

II. THE SECURITY OF THE EUROPEAN PROJECT

In this Article, security is conceived in its broadest existential meaning, entailing the need that every polity is called upon to satisfy: preserving (and promoting) its core values within a demarcated geolegal and geopolitical area and throughout an extended period of time against internal and external threats.[3] Whenever the

[2] In this Article, the notion of 'EU judiciary' includes national courts. See P Craig, 'The Jurisdiction of the Community Courts Reconsidered' in G de Búrca and J Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001), p 178: 'It is clear that properly understood we have three types of Community Court, not just two: the ECJ, the CFI, *and* national courts'.

[3] It should be borne in mind that the existence of an unamendable core of fundamental principles, which could not be altered by Member States, is a matter of debate: J L Da Cruz Vilaca and N Picarra, 'Y-a-t-il des limites matérielles à la révision des traités instituant les communautés européennes?' (1993) 29 *Cahiers de droit européen* 3; B de Witte, 'Treaty Revision in the European Union: Constitutional Change Through International Law' (2004) 35 *Netherlands Yearbook of International Law* 51, pp 56–57 (arguing against the existence of substantive limits to the amendment powers of Member States). Importantly, see *Kadi and Al Barakaat*, C-402/05 and C-415/05, EU:C:2008:461, para 304: 'Art. 307 EC may in no circumstances permit any challenge to the principles

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

foundational values of any polity are questioned by an excessively high number of opponents, the very existence of the polity is at stake.[4] Founding a polity means also attempting to secure its long-term survival. Such an all-encompassing, compelling need operates at an overarching, meta-constitutional level and is thus not identifiable as such with—but necessarily presupposes—classic constitutional values, such as liberty, the protection of the individual, the rule of law, or justice as expressed by Article 2 of the Treaty on European Union ('TEU') and identified by some scholars as the foundational values of the EU legal order.[5] The influence of such an overarching rationale on the production of constitutional and legislative material may be more evident in times of emergency. Security is thus a concept that goes beyond the mere notion of stability. It is associated with the identity of a polity and consequently acquires an existential connotation.[6] In other words, this 'superior reason' is pursued by EU institutions and actors beyond and sometimes even against the constitutional aims and principles that are set out in the Treaties and becomes particularly evident when the EU needs to adapt to, or is challenged by, events that undermine or endanger its existence.[7] One of the fundamental features of the EU is self-preservation in the face of threats and the emergence of such threats—whether real or purely imaginary—is a powerful self-justifying tool. The development of the EU is thus a process, in which European integration, security, and crisis are closely interrelated. In this process, two ambiguous and contradictory discourses of power can be detected: security and 'fundamental' or 'individual' rights.[8]

(F'note continued)
that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights …'.

[4] M Fichera, 'Security Issues as an Existential Threat to the Community' in M Fichera and J Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia, 2013), pp 85, 92. The broad, new notion of security employed in this Article and previous works should not be confused with the Area of Freedom, Security, and Justice, because it refers to the European constitutional framework as a whole. See also M Fichera, 'Discursive Constituent Power and European Integration' in A B Engelbrekt and X Groussot (eds), *The Future of Europe – Political and Legal Integration Beyond Brexit* (Hart, 2019), p 129.

[5] A Rosas and L Armati, *EU Constitutional Law: An Introduction*, 2nd ed (Hart Publishing, 2012), p 54. Others believe that the EU's constitutional core should be represented by 'three normative ideals': democracy, rights, and solidarity. See D Sarmiento, 'The EU's Constitutional Core' in A S Arnaiz and C A Llivinia (eds), *National Constitutional Identity and European Integration* (Intersentia, 2013), pp 177, 187.

[6] For further details, see M Fichera, *The Foundations of the EU as a Polity* (Edward Elgar, 2018), where this conceptual framework is used to analyse several 'crises' of the EU. This notion is thus different from traditional characterisations of security in the field of public order, or as national security. See eg J Richards, *A Guide to National Security: Threats, Responses and Strategies* (Oxford University Press, 2012); H K Koh, *The National Security Constitution: Sharing Power after the Iran Contra Affair* (Yale University Press, 1990); K Tuori, 'A European Security Constitution?' in Fichera and Kremer (eds), *Law and Security in Europe*, note 4 above, p 39.

[7] One example of this is the adoption of measures during the Eurozone crisis, which were not always in line with EU law.

[8] On this particular aspect see Fichera, 'Security Issues as Existential Threat to the Community', note 4 above, p 85, where 'fundamental' rights are considered to be different from 'human' rights: see eg

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

Security and rights discourses operate both at the national and EU level: they express the tension between the expansive trend of the EU machinery—typically, through the doctrines of primacy, direct effect, loyalty, the principles of autonomy, uniformity, effectiveness,[9] as well as common constitutional traditions[10]—and the resistance by Member States—most commonly, through 'counterlimits' and identitarian reasoning. Through the mutually reinforcing discourses of security and rights the EU pursues a strategy of self-justification and self-empowerment accomplished *in the name of the peoples of Europe*.[11] While there was no physical 'people' at the origins, an idea of 'people'—or 'peoples'—has been relentlessly constructed from the very beginning of the process of European integration.[12]

The growing body of EU law plays an important role in this context, precisely because through its classic doctrines and legal principles, on the one hand, the EU puts forward its triple claim of autonomy, authority, and legitimacy—the security discourse—while, on the other, the EU vows to protect, emancipate, and empower individuals—the rights discourse. The notion of 'discourses of power' is crucial for an appropriate understanding of this argument. Discourses of power can in fact be constitutive of a polity, while at the same time being constantly in tension with or overlapping each other. They shape meanings, condition actors' behaviour and choices, and correspond to activities, speech acts, and rhetorical strategies that dominate in a given historical context. This does not happen by chance. Processes of production and interpretation of texts, as well as the social conditions within which they are generated, and other social practices, such as courts' rulings or other jurisdictional acts, are indicative of specific patterns or relations of power.[13] These discourses are constitutive of the EU as a polity because it is through them that the interaction between the EU institutions, as well as between the institutional apparatus and the citizens, takes place. They contribute to shaping a reality that is an integral part of the EU legal order. 'Discourses' are interpreted here as different from 'narratives', as the latter are (sometimes competing) forms

(F'note continued)

G Palombella, 'From Human Rights to Fundamental Rights: Consequences of a Conceptual Distinction' (2007) 93 *Archiv für Rechts- und Sozialphilosophie* 396. The EU cannot of course be compared to a human rights organisation. For the purposes of this Article, I use the notions of 'fundamental' and 'individual' rights, or simply rights, interchangeably, as embracing both fundamental rights and fundamental freedoms.

[9] See eg *Defrenne v Sabena (No 2)*, C-43/75, EU:C:1976:56; *Van Duyn v Home Office*, C-41/74, EU:C:1974:133; *Francovich v Italy*, C-6/90 and C-9/90, EU:C:1991:428.

[10] See eg *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114, para 3; *Winner Wetten*, C-409/06, EU:C:2010:503, para 61; *Križan*, C-416/10, EU:C:2013:8 para 70.

[11] Reference to 'the people' or 'the peoples' of Europe can be found, eg in the Preamble of the Treaty of Lisbon.

[12] This is true even of alternative projects, eg the failed Fouchet Plan (1961) (which pursued a more intergovernmental agenda). The plan aimed to build up a 'Europe of Peoples' and in its Article 2 emphasised the need to protect human rights, fundamental rights and democracy: at www.cvce.eu.

[13] N Fairclough, *Language and Power* (Longman, 1989), p 26.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

of interpretation of reality employed to explain or justify events, and/or to support specific policies.[14]

In other words, discourses are considered essentially 'practices that systematically form the objects of which they speak',[15] and more specifically, daily practices embedded in the very process of formation of a polity. They include all forms of formal and informal social relationships and interactions between economic and social actors (eg courts, parliaments, media, academic work, as well as social movements, trade unions, etc), which often clash with each other. The concept of 'discourse' employed here is thus potentially very wide and does not include merely 'groupings of utterances or statements', but 'whatever signifies or has meaning' and produces effects within a social and institutional context.[16] By observing such practices, it is almost inevitable to point out how, regardless of our personal judgement, dominance may be enacted and reproduced by subtle, routine, everyday forms of text and talk that appear 'natural' and quite 'acceptable'.[17] Importantly, attention is paid to that type of social power that is exercised by entrenched elites or specific sectors of society. A fundamental feature inherent in the notion of 'discourses of power' employed in this Article is ideological and political struggle.[18]

From this angle, the importance of the first, foundational cases of EU law lies not only in their 'constitutional' significance, but also in the contribution they gave to the development of the intertwined security and rights discourses from the perspective of autonomy and effectiveness/uniformity. In particular, *Van Gend en Loos* and *Costa v ENEL* flow from the 'speciality' of the EU legal order, which, on the one hand (*Van Gend*), empowers individuals—the rights discourse—and, on the other hand (*Costa*), empowers the EU legal order itself—the security discourse. These rulings are part of a set of 'pre-dictions' and 'retro-dictions', through which not only the strategic moves of the main actors, but also their semantic patterns have formed a judicial framework of principles that have crystallised at the foundations of the EU polity.[19]

As is well known, the idea that the EU legal order has a constitutional character has been repeatedly emphasised by the Court in its case law.[20] However, precisely because of the concerns deriving from the tension between the transnational and the national level, from the seventies onwards the fundamental rights discourse has been a necessary legitimacy- and autonomy-enhancing tool, as part of the Court's weaponry. Drawing on the security meta-constitutional rationale, a constant

---

[14] R R Krebs, *Narrative and the Making of US National Security* (Cambridge University Press, 2015).

[15] M Foucault, *The Archaeology of Knowledge* (AM Tavistock, 1972), p 49.

[16] D Macdonnell, *Theories of Discourse* (Blackwell, 1986), p 4.

[17] T A van Djik, 'Principles of Critical Discourse Analysis' (1993) 4 *Discourse and Society* 249, p 254.

[18] M Pecheux, *Language, Semantics and Ideology* (Macmillan, 1982).

[19] A Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of the EU Polity' (2010) 16 *European Law Journal* 1, pp 5–6.

[20] See eg *Les Verts v Parliament*, C-294/83, EU:C:1986:166; Opinion 1/91 (Draft EEA Agreement), EU:C:1991:490; Opinion 2/13 (Accession to the ECHR), EU:C:2014:2454, paras 158–63; *Wightman ao v Secretary of State for Exiting the European Union*, C-621/18, EU:C:2018:999, paras 44–45.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

effort to boost the EU's credentials as a distinct creature of transnational law has led to an assertion of autonomy, on the one hand, vis-á-vis its Member States,[21] and on the other, vis-á-vis international law.[22] Such autonomy implies that the interpretation of fundamental rights that lie at the core of the EU legal system is in line with the EU's structure and objectives.[23] Of course, according to Article 51(1) of the Charter of Fundamental Rights ('CFR'), EU fundamental rights bind Member States only when they implement EU law. Moreover, (1) domestic standards of protection of fundamental rights cannot prejudice either the standards provided by the CFR or the principles of primacy, unity and effectiveness of EU law and (2) Article 53 CFR cannot be interpreted as meaning that a Member State may disapply EU law that is in compliance with the CFR when fundamental rights protected by that State's constitution are at stake: the so-called *Melloni* doctrine conveys the idea that whenever the application of national constitutional standards of protection of fundamental rights might compromise the primacy, effectiveness, and unity of EU law, national courts ought to refrain from using them.[24] The CFR is thus the cornerstone of the EU legal system of protection of fundamental rights: case law, too, indicates that its provisions must be respected not only by the institutions, bodies, offices, and agencies of the EU, but also by the Member States when they implement EU law.[25] An additional example of the interplay between the security and rights discourses is the Court of Justice of the European Union's ('CJEU') ruling that the draft agreement for the accession to the European Convention on Human Rights ('ECHR') would affect 'the specific characteristics of EU law and its autonomy' and would therefore not be compatible with Article 6(2) TEU.[26]

Security and rights discourses resurface time and again not only in the case law of the CJEU, but also in official speeches in times of crisis. As pointed out earlier, the self-justificatory nature of such discourses is particularly evident. The EU liberal project cannot be interrupted, because people demand it. In other words, the *finalité* of European integration—sometimes overtly federalist, often leaving little space for reflexivity—requires simultaneously further enlargement and reinforced cooperation, because any alternative solution would lead to self-destruction and 'would demand a fatal price above all of our people'.[27] Correspondingly, even in the face of seemingly overwhelming financial distress, 'the ECB is ready to do whatever it

[21] *Stauder v City of Ulm*, C-29/69, EU:C:1969:57; *Internationale Handellsgesellschaft*, note 10 above; *Nold v Commission*, C-4/73, EU:C:1974:51. More recently *Melloni*, C-C-399/11, EU:C:2013:107.

[22] *Kadi and Al-Barakaat*, note 3 above.

[23] *Internationale Handellsgesellschaft*, note 10 above, para 3; *Kadi and Al-Barakaat*, note 3 above.

[24] *Melloni*, note 21 above, paras 58–60.

[25] *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paras 17–21.

[26] Opinion 2/13, EU:C:2014:2454, para 200.

[27] Speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', pp 3–5.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

takes to preserve the euro', which is, as a result, 'irreversible'.[28] The reason for this zealous defense of the European *Sonderweg* is that, ultimately, a government must offer its citizens 'physical and economic security', as well as protect liberty and individual rights.[29] This means that 'Europe' must not only protect its citizens, but also 'empower' them and 'preserve the European way of life'.[30]

Inevitably, security is also an ambiguous notion which is characterised by tensions and contradictions. In particular, when the security meta-constitutional rationale becomes self-referential—namely when European integration is pursued for its own sake—the risk is that the European project may be unable to deliver what it promises. Two examples may be mentioned here. First, in order *to secure* the uniform interpretation and application of EU law, fundamental rights may be restricted for the purposes of achieving the objectives set out by the Treaties,[31] above all the establishment of a common market,[32] or the stability of the financial system.[33]

Secondly, the self-referential character of security can be detected in the weak social embeddedness of EU law-making. Social rights have sometimes been merely protected as a consequence of the application of the principle of formal equality (*Griesmar*; *Mouflin*)[34] or with a view to protecting the free movement of workers (*Decker*, *Elsen*),[35] or of services (*Kohll*).[36] Moreover, although there have been

---

[28] Speech by Mario Draghi, President of the European Central Bank, at the Global Investment Conference in London, 26 July 2012: 'The only way out of this present crisis is to have more Europe, not less Europe'. Similarly, German Chancellor Angela Merkel portrayed both the financial and refugee crises as existential crises. As monetary union is a 'community of fate' (*Schicksalgemeinschaft*) 'if the euro fails, then Europe fails': see 'Merkel Says Europe Must Be Bound Closer Together' (*Der Spiegel Online*, 7 September 2011). In addition, 'if Europe fails on the question of refugees, then it won't be the Europe we wished for': 'Migrant crisis: Merkel warns of EU failure' (*BBC News*, 31 August 2015).

[29] Speech by Mario Draghi, President of the European Central Bank, at the 'Teatro Sociale' in Trento, 13 September 2016, p 1 ('De Gasperi' award ceremony).

[30] State of the Union Address by Jean-Claude Juncker, President of the European Commission, Strasbourg, 14 September 2016, 'Towards a Better Europe: A Europe that Protects, Empowers and Defends'. See also Speech by Mario Draghi, President of the European Central Bank, at the joint ECB and Banka Slovenije Conference on the Occasion of the 10th Anniversary of the Adoption of the Euro, Ljubljana, 2 February 2017, 'Security through Unity: Making Integration Work for Europe'.

[31] *Internationale Handelgesellschaft*, note 10 above, para 4, where the CJEU ruled that the protection of fundamental rights, 'whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and objectives of the Community'.

[32] For example, in *Wachauf*, C-5/88, EU:C:1989:321, para 18, the CJEU points out that '… fundamental rights … are not absolute … but must be considered in relation to their social function', so that 'restrictions may be imposed on the exercise of those rights, in particular in the context of the organisation of a common market, provided that those restrictions correspond in fact to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights'.

[33] *Peter Gauweiler ao v Deutscher Bundestag*, C-62/14, EU:C:2015:400.

[34] *Griesmar*, C-366/99, EU:C:2001:648; *Mouflin*, C-206/00, EU:C:2001:695.

[35] *Decker*, C-120/95, EU:C:1998:167; *Elsen*, C-135/99, EU:C:2000:647.

[36] *Kohll*, C-158/96, EU:C:1998:171.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

positive developments in the case law of the CJEU, a variety of not necessarily clear-cut lines ('inside' and 'outside' regimes of protection by law) have been drawn between different categories, such as workers and non-workers, or workers who benefit from secure, full-time jobs and workers who do not.[37]

Elsewhere six dimensions of security have been distinguished: the spatial, temporal, popular, ontological, epistemic, and semantic (or reflexive) dimension.[38] Recent events have showed that, for the first time in the history of the European liberal project, all dimensions of security are being challenged simultaneously by different types of crisis. It is thus necessary to illustrate the implications of this complex and unprecedented state of affairs. This Article focuses on two dimensions in particular: popular and epistemic.

Popular security evokes the notions of *demos* and identity and is therefore associated with the democratic side of European integration. Epistemic security refers to the possibility for different legal systems to reconcile their constitutional claims and is closely related with the rule of law side of European integration. The crucial question of epistemic security is to what extent multiple rationalities or claims of authority can co-exist in the same legal and political space. How can we ensure the survival of a polity, in which conflictuality among several levels is not only visible, but also growing? This implies that autonomy, authority, and legitimacy are contested *in both directions*: from the national to the EU and, conversely, from the EU to the national.

The following Part III will advocate a move from self-referential to heterarchical security, from the perspective of these two dimensions. As will be seen in Part IV, two crises are relevant for our purposes: the constitutional identity crisis and the rule of law crisis.

III. FROM SELF-REFERENTIAL TO HETERARCHICAL SECURITY

The argument in this Article is that a shift from self-referential to heterarchical security is necessary. One of the fundamental requirements of heterarchical security is that the principles of autonomy, primacy, uniformity, and effectiveness of EU law be understood in relative, not absolute terms.[39] As a result, national—both ordinary and constitutional—courts ought to be given a more prominent role in the architecture of European integration, especially as regards the interpretation of EU law according to their own legal-cultural parameters. What is more (as will be observed later), signs that such transformation is taking place can already be detected, to the extent that we are witnessing something akin to a constitutional moment, which corresponds to a crucial stage of European integration. It is worth keeping in mind that—although security and rights discourses take place in the form not only of case law, but also of legislation, media activity, EU institutions' official documents, academic

[37] On this, see C O'Brien, *Unity in Adversity- EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing, 2017).

[38] M Fichera, *The Foundations of the EU as a Polity*, note 6 above.

[39] Ibid.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

debate, and so on—the role of the EU judiciary in the self-preservation and self-perpetuation of the EU legal order is much more relevant that may seem at first sight.

In the past, the political, inherently conflictual nature of EU constitutional claims has been disguised through security and rights discourses, pointing towards a seemingly neutral market (economic-technocratic) integration,[40] mostly negative integration,[41] which pursued the aim of 'the decoupling of politics and economics',[42] which as has already been seen, followed in reality an eminently political agenda. For example, the Economic and Monetary Union of the EU ('EMU') was initially supposed to promote deeper integration and lead to a political union, even though the details of any form of political integration—starting from a sound coordination of fiscal policies—were far from being agreed upon by the very Member States that launched the EMU.[43] This state of affairs seems increasingly difficult to maintain in the current historical-political climate, as the process of constitutionalisation reaches a more advanced stage, in which the probability of high-intensity conflict as regards key issues of EU integration between different levels of governance and geo-political areas is growing.[44] From the heterarchical perspective, it can be argued, in a first approximation, that a transnational polity such as the EU is secure as long as its principles and objectives are not imposed unilaterally upon its members.

As a remedy against self-referentiality, the EU ought not to be seen as a 'mechanical necessity imposed by the logic of integration': in other words, not only a public debate of what type of Europe responds to the democratic demands of the Member States is better than a sterile debate about more or less Europe,[45] but also, and more forcefully: the question of 'why Europe?' is much more significant than the question of 'what is Europe?' In fact, the 'heterarchical paradigm' is better suited than other paradigms to address the current state of affairs,[46] and to answer the question above, as long as this paradigm allows some degree of openness to agonistic conflict and contestation.[47] Europe exists in order to enable the peaceful co-existence of legal-cultural clusters and sources of authority exercising distinct constitutional claims.

The heterarchical features of the EU as transnational polity have been explored by different versions of constitutional pluralism from a variety of theoretical angles. Yet, most of these versions, while predicated upon normative frameworks of discursivity,

---

[40] E Haas, *The Uniting of Europe* (Stanford University Press, 1958).

[41] See eg *Cassis de Dijon*, C-120/78, EU:C:1979:42.

[42] G Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone too Far?* (Cambridge University Press, 2014), pp 149–78.

[43] Ibid, p 50.

[44] M Fichera, 'Law, Community and *Ultima Ratio* in Transnational Law' in M Fichera et al (eds), *Polity and Crisis – Reflections on the European Odyssey* (Ashgate 2014/Routledge, 2016), p 189.

[45] M P Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice (EUI RSCAS PP, 2012), p 5.

[46] See, for one version of the 'heterarchical paradigm' (as defined in this Article), M Avbelj and J Komarek (eds) *Constitutional Pluralism and Beyond* (Hart Publishing, 2012).

[47] For theories of agonistic pluralism see eg C Mouffe, 'Deliberative Democracy or Agonistic Pluralism?' (1999) *Social Research* 745.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

constitutional tolerance, and/or 'best fit', in one way or another, locate the ultimate source of authority at the EU level, thus translating to the new environment the traditional constitutional framework which is so familiar in State-centric approaches. In other words, although their initial assumption is the existence of multiple sites of legal authority and/or perspectives, they do not cut loose neatly and unambiguously from their moorings in the domestic configuration of a constitutional order: their mind frame is still self-referential.[48]

By way of contrast, some forms of so-called epistemic and/or radical pluralism seem to be going in a more promising direction.[49] Analogously, some recent works, which interestingly dismiss the vocabulary of coherence, universality, and sovereignty, opt for an efficiency-based configuration of multi-level governance, in which emphasis is placed on direct deliberation at the local level, which is, however, placed beyond the reach of courts.[50] The most significant contribution of this last group of theories is that, while departing from different premises, they look more deeply at the novel character of European integration, with a level of perspicacity that is missing in other approaches. Yet, just like these other approaches, the main focus seems to be the dilemmas and paradoxes of sovereignty. Instead, one important consideration has been left aside or addressed only marginally: the question of security as a meta-constitutional rationale of the European project—in particular, how the shift from self-referential to heterarchical security ought to take place. One of the features of this necessary transformation is represented by the activity of the EU judiciary as a whole.

A few scholars have in the past rightly emphasised in different ways the need to consider the point of view of domestic courts more carefully.[51] According to Davies' 'interpretative pluralism' (inspired by the principle of non-domination),

---

[48] See eg M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262, p 302; J Weiler, 'European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order' (1996) 46 *Political Studies* 517, p 532; M P Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed) *Sovereignty in Transition* (Hart Publishing, 2003), pp 501, 523–24.

[49] See eg N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; N Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (Oxford University Press, 2010).

[50] O Gerstenberg and C Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002).

[51] See eg J Komárek, 'Why National Constitutional Courts Should Not Embrace EU Fundamental Rights' in S Weatherill et al (eds) *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart Publishing, 2015), pp 75–92; M Dani, 'National Constitutional Courts in Supranational Litigation: A Contextual Analysis' (2017) 23 *European Law Journal* 189 (where the author, while conceding that 'each judicial actor is given the opportunity to represent its particular legal culture and engage with the normative claims formulated by its interlocutors', and, in particular, ordinary courts have become 'trusted partners in constitutional adjudication', maintains that, although constitutional courts should be more prominent, they should not be 'expected to embark on rights-based constitutional resistance against supranational technocratic and intergovernmental encroachment' in the name of

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

the CJEU ought not to possess definitive interpretative authority over EU law: national ordinary and constitutional courts should be left free to provide alternative approaches, thus participating more actively in the interpretation of the Treaties.[52] This is an important observation. However, two remarks ought to be made. First, security and right discourses both at the national and EU level are inevitably associated with ambiguity and contested concepts. Second—and as a result of recognising the degree of ambiguity that is inherent in such discourses—the notion of common constitutional traditions may be particularly useful as a tool of judicial inter-systemic communication, because it allows respect for legal-cultural idiosyncrasies and by-passes identitarian reasoning.[53]

Suggesting that one way of addressing high-intensity conflict is to rely upon national courts may at times be considered reminiscent of the model of dispersed judicial review, which prevails in US constitutionalism. While a comparative analysis of the US and European models lies outside the scope of this work, it is worth observing that, despite traditional continental scepticism towards US-style judicial review,[54] the distinction between the two models is blurring,[55] and some features of the US model—such as, for example, the capacity to manage high-intensity legal-political conflict and the increased possibility to count on the experience of lower-level courts for the interpretation of federal law[56]—may be relevant for the current stages of European integration.

The significance of national courts, and, relatedly, of security and rights discourses in the domestic sphere, is confirmed by the constitutional identity and rule of law crisis:[57] recent case law indicates that heterarchy may be emerging more forcefully.

(F'note continued)
constitutional democracy); G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 *European Law Journal* 1.

[52] As Davies readily recognises, 'Certainly, all this can lead to impasse and conflict and courts pitted against each other. Yet that is in the nature of legal systems—there are often long-standing and frustrating divergences between courts at different levels, or in different regions, or branches of the judiciary'. Davies, 'Does the Court of Justice own the Treaties', note 51 above.

[53] M Fichera and O Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions. Which Language for Cooperative Constitutionalism in Europe?' (2019) *German Law Journal* forthcoming.

[54] See eg M Cappelletti, 'Judicial Review in Comparative Perspective' (1970) 58 *California Law Review* 1017, p 1047 (who believes that 'the bulk of Europe's judiciary seems psychologically incapable of the value-oriented, quasi-political functions' associated with US-style judicial review); C F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007); V F Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press, 2009).

[55] As admitted in Cappelletti, note 54 above, p 1050.

[56] M Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the US Supreme Court' (2006) 4 *International Journal of Constitutional Law* 618.

[57] The importance of the role of national courts in the configuration of EU integration was already pointed out in A M Slaughter et al (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing, 1998).

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

IV. THE CONSTITUTIONAL IDENTITY AND RULE OF LAW CRISIS

The EU polity is currently going through an unusually intense period of contestation and challenge. There are several causes that lie at the origin of such contestation, but the variety and complexity of crises that have recently affected the European countries are certainly a major factor: the Eurozone crisis, the rule of law crisis, and the refugee crisis are some clear examples.[58] It has been observed that the EU is experiencing a sort of 'existential crisis', which stems from the economic, financial, fiscal, macroeconomic, and political structural weaknesses of the EU.[59]

Up until the turn of the century, the underpinnings of the EU were still to be found in its liberal-democratic promise to reconcile capitalism and welfare by standing above the contenders and providing an institutional superstructure[60] which would oversee and shape Member States' intercourse. As noted earlier, this narrative of reconciliation could be contrasted with the inner core of European integration, which has always been a political project, from the very beginning.[61] 'Integration through law' was only on the surface an aloof, aseptic operation conceived in some legal laboratory of continental Europe.[62] The European liberal project possessed a fictitious aura of neutrality, as if removing tariffs, allowing goods, people, and services to circulate freely, and creating a common currency were mere technical matters, which was necessary to delegate to a new, 'enlightened' transnational entity. The transnational legal system emerging from the post-Cold War consensus was, after all, an epitome of the positivist understanding of the rule of law as a regulatory mechanism conceived to constrain constituent power.[63] Despite the inherent tension between the democracy component and the rule of law or constitutionalism component of modern nation States, various attempts have been made to integrate them.[64] Most famously, the legitimation of liberal democracy was supposed to be achieved

---

[58] See eg A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, 2015); C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); A J Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 22 *European Law Journal* 388.

[59] A J Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal* 453; J-C Juncker, 'State of the Union Address 2016: Towards a Better Europe, a Europe that Protects, Empowers and Defends', Strasbourg, 14 September 2016 ('Our European Union is, at least in part, in an existential crisis'.); Fichera, 'Security Issues as Existential Threat to the Community', note 4 above, pp 85–111.

[60] I use this term without any Marxist undertones or sociocultural implications.

[61] The EMU itself was considered to be 'the royal road to political union' and in the 1970s it replaced customs union as the main goal of European integration. G Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press, 2014), p 23.

[62] P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Springer, 1974).

[63] J Raz, 'The Rule of Law and Its Virtue' in J Raz (ed) *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009), p 210.

[64] See eg J Habermas, *Between Facts and Norms* (The MIT Press, 1996).

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

through communicative arrangements promoting opinion- and will-formation.[65] Of course, such effort presupposes the existence of an inclusive from of rationality. However, the current crisis shows how the European project has been marked by the prevalence of one form of rationality over the others: market rationality. As a result, it is much more meaningful to refer to a crisis of the EU's liberal project, rather than, merely, a crisis of the EU's neoliberal project.

The unprecedented attacks to the European liberal project by so-called populist parties are not so much directed at Europe, as to *a certain form of governing contemporary societies*. As a matter of fact, populist governments do not object to European integration as such, and sometimes blame the EU for betraying the values of the Treaty of Maastricht.[66] These arguments ought not to be downplayed or belittled.

In order to explain better the interplay between security and crisis, the following sections attempt to focus in particular on the constitutional identity and rule of law crisis. This type of crisis may be analysed through the lens of both epistemic security and popular security.

A. The constitutional identity crisis

In Italy,[67] Denmark,[68] Hungary,[69] Portugal,[70] Greece,[71] Spain,[72] Czech Republic,[73] and the United Kingdom,[74] the relationship between the EU and the domestic level, and in particular between the CJEU and domestic constitutional courts, has been as conflictual as ever in recent years. In the past, as well known, a few episodes of tension had already indicated how the issues of primacy and autonomy (as well as the related issue of *Kompetenz-Kompetenz*)—in particular the extent to which

---

[65] Ibid.

[66] See eg 'Salvini Hails Six Months in Power, Wants to Personally Negotiate with EU' (Euractiv, 10 December 2018), https://www.euractiv.com/section/eu-elections-2019/news/salvini-hails-six-months-in-power-wants-to-personally-negotiate-with-eu.

[67] C Cost Ordinanza No 207/2013, www.cortecostituzionale.it; *Taricco*, C-105/14, EU:C:2015:555; more recently, *Criminal proceedings against M A S*, C-42/17, EU:C:2017:936.

[68] *Dansk Industri v Rasmussen*, C-441/14, EU:C:2016:278; Danish Supreme Court, Case No 15/2014 *Dansk Industri, acting on behalf of Ajos* A/S, Judgment of 6 December 2016.

[69] Hungarian Constitutional Court, Case No 22/2016, Judgment of 30 November 2016, http://huncon-court.hu/sajto/news/communication-on-the-interpretation-of-the-fundamental-laws-provision-allowing-the-joint-exercise-of-powers-with-the-other-member-states-through-the-institutions-of-the-european-union; *Slovak, Hungary, Poland v Council* (asylum-seeker quota), C-643 to 647/15, EU:C:2017:631.

[70] Acórdão do Tribunal Constitucional No 187/2013, Judgment of 22 April 2013, Diário da República No 78/2013, Série I de 2013-04-22.

[71] Greek Council of State, Case 668/2012.

[72] *Melloni* note 21 above; Tribunal Constitucional, Sentencia No 26/2014, *Melloni*, 13 February 2014, BOE No 60 Sec. TC. P. 85 (which recalls the famous judgment 1/2004).

[73] Pl ÚS 5/12, *Slovak Pensions* case (the first time a CJEU ruling was found *ultra vires*).

[74] *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

transferring ever larger portions of national sovereignty to the EU is constitutionally legitimate—have become pivotal for the construction of the EU polity.[75] Nevertheless, more recently the stakes have been raised to the extent that we are witnessing a crucial turning point for the EU polity.

The *Taricco* case is emblematic of the capacity of constitutional courts to set boundaries against the EU's interference with national constitutional identity—and at the same time of the CJEU's intention to ensure the primacy, autonomy, and effectiveness of EU law—although differently from the *Melloni/Fransson* approach. The question before the CJEU in *Taricco I* was whether, by making it easier for those accused of valued added tax ('VAT') fraud to achieve impunity, Italian legislation on prescription periods violates EU law.[76] The reasoning of the Court was straightforward: as Article 325 of the Treaty on the Functioning of the European Union ('TFEU') prescribes the need to fight against fraud and other illegal activities against the EU financial interests, national rules preventing the enactment of effective and dissuasive measures against VAT evasion ought to be disapplied whenever this is necessary to ensure EU law's full effect.[77] What is more, the disapplication of national law would not have the effect of infringing the rights of the accused, as guaranteed by Article 49 CFR.[78]

The novelty of this case resides in the reaction of the Italian Constitutional Court (ICC). The ICC not surprisingly adopted—along a wavelength similar to other courts in the past few years—an identitarian language, by relying on Article 4(2) TEU and the need to reconcile unity and diversity.[79] This recalls in part the attitude that the same Court had in the past, especially in the earlier stages of its well-known 'counter-limits doctrine',[80] although, at the same time, the ICC seemed to have a more conciliatory attitude than its German counterpart in *Gauweiler*.[81] In any case, in *Taricco*, the ICC emphatically argued that a minimum degree of diversity is necessary to preserve not only national identity, but also the constitutional foundations which the

[75] In addition to the famous rulings of the German and Italian Constitutional Court, see for example in Denmark, *Carlsen v Rasmussen* (Danish Maastricht Case) (1999) 3 CMLR 854; in the UK, *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); in Estonia, the ruling of the Supreme Court on the EMU, 3-4-1-6-12, 12 July 2012 (and all other European courts' rulings issued during the economic and financial crisis).

[76] In particular, Article 158 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, as well as other TFEU provisions.

[77] *Taricco*, note 67 above, para 49: this could occur 'without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure'. See (as in *Ajos*) *Kücükdeveci v Swedex*, C-555/07, EU:C:2010:21, para 51.

[78] *Kücükdeveci v Swedex*, note 77 above, para 55. In any case, 'if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected' (para 53).

[79] C Cost Ordinanza No 207/2013, note 67 above.

[80] C Cost Sentenza No 183/73; Sentenza No 170/84, www.cortecostituzionale.it. See also M Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' (1990) 12 *Michigan Journal of International Law* 173.

[81] *Gauweiler*, note 33 above.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

Treaties rely upon as a direct derivation of the Member State's will.[82] As prescription periods in the Italian legal system qualify as substantive, rather than procedural criminal rules, they form part of the principle of legality in criminal matters (Article 25 Italian Constitution), which is one of the fundamental principles of the Italian legal system. As a result, the CJEU's interpretation of Article 325 TFEU should pay heed to Italian constitutional identity.

In the eyes of the ICC, in this particular case, contrary to *Melloni*, the principles of primacy and uniform application of EU law were not prejudiced. The reason is that the ICC's opinion does not amount to an alternative interpretation of EU law, but reflects a feature of the Italian legal system, which ensures a higher level of protection for the accused person than the one guaranteed by Articles 49 CFR and 7 ECHR.[83] The strategy of the ICC consists therefore in making use of the security and fundamental rights discourses with the explicit intent to safeguard the Italian legal system and the Court's own role against the intrusion of foreign elements, which may alter the functioning and scope of individual rights as interpreted and enforced domestically.

Importantly, however, the corresponding ruling of the CJEU in *Taricco II* can, in this regard, also be inscribed within the security meta-rationale as a fine example that goes beyond a purely self-referential scheme.[84] In other words, the CJEU has realised that the conflict originates from a crucial legal-cultural difference. The Italian legal system does not accept an interpretation of the principle of separation of powers in such a way that a judge is free to establish legal criteria and categories, which would normally be entrusted to the legislator. True, the Italian legislator has been inactive, and could have filled the gap earlier. Yet, this does not justify an intrusion of EU law to the extent of altering the constitutional balance of a Member State. The effort of the CJEU—which employs in its reasoning the notion of 'common constitutional traditions'—is certainly laudable. While confirming the importance of the national identity clause (Article 4(2) TEU), the CJEU attempted to build up common principles with the aim of showing how all provisions on fundamental rights and fundamental principles can be read together systemically. Clearly, the CJEU was very cautious here. National judges are, in principle, obliged to fully respect the obligation enshrined in Article 325 TFEU—with the consequence, as mentioned above, that national provisions preventing compliance with such obligation ought to be disapplied. However, protection of the financial interests of the EU through criminal law belongs to the shared competences of the EU and Member States. In this context, it cannot be ignored, said the Court, that, at the time of the commission of the crime, there was no fully harmonised legislation on fraud against the financial interests of the EU.[85] As a result, Italy had a large room for maneuver and was free to regulate the field as it wished—including the application of the principle of legality to

[82] C Cost Ordinanza No 207/2013, note 67 above, para 6.

[83] Ibid, para 8. See A Bernardi (ed), *I Controlimiti- Primato delle Norme Europee e Difesa dei Principi Costituzionali* (Jovene, 2017).

[84] *Criminal proceedings against M A S*, note 67 above.

[85] Ibid, para 44.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

prescription periods.[86] It is undeniable that the alleged offenders were not able to foresee the circumstances in which Article 325 TFEU applies. As noted, the main problem deriving from the *Melloni*/*Fransson* doctrine here is that the Italian system does not allow the judge to replace the legislator by providing the missing criteria.[87] Hence, not only the principles of foreseeability, clarity, and non-retroactivity, but also the principle of separation of powers would be compromised.

Importantly, the CJEU, while discussing the principle of legality, considered its relevance both for the EU legal order and national legal orders. Moreover, the Court included it in the Member States' 'common constitutional traditions', by mentioning several provisions, including Article 7(1) of the ECHR.

Taricco II ultimately shows the importance of conflict in EU law. It is by raising its voice that the ICC has showed how delicate matters relating to national diversity may be addressed. It also indicates one possible way out of conflict: playing the 'common constitutional traditions' card instead of the 'identity card' reduces the likelihood of deadlocks and insurmountable hurdles. Notably, however, in the final twist in the *Taricco* saga, the ICC has reverted to an identitarian approach.[88] While acknowledging the power of the CJEU to interpret EU law uniformly, the ICC still argued that Article 325 TFEU does not comply with the requirements of specificity and clarity under domestic law. Thus, the degree of precision postulated by Article 25(2) of the Italian Constitution precludes the application of the *Taricco* rule to facts occurring before the publication of the *Taricco I* ruling.

It is argued here that alternative interpretations of EU law by national courts should not be precluded as such, and it would have been more helpful if the ICC had embraced more explicitly the language of common constitutional traditions. In other words, the Court could have at the same time clarified that, while the principle of legality belongs to such traditions, nevertheless it needs to be interpreted in the context of the Italian legal order, in conjunction with other relevant principles, such as separation of powers. This would be in line with the configuration of national courts (at all levels) as EU law courts, which (ought to) play a key role in the EU legal order.[89] Because the EU and national legal order overlap with each other, there is a common epistemic ground which ought to be preserved, even though their ultimate claims of authority remain separate and irreconcilable.

In other words, the heterarchical paradigm, while admitting agonistic contestation and diversity, at the same time ought to seek reconciliation by employing a language that preserves the EU's epistemic core. The *Taricco* saga represents in this sense a failed opportunity to embrace such language through the use of common constitutional traditions, especially because doing so would enhance the role of national constitutional and supreme courts in the interpretation of EU law.

---

[86] Ibid, para 45.

[87] Ibid, paras 41–42.

[88] C Cost Sentenza No 115/2018, especially paras 5 and 11, https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20180601103714.pdf.

[89] M Fichera et al, Comment, 'Forum di discussione- La saga Taricco a una svolta: in attesa della decisione della Corte Costituzionale'(2018) 1 *Diritti Comparati*, p 27.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

B. The rule of law crisis and populism

The most important examples of the rule of law crisis are the events occurring in three post-communist countries: Hungary, Poland, and Romania.[90] The recent Proposal by the Commission to trigger the Article 7 TEU procedure draws on the security meta-constitutional rationale by recognising the situation of systemic threat to the rule of law.[91] Interestingly, a 'core meaning' of the rule of law is identified as part of the EU's 'common values'. Its key components ('whatever the model of the justice system chosen in a Member State') would be the principles of the separation of powers, legal certainty, the independence of the judiciary, and equality before the law. Respect for the rule of law is viewed as a precondition for mutual trust and loyal cooperation—and, as a result, for the smooth functioning of the internal market.[92] The European Parliament's vote calling on the Council of the EU to act against Hungary to prevent a systemic threat to the EU's founding values can also be inscribed within the security meta-constitutional rationale.[93]

Clearly, in all cases mentioned above constitutionalism's internal connection with the ideals of democracy, self-determination, constituent power, representation, rule of law, and separation of powers has been eroded. However, and crucially, the most difficult dilemma originates from the awkward relationship between the transnational and the national level. In this context, the contradictions in the security and fundamental rights discourses are even more evident:[94] common values can only be upheld to the extent that a line is drawn between those who share them and those who do not. The real challenge of the rule of law crisis is that the EU institutions are not immune from it either: this is part and parcel of the above-mentioned criticism levelled at the EU as such.

---

[90] Other examples could be made, such as the case of the Roma repatriation in France. See T Konstadinides, *The Rule of Law in the European Union – The Internal Dimension* (Hart Publishing, 2017), p 146.

[91] COM (2017) 835 final, *European Commission Reasoned Proposal in Accordance with Article 7(1) of the Treaty on the European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*.

[92] In addition to this, COM (2019) 163 final, *Communication from the Commission on Further Strengthening the Rule of Law within the Union*, p 13 and COM (2019) 343 final, *Communication from the Commission on Strengthening the Rule of Law within the Union – A Blueprint for Action*, p 4 both emphasise the importance of national courts for the application of EU law.

[93] European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, Report on the Situation in Hungary, 2017/2131(INL).

[94] A von Bogdandy et al, 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Arena*: *Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015), p 235 provides a response which can be framed within such discourses.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

Yet, objections to the heterarchical paradigm, raised on occasion of the rule of law crisis, are partly misplaced.[95] The European project's fictitious aura of neutrality has concealed the tension between its universalistic and imperialistic ambition and the practical need to draw lines between who is inside and who is outside, which is always a constitutional act. The illiberal turn taking place in some European countries is precisely an indication of the extent to which an essential epistemic core needs to be preserved within the EU. The move from self-referential to heterarchical security allows addressing this issue, because the latter opens up a path towards alternative visions of the European project only as long as the very reasons lying behind this project are not compromised. Heterarchical security points to a deeper rationale of European integration, one under which free and peaceful coexistence of States and peoples and individual emancipation are simultaneously safeguarded. This is the meeting point of epistemic and popular security: the EU as a polity and legal system can only survive if it fosters a dual conception of 'The People': on the one hand, 'mobile people', ie a construction of people as freely moving from one place to another of the EU territory; and on the other hand 'peoples' in the plural, ie a construction of 'demoi' that is supposed to underpin the *process* of development of the EU as a polity.[96] Yet, any attempt to refer to a 'traditional understanding of the primacy of EU law' as emerging from *Costa v ENEL* should be reconceived.[97] The idea that a permanent limitation of the Member States' sovereign rights has taken place once and for all runs against the configuration of heterarchical security. The provision of Article 50 TEU, which 'leaves each Member State free to choose whether or not it wishes to take part in the European project',[98] should be read in this light, as confirmed recently by the CJEU in *Wightman*.[99] After all, one of the populist and authoritarian movements' mainstays is the contention that that the rule of law and the will of the people must be separated, or at least that, as a result of an inevitable conflict between them, the latter ought to prevail as the ultimate, unrestrained source of authority.[100] This is an opportunity to reflect on the

[95] See eg R D Kelemen and L Pech, 'Why Autocrats Love Constitutional Pluralism: Lessons from Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59. The authors quote the Polish government's White Paper on the Reform of the Polish Judiciary, which explicitly relies on MacCormick's thesis to support its own claims, as evidence of the inadequacy of the heterarchical paradigm.

[96] For the idea of demoicracy, see references later in this work.

[97] Kelemen and Pech, note 95 above, p 7.

[98] M Fichera, 'Brexit and the Security of the European project: Citizenship and Free Movement as a Case Study' (2018) 69 *Northern Ireland Legal Quarterly* 249, p 259.

[99] *Wightman*, note 20 above. Importantly, in support of the argument that the intention to withdraw can be unilaterally revoked any time prior to the conclusion of the withdrawal agreement, AG Campos Sánchez-Bordona emphasises that such conclusion is "consonant with the survival … of any association in which very strong links have been forged" as well as with the protection of the rights of EU citizens. Opinion of Advocate-General Campos Sánchez-Bordona, *Wightman*, note 20 above, paras 134–37.

[100] An appropriate analysis of the distinction between populism and authoritarianism lies beyond the scope of this work.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

possibility—but not inevitability—of any such conflict. It should always be borne in mind that the very security that is the presupposition to the European project can easily turn into a mortal threat, if pursued at all costs. Populism and growing Euroscepticism are in this sense an important litmus test of the future of the EU.

Ultimately, the Polish, Hungarian, and Romanian rule of law crises have brought forward an all-too-familiar idea of 'people', whose historical, ethnic, and cultural roots are associated with their national territory.[101] After all, various milder or harsher versions of 'nationalism' can be found in both left-wing and right-wing populism in many European countries.[102] As a result, populist movements promising a new future for the EU find it difficult to evoke an idea of 'people' that embraces the EU as a whole. Populism attaches to the notion of people an inevitably moralistic imagery,[103] one that is not able to escape the borders of the nation State. This is not merely a distinctive feature of populism: it may also be its limit. Therefore, populists fail precisely on their own ground: while articulating a language *for their own people*, they are unable to speak on behalf of others' people. Even when they put forward a political project for the EU, they cannot avoid rephrasing it in terms of 'we each' instead of 'we together'. For better or worse, the 'people' are a fundamental construct of European integration,[104] and whoever advocates change for the EU cannot avoid speaking (or claiming to be speaking) on their behalf. Such fundamental construct is predicated upon two forces: a unifying power and an exclusionary power.

However, having said that, the problem inherent in the idea of 'people' is that whoever evokes it—regardless of whether or not it does so under the aegis of populism—constantly runs the risk of rehearsing a moralistic imagery. Both its unifying power (bringing unity, even if this means an artificial unity) and its exclusionary power (separating *us* from *them*) possess a claim of universality that conceals the reality of tensions, contradictions and conflicts that always emerge within the notion of 'people'.[105] It is argued here that if, as suggested by scholars, EU constitutionalism should avoid relying on a homogeneous, uniform notion of 'people',[106] it follows that conflict should be addressed more openly. As the EU reaches an advanced stage of integration, fundamental issues should be brought out to the surface and

---

[101] Von Bogdandy and Sonnevend (eds), *Constitutional Crisis in the European Constitutional Arena*, note 94 above.

[102] S Champeau, 'Populist Movements and the European Union' in S Champeau et al (eds), *The Future of Europe- Democracy, Legitimacy and Justice After the Euro Crisis* (Rowman and Littlefield, 2015), p 195.

[103] J W Muller, *What is Populism* (University of Pennsylvania Press, 2016)

[104] 'The political operation par excellence is always going to be the construction of "a people"'. E Laclau, *On Populist Reason* (Verso, 2005), p 153.

[105] 'For politics, the fact that the people are internally divided is not, actually, a scandal to be deplored. It is the primary condition of the exercise of politics'. J Rancière, *Disagreement: Philosophy and Politics*, J Rose (trans) (University of Minnesota Press, 1999), pp 87–88.

[106] R Bellamy, 'An Ever Closer Union Among the Peoples of Europe: Republican Intergovernmentalism and Demoicratic Representation within the EU' (2013) 35 *Journal of European Integration* 499; K Nicolaïdis, 'European Demoicracy and Its Crisis' (2013) 51 *Journal of Common Market Studies* 351.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

debated, rather than ignored or postponed. Contrary to what is commonly believed, a weakness (rather than a strength) of the European project has consisted precisely in repressing legal-political conflict beneath a veil of neutrality and technocratic rule.[107] One way of addressing conflict more openly is to allow national courts to articulate the constitutional claims of their respective countries in legal-cultural terms, while at the same time participating in shaping the common epistemic core of the European project.

C. The role of national courts

It has already been noted how elements of heterarchy may already be potentially identified in many recent cases, including the *Taricco* saga. However, the emergence of additional elements of heterarchy can be detected in another string of important cases, which are related to both the constitutional identity and rule of law crisis. These cases show not only that national courts are gaining more relevance in the architecture of European integration, but also that, by encouraging decentralised enforcement and/or review of EU law, the EU judiciary may be developing features closer to (but not necessarily identical with) the US model of diffuse review. At the same time, protecting and promoting EU values seems to require establishing clear criteria identifying the components of the EU judiciary as an integrated network. Such heterarchically oriented development points towards a significant constitutional moment for the EU.

To begin with, the CJEU has re-elaborated the notion of 'EU judiciary' in functional, as opposed to substantive terms. In other words, as ruled in *Associação Sindical dos Juízes Portugueses*, Article 19 TEU gives concrete expression to the founding value of the rule of law by conferring the function of judicial review not only upon the CJEU, but also national courts and tribunals as part of the EU judiciary.[108] It follows that Member States are obliged, by virtue of the principle of loyal cooperation—Article 4(3) TEU—to ensure the application of EU law and effective judicial protection of individuals in the subject matters falling within the scope of EU law. Effective judicial protection has thus been tied up by the CJEU with the value of the rule of law (Article 2 TEU) and, as a principle directly originating from the Member States' common constitutional traditions, with Articles 6 and 13 ECHR, as well as Article 47 CFR.[109] Member States must make sure that all courts or tribunals that are included in the definition of the EU judiciary respect criteria of effective judicial protection.[110] All those courts that may potentially be called to apply or interpret a provision of EU law are *de jure* part of the EU judiciary. A key requirement to be part of this selective *club* is judicial independence and ensuring the

[107] M Fichera, *The Foundations of the EU As A Polity*, note 6 above.

[108] *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para 31. On this case, see M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 *European Constitutional Law Review* 622.

[109] *Associação Sindical dos Juízes Portugueses*, note 108 above, paras 35–36.

[110] Ibid, para 37.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

latter is essential to fostering mutual trust among courts.[111] In this broader, functional perspective, a national measure compromising the independence of a national court may thus fall within the jurisdiction of the CJEU even when the legal situation does not come within the material scope of EU law, namely whenever a domestic court acts as an EU court, ie has jurisdiction over *potential* questions of EU law.

It is in this light that one should consider the *Polish Forest* case, in which the Court ruled that ensuring effective application of EU law—in particular by way of sanctions for non-compliance with interim measures ordered by a national court—represents a key component of the rule of law enshrined in Article 2 TEU.[112] The previous rulings opened the path allowing the CJEU to find for the first time a Member State (Poland) in breach of Article 19(1) TEU, in particular as regards the principles of the irremovability of judges and judicial independence.[113] Because Poland's Supreme Court 'may be called upon to rule on questions concerning the application or interpretation of EU law and … as a "court or tribunal", within the meaning of EU law, it comes within the Polish judicial system in the 'fields covered by Union law … that that court must meet the requirements of effective judicial protection'.[114] Consequently, the adoption of national measures undermining the Supreme Court's independence triggers the application of EU law, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) CFR. Interestingly, two Opinions of the Advocate-General Tanchev in analogous cases involving Poland seem to be on the same wavelength.[115]

In addition, it is worth pointing out that national courts, as part of the EU judiciary, are increasingly encouraged to take part in the review of EU law, for example by requesting an EU Institution to provide the relevant evidence and information when ruling on the validity of EU acts.[116] Yet, once again, it should be borne in mind that legal-political conflict is an integral element of the EU judiciary, as confirmed by recent rulings by the Spanish Constitutional Tribunal,[117] as well as its

---

[111] Ibid, para 41.

[112] *Commission v Poland* (Polish Forest), Order of the Court, C-441/17, EU:C:2018:255, para 102. See eg P Wennerås, 'Saving the Forest and the Rule of Law' (2019) 56 *Common Market Law Review* 541.

[113] *Commission v Poland*, Order of the Court, C-619/18, EU:C:2019:615.

[114] Ibid, para 52. For other cases, which may be considered part of the 'rule of law crisis', see eg *Torubarov*, C-556/17, EU:C:2019:626; *F*, C-473/16, EU:C:2018:36 (on asylum and refugees respectively).

[115] Opinion of AG Tanchev, C-585/18, 624/18, 625/18, EU:C:2019:551; Opinion of AG Tanchev, C-192/178, EU:C:2019:529. In the latter, Tanchev is particularly careful to point out that Article 19(1) TEU operates only in exceptional cases related to 'systemic or generalised deficiencies', 'which compromise the essence of the irremovability and independence of judges': otherwise, 'respect for the boundary between the competences of the EU, and those of the Member States, is as important in an EU legal order based on the rule of law as the protection of fundamental rights (points 114–16).

[116] *Eurobolt*, C-644/17, EU:C:2019:555.

[117] See eg STC 37-2019, in which the Spanish Constitutional Tribunal ruled that Spanish domestic courts are under a special duty to make a preliminary reference only if they ascertain that a piece of legislation breaches EU law, and not otherwise. This has been interpreted as a move to discourage courts of last instance from setting aside statutes violating EU law. See D Sarmiento, 'Should Constitutional

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

German and Italian counterparts.[118] In these rulings, domestic constitutional courts claim a more significant role than ordinary courts in the preliminary rulings procedure. The tension between ordinary and constitutional legality is enhanced by the degree of interpenetration between the EU and national legal order, typical of a more mature stage of integration. Security and rights self-justifying and contradictory discourses continue to operate in the triangle constitutional courts-ordinary courts-Court of Justice. The Italian context is once again instructive. Recently the CJEU has clarified in *Global Starnet* that, whenever a provision of national law raises doubts of compatibility with both the national Constitution and EU law—so-called 'dual preliminarity'—the existence of a mandatory reference to a domestic constitutional court does not eliminate a national court's right or obligation (depending on the circumstances) to refer questions for the interpretation or validity of EU law.[119] This should be true even if, in the course of the same national proceedings, the domestic constitutional court has assessed the constitutionality of national rules in the light of regulatory parameters analogous to those established under EU law. Such ruling is based on the meta-constitutional rationale of security: the effectiveness of EU law would be impaired if the national court were precluded from referring questions for a preliminary ruling.[120] Despite this assertive statement, the ICC has responded by further refining its approach on the issue of 'dual preliminarity'. In fact, *Global Starnet* seemed an immediate follow-up to the ICC's argument that, since the CFR is not only a part of EU law but has a typically constitutional character, its enforcement cannot be left to ordinary judges. According to *Corte Costituzionale*, whenever the content and scope of application of a Charter's right overlap with a right protected by the Italian Constitution, priority must be given to the question of constitutionality—regardless of whether or not EU law would be directly applicable. In such cases, the ICC would reserve to itself the power to review the national legislative act on the basis of *both* internal and EU criteria.[121] Yet, despite *Global Starnet*, the ICC went even further in later rulings by stating that it would intervene when not only provisions of the Charter, but also principles contained in secondary

(F'note continued)
Courts Be Guardians of the Duty to Make a Preliminary Reference?' (*Despite Our Differences*, 26 June 2019), https://despiteourdifferencesblog.wordpress.com.

[118] The German Federal Constitutional Court claimed to have the 'first word' before any issue is brought to the CJEU. The Court in fact claimed it may review whether a national law is compatible with the Basic Law, including in cases where compatibility with the secondary law of the EU is also in doubt. See BVerfG, Order of 21 March 2018, 1 BvF 1/13, English Press Release No 32/2018 of 4 May 2018, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/03/fs20180321_1bvf000113.html. The Italian Constitutional Court followed a similar path in issues of 'dual preliminarity': in Sentenze No 269/2017 of 7 November 2017, it advocated priority of reference whenever national legislation conflicts at the same time with the Italian Constitution and the CFR: see https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2017&numero=269.

[119] *Global Starnet*, C-322/16, EU:C:2017:985, para 21.

[120] Ibid, para 23.

[121] Corte Costituzionale, Sentenza No 269/2017 of 7 November 2017. Articles 11 and 117(1) Italian Constitution are employed as legal basis by the Italian Court.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

law that are closely connected with the CFR are at issue.[122] The ICC grounded its reasoning in the constitutional nature of the question raised by the referring judge and the need to interpret fundamental rights protected by the Charter in line with Member States' common constitutional traditions indicated by Article 52(4) CFR.[123] Interestingly, however, the ICC added that the power of ordinary courts to refer a question to the CJEU is left unprejudiced and its own 'first word' in this specific case was not a rule: it had only been pronounced upon request by the referring judge.[124] In other words, the ICC after all leaves the ordinary judge free to decide whether the particular question should be referred also to the CJEU, *even on the same points that have been addressed by the ICC*. In light of these recent rulings, it may be argued that the ordinary judge ought to maintain a margin of discretion when choosing to which Court he/she prefers to submit the relevant question(s) first. This seems to be more in line with the role of national courts as outlined by the Treaties and the case law. He/she would also be best placed to assess by which court a particular question ought to be answered, thus avoiding or reducing potential friction.

V. CONCLUSIONS

This Article has attempted to illustrate how important crisis is to flesh out the *reasons* behind the European liberal project. Security should thus be viewed as a meta-constitutional rationale, whose explanatory value consists in clarifying from a legal-political perspective the activities of EU actors and the relationship between the EU and its Member States. It is argued here that security is expressed through security and fundamental rights as discourses of power and we may fully understand the functioning of these discourses only from the perspective of justification. In particular, it is possible to point out the circularity of such discourses, and, consequently, the ever-present risk that the self-referentiality of the meta-rationale of security may lead to self-destruction. In fact, the chapter, while referring to six dimensions of security —spatial, temporal, ontological, popular, epistemic, and reflexive—has examined two of them, ie the popular and the epistemic. For the first time in the history of the European liberal project, all dimensions of security are being challenged simultaneously by different types of 'crisis'. This mind frame allows us to expose the contradictions and ambiguity inherent in the security meta-constitutional rationale, which should be recognised openly and not be necessarily a cause for concern. Paradoxes and tensions certainly emerge from the common effort to construe an internal market within a diversified multi-layered transnational society, while at the same time preventing its fragmentation and dissolution. Yet, the moment has come to face legal-political conflict and address it directly, rather than conceal it

[122] See eg Corte Costituzionale, Sentenza No 20/2019, para 2.1, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=20. The case concerned Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data, OJ L 119, 4.5.2016.

[123] Corte Costituzionale, Sentenza No 20/2019, note 122 above, para 2.3.

[124] See also Corte Costituzionale, Sentenza No 63/2019, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=63.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press

behind a veil of neutrality. Being ready for actual confrontation means dismissing the straitjacket imposed by the European liberal project and moving beyond the current state of affairs. As a result, the constellation of nation States should not be sidelined too easily and, at the same time, the needs and claims of the local level should be considered more carefully. In other words, the principles of primacy, autonomy, uniformity, and effectiveness of EU law ought to be conceived in relative, rather than in absolute terms. The move suggested in this Article—from self-referential to heterarchical security—indicates that a different form of coexistence in the EU polity is possible—one which addresses conflict by simultaneously permitting the CJEU (as well as other EU institutions) to engage more proactively with national courts *and* identifying a common epistemic core, which ought to be upheld in the context of the rule of law crisis when the liberal-democratic tenets upon which the EU polity rests are threatened.

https://doi.org/10.1017/cel.2019.16 Published online by Cambridge University Press