8. European dys-integration, popular disillusionment and Brexit: could ‘substantive constitutionalisation’ help win back minds and hearts?

Fotis Vergis¹

1. INTRODUCTION

The multiple ‘crises’ that engulfed the EU over the past decade, culminating in the Brexit saga, challenge the traditional narrative of perpetual ‘further integration’ but, more importantly, might reveal deeper systemic flaws. The trajectory of the EU could be described as one of ‘dys-integration’:² integration that is skewed and tainted by traditionally established perceptions as to the EU’s original free market foundations. To an extent, this suggested ‘dys-integration’, as manifested in the interpretative choices, policy and conduct of EU institutions, including the Court of Justice of the European Union (CJEU), was one of the factors that fostered the perception of the EU as an entity disconnected from its constituent peoples, lacking in democratic legitimacy and accountability. This sentiment fuelled nationalistic and opportunistic narratives, but also valid critique of the EU. The result of the Brexit referendum and the strenuous process that ensued constitute the emblematic consequence of the rise of such sceptical and critical voices.

It could be argued that the crises the EU has faced are endemic; a feature, rather than a symptom, of its systemic construction and of the underlying

¹ I am grateful to the organisers of and participants in the ‘Law, Solidarity and the Constitutional Crisis’ discussion (Lund, 2019), to this volume’s editors and to Catherine Barnard, Filip Dorsemont, Keith Ewing, Sacha Garben and Dan Wincott for their comments and feedback on earlier versions of this chapter. As usual, all mistakes remain mine entirely.

² Eva Nanopoulos and Fotis Vergis, ‘Conclusion’ in Eva Nanopoulos and Fotis Vergis (eds), *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (CUP 2019) 437–9.

economic and geopolitical objectives and balance that the Union is meant to serve. Such an approach would see no other solution than rupture and reconstruction. However, this chapter will attempt to explore solutions from within the EU's existing primary framework and examine whether embracing a more consistent interpretation and application of the current EU constitutional framework and its normative foundations would be enough to help reverse the 'dys-integration' perception.

'Substantive constitutionalisation', as will be discussed, attempts to identify a legal and political standard of EU accountability within the constitution of the 'autonomous' legal order which the EU purports to be. The normative and material elements of EU primary law that form the Union's substantive constitution reveal the familiar inverted pyramid of constitutional review, and, thus, a constitutional yardstick for the arsenal of EU legal and political constitutionalism.

Embracing the clarity that such a yardstick could address popularised misconceptions about the role and alleged agenda of EU institutions, but also present the public, including its more critical members, with a tangible standard upon which to hold the EU politically and legally accountable. Critical narratives before the Brexit vote, for example, had promoted a perception of the CJEU as an activist court, set on eroding national sovereignty and promoting a particular economic model above all else. Examination of the EU substantive constitution indicates, however, that the normative basis of the EU's current constitutional architecture is one of balance, rooted in fundamental liberal, socioeconomic and democratic values and objectives. Understanding that this balance entails comprehensive consideration of interwoven objectives, functions and codependent aspects, of which economic freedoms are but a single element, would facilitate a relevant consistent interpretation of EU law. It would also substantively define and inform the conduct of EU institutions.

The chapter considers whether radical solutions such as treaty reforms or paradigm rupture are unnecessary to win back some goodwill towards the EU and keep centrifuge narratives at bay. Simply reshaping our understanding of the current EU constitutional framework could hold the potential to bridge the broadening disconnect between the EU and popular public perception of its nature and role.

2. LEGITIMACY AND POPULAR DISILLUSIONMENT: THE BREXIT EXAMPLE

2.1 Brexit as a Symptom of Common Dys-content: Context

Emblematic as it may be, the result of the June 2016 referendum in the UK was arguably not primarily a direct result of conscious engagement with the EU and its suggested legitimacy crisis, despite predictions to the contrary.³ Slogans alluding to corrosion of national sovereignty at the hands of encroaching EU integration and expansionism ('Take Back Control'⁴) and the loss of power to unelected bureaucrats in Brussels⁵ were most prominent in the pre-referendum campaign.⁶ However, notwithstanding their legal inaccuracy, it is questionable whether such arguments featured equally prominently in the minds of voters when weighing whether they would vote for the country to leave the EU. The complexity of determining the causal bases of a multifaceted vote notwithstanding,⁷ relevant research suggests that, of the plethora of arguments utilised in the run up to the referendum, issues related to the economy and immigration eventually emerged dominant in the minds of voters.⁸ These two issues had a particular impact on those experiencing financial, economic, and employment precarity,⁹ who were vulnerable to the edict of 'labour market flexibility'.¹⁰ Questions that relate to the nature of European integration or the EU itself, including those that relate to their democratic legitimacy, eventually receded into the background. As was to be expected, there was limited public

³ Sofia Vassilopoulou, 'UK Euroscepticism and the Brexit Referendum' (2016) 87(2) *The Political Quarterly* 219.

⁴ Sara Hobolt, 'The Brexit Vote: A Divided Nation, A Divided Continent' (2016) 23(9) *Journal of European Public Policy* 1259, 1262.

⁵ Steve Corbett and Alan Walker, 'Introduction: European Social Policy and Society after Brexit: Neoliberalism, Populism and Social Quality' (2019) 18(1) *Social Policy & Society* 87.

⁶ For a comprehensive overview and analysis of the pre- and post-referendum language and discourse see Veronika Koller, Susanne Kopf and Marlene Miglbauer (eds), *Discourses of Brexit* (Routledge 2019).

⁷ Sascha Becker, Thiemo Fetzer and Dennis Novy, 'Who Voted for Brexit? A Comprehensive District-level Analysis' (2017) 32(92) *Economic Policy* 601.

⁸ Kirby Swales, *Understanding the Leave Vote* (NatCen Social Research 2016), 8; Hobolt (n 4) 1262–3.

See also Sara Hobolt and Christopher Wratil, 'Which Argument Will Win the Referendum – Immigration or the Economy?', LSE EUROPP Blog <https://blogs.lse.ac.uk/europpblog/2016/06/21/brexit-winning-argument-immigration-or-economy/>, accessed 29 October 2019.

⁹ Becker, Fetzer and Novy (n 7) 605, 628–9.

¹⁰ *ibid.*, 605.

knowledge to allow for any informed discussion regarding the normative integrity of the Union as a legal entity, or even the exploration of institutional avenues that could address the perceived overreach of the EU or the adverse effects of its policies. Even when such public debate was attempted, critics would often point to the Union's conduct during the euro crisis to highlight the ineffectiveness of any means of reaction other than withdrawal.

That does not mean that the Brexit vote was a distinctly British phenomenon, only marginally related to the European integration project as such. Voters were of course affected by factors which, on the surface, appear purely domestic. The electorate was frustrated by continuous austerity policies,¹¹ growing inequality and the inherent inability to find proportionate expression through the first-past-the-post (FPTP) system of parliamentary elections. The referendum provided it with a unique opportunity to voice its discontent directly and unshackled by the distorting FPTP filter.¹² However, the substantive issues and the frustrations informing the vote were shared beyond the British shores,¹³ particularly in the years during and after the euro crisis.¹⁴ Popular frustration across the continent has sprung out of similar socioeconomic and political concerns (including regarding globalisation, questions of sovereignty and immigration), fuelled by the sentiment of de facto disenfranchisement and loss of trust towards established (political) institutions.¹⁵

The commonality of sentiment is not entirely irrelevant to the perceived nature and objective of the EU, and, importantly, the conduct of its institutions that has been experienced, especially in times of social and economic crisis. What the EU appeared to prioritise when under stress, and the remedies it employed, enhanced the conviction that it is an entity predominantly geared towards the promotion of a particular model of economic integration, based on neoclassical and neoliberal economic dogma, and thus, even in an emergency, uninterested in any action or policy that would challenge that paradigm.¹⁶ The recent example of the Union's response to the COVID-19 crisis – from

¹¹ Thiemo Fetzer, 'Did Austerity Cause Brexit?', (2019) 119(11) *American Economic Review* 3849.

¹² Becker, Fetzer and Novy (n 7) 644.

¹³ Hobolt (n 4) 1260; Becker, Fetzer and Novy (n 7) 601. See also Justin Gest, *The New Minority* (OUP 2016).

¹⁴ Sara Hobolt and James Tilley, 'Fleeing the Centre: The Rise of Challenger Parties in the Aftermath of the Euro Crisis' (2016) 39(5) *West European Politics* 971. See also Hanspeter Kriesi et al (eds) *Political Conflict in Western Europe* (CUP 2012).

¹⁵ Becker, Fetzer and Novy (n 7) 606; see also Karen Ferree, G. Bingham Powell and Ethan Scheiner, 'Context, Electoral Rules, and Party Systems' (2014) 17 *Annual Review of Political Science* 421; also Pieter Pecinovsky, ch 4 in this volume.

¹⁶ Alan Walker and Steve Corbett, 'The Post-Brexit Declaration on Social Quality in Europe' (2019) 18(1) *Social Policy & Society* 161, 162.

the early days of knee-jerk nationally entrenched reactions, instead of central co-ordination and a show of solidarity, to the Commission's early vaccine policy debacle – was indicative of how that perception is fuelled.

The EU's *modus operandi* did not provide hope that it could present a remedy to those fundamental issues that have triggered public unease. As Hobolt puts it, faced with a multiplicity of complex systemic and socio-economic pressures, a significant number of voters tend to regard the EU as part of the problem and definitely not as a source of solutions.¹⁷ Walker and Corbett's analysis concurs. They discern a clear relation of popular disillusionment with the embrace of utilitarian neoliberal dogma¹⁸ and policy agendas¹⁹ promoted by EU institutions, particularly as regards those Member States worse hit by the euro crisis, at the expense of any notion of transnational solidarity based on social equality that a 'European Social Model' might have been expected to safeguard. Those policies had devastating consequences on people's lives, inter alia exacerbating precariousness, inequality and social exclusion.²⁰ Further, though, they contributed in cementing a sentiment of alienation instead of commonality²¹ as regards the European project.

Even in fields where the EU could have claimed moral superiority and asserted its declared distinctive character vis-à-vis other international actors as a 'new (transnational) legal order' based upon the rule of law, a beacon of a social model based on notions of solidarity and respect for the fundamental liberal values,²² its track record did not fare much better. The refugee and immigration crisis presented the perfect opportunity for the EU to affirm its commitment to those liberal values, including its respect for human rights and humanism.²³ Its political and institutional response, the logical result of the already established exclusionary policy that the 'Fortress Europe'²⁴ paradigm represents, did anything but. It could even be argued that extreme right-wing

¹⁷ Hobolt (n 4) 1260.

¹⁸ Walker and Corbett (n 16) 161.

¹⁹ *ibid.*, 162–3.

²⁰ *ibid.*, 164.

²¹ Luisa Antonioli, Luigi Bonatti and Carlo Ruzza (eds), *Highs and Lows of European Integration: Sixty Years after the Treaty of Rome* (Springer 2019).

²² See also Sacha Garben, ch 9 in this volume.

²³ See Joxerramon Bengoetxea, ch 7 in this volume.

²⁴ Inter alia, Petra Bendel, 'Immigration Policy in the European Union: Still Bringing Up the Walls for Fortress Europe?' (2005) 2(2) *Migration Letters* 21; Nadine El-Enany, 'On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the Refugee' (2015) 22(1) *International Journal on Minority and Group Rights* 7; Dimitris Dalakoglou, 'Europe's Last Frontier: The Spatialities of the Refugee Crisis' (2016) 20(2) *City* 180.

and xenophobic narratives²⁵ that emerged during that crisis were effectively condoned,²⁶ if not facilitated, by the Union's acquiescence and effective promotion of a 'law and order'-type policy of closed borders and containment.²⁷

2.2 From Symptoms to Causes: Market-oriented Roots of the EU and Its Political Ethos

The Union's conduct is neither coincidental nor simply the result of an era in which the political zeitgeist is dominated by particular economic tenets. As we have argued elsewhere with Eva Nanopoulos,²⁸ the historical, ideological and predominantly market-oriented roots of the EU, and the institutional and political ethos they have fostered, have restricted the Union's conduct within pre-prescribed conceptual boundaries. This deeply embedded ideological understanding of what the Union is, and what (and how) it is set to achieve, still rests upon the myth of social prosperity and equality that will ensue from (free market-based) economic integration. The Union is primarily construed as the guardian of this free market 'order',²⁹ the fundamental elements of which not only enjoy implied hierarchical primacy within the normative architecture of the EU but are beyond reproach.³⁰ As such, the move towards 'making ordoliberal austerity the dominant form of managerial-socioeconomic policy in the EU', as Fouskas and Gökay remarked,³¹ was not difficult; in fact, it was

²⁵ See Maureen Rovers, Gabi Schaap and Serena Daalman, 'Loved and Feared in Fortress Europe: Framing the European Refugee Crisis' (2019) 45(2) Communications, <https://doi.org/10.1515/commun-2019-2063>; Salomi Boukala and Dimitra Dimitrakopoulou, 'Absurdity and the "Blame Game" within the Schengen Area: Analyzing Greek (Social) Media Discourses on the Refugee Crisis' (2018) 16(1-2) Journal of Immigrant & Refugee Studies 179; Nimet Özbek, 'Refugees as Scapegoat for Terrorism' (2018) 15(4) Journal of Human Sciences 1968; Alexander Callum Harrison, 'Mediations of "the Refugee Crisis": The (Ir)reconciliation of Ideological Contradictions in Fortress Europe' (2016) 9(4) Networking Knowledge 1.

²⁶ Eric Fassin and Aurélie Windels, 'The German Dream: Neoliberalism and Fortress Europe' (2016) 1 Near Futures Online.

²⁷ Jonathan Zaragoza-Cristiani, 'Containing the Refugee Crisis: How the EU Turned the Balkans and Turkey into an EU Borderland' (2017) 52(4) The International Spectator 59.

²⁸ Nanopoulos and Vergis (n 2).

²⁹ Eva Nanopoulos and Fotis Vergis, 'The Inherently Undemocratic EU Democracy: Moving Beyond the Democratic Deficit Debate' in Nanopoulos and Vergis (n 2); Vassilis Fouskas and Bulent Gökay, 'Germany's Ordoliberal Austerity and the European Disunion' in Vassilis Fouskas and Bulent Gökay (eds), *The Disintegration of Euro-Atlanticism and New Authoritarianism* (Springer 2019) 45, 48–52.

³⁰ Nanopoulos and Vergis (n 29) 136–7.

³¹ Fouskas and Gökay (n 29) 52.

relatively easy for it to be presented as the only logical political³² and legal³³ alternative. This understanding has long tainted the mindset of institutional actors, including the CJEU.

2.3 Winners and Losers of European ‘Dys-integration’

Beyond the euro crisis, the primary consequence of this established, yet skewed, free market-oriented conception of the role, function and objective of the Union has been the development of a dysfunctional and imbalanced version of ‘European integration’. In this version, the EU is to ensure ‘prosperity’ only within the confines of a particular market model which internalises inequality, and only for those that emerge victorious from the relentless free market process of perpetual competition.³⁴ This produces a dysfunctional model of development; a process of ‘dys-integration’.³⁵ This ‘dys-integration’ process encourages a race to the bottom as regards social rights and standards, viewed as obstacles to market liberalisation. It locks economic and monetary policy into a straitjacket that effectively impedes Keynesian and traditional social democratic options. Ultimately it can even reinforce and recycle stereotypical roles for Member States (industrialised north/service-providing south; consumer states/producer states, and so on)³⁶ that are far remote from the aspiration of pluralism and diversity that the EU formally embraces. Under this model, what is harmonised within the common European sphere is ‘the embedment of market liberal and, increasingly, neo-liberal assumptions’.³⁷

European ‘dys-integration’, in this sense, is a systemic feature of the EU. This feature was originally engrained in a framework so fundamentally attached to market liberalisation that it had effectively placed a variation of this model at the core of the irreproachable ‘*ordo*’ of its economic constitution. As a result, the development of the winners/losers divide becomes a self-fulfilling prophecy. It is logical that those with greater affinity for this form of European integration will be those that already possess the characteristics and advantages the system favours, thus making them ‘winners’. Individuals who

³² *ibid.*, 53.

³³ Benjamin Farrand and Marco Rizzi, ‘There Is No (Legal) Alternative: Codifying Economic Ideology into Law’ in Nanopoulos and Vergis (n 2).

³⁴ See also Sacha Garben, ch 9 in this volume.

³⁵ Eva Nanopoulos and Fotis Vergis, ‘The Elephant in the Room: A Tale of Crisis’ in Nanopoulos and Vergis (n 2).

³⁶ *ibid.* See also Fouskas and Gökay (n 29).

³⁷ Nanopoulos and Vergis (n 35).

already enjoy higher levels of income, property and education;³⁸ are engaged in 'higher status' white-collar occupations and possess more 'marketable' occupational skills;³⁹ and live in geographical areas that facilitate taking advantage of free economic movement (such as Member States that border other Member States)⁴⁰ are by default favoured. Disadvantaged groups that do not enjoy the same characteristics and privileges from the starting line (including manual labourers, the unemployed, precarious workers, undocumented workers, homeworkers and those with low income and education) have no chance. Free market capitalism becomes a rigged game favouring those who were privileged to begin with. The promise it makes that anyone can have the chance to join the winners is, at best, a useful myth.

Furthermore, it is useful to recall that a 'winner' in this context is not necessarily someone who has managed to put some of those 'winning' characteristics to good use, so as to escape the risk of complete loss (unemployment, underemployment, economic and social marginalisation). As Simpson has remarked,⁴¹ the system has reached a point of strain where there is a significant number of people who are, to an extent, economically secure and socially integrated, but perceive themselves to be at considerable risk of financial insecurity and, therefore, economic and social adversity. The educated precarious,⁴² the remnants of the older middle class, are now a few wage packets away from definitively joining the 'losers'.

European dys-integration produces tangible effects in the lives of European citizens that were loudly reflected in the Brexit referendum. It leads to the development of a stark divide across those that partake in its free market economic model: on one side the ultimate beneficiaries of this model, those who were able to take advantage of its principles and characteristics and prosper;⁴³ on the other, those who fell between its cracks or who face the adverse consequences of its inherent features, such as the removal of the protective normative and institutional structures of the post-Second World War welfare and social state. Dys-integration facilitates the emergence within the European sphere of

³⁸ Matthew Gabel and Harvey Palmer, 'Understanding Variation in Public Support for European Integration' (1995) 27(1) *European Journal of Political Research* 27; Becker, Fetzer and Novy (n 7) 628; Hobolt (n 4) 1269.

³⁹ Gabel and Palmer (n 38) 10–12.

⁴⁰ *ibid*; Becker, Fetzer and Novy (n 7) 625–6.

⁴¹ Kathryn Simpson, 'What to Do about Inequality? Public Opinion Support for the European Union and Further European Integration in the Republic of Ireland' (2019) 34(1) *Irish Political Studies* 69, 73.

⁴² *ibid*, 79.

⁴³ Matthew Gabel, *Interest and Integration: Market Liberalization, Public Opinion and European Union* (University of Michigan Press 1998); Gabel and Palmer (n 38) 19.

the divide among ‘winners’ and ‘losers’ of globalisation.⁴⁴ It was largely across this divide that the battle lines for the Brexit referendum were drawn⁴⁵ and its outcome ultimately decided, rather than traditional political affiliations or an oversimplified fight between nationalism and cosmopolitanism.

3. THE SUBSTANTIVELY DISENFRANCHISED

Analysis of the voting patterns at the Brexit referendum could lead to the assumption that the referendum result is not solely to be attributed to a revolt by the ‘losers’ of market integration. Economy and migration-related considerations notwithstanding, the data reveals that the referendum was seen by parts of the electorate that do not neatly fit into the ‘loser of globalisation’ box as a chance to express their discontent with their effective democratic disenfranchisement.

It is remarkable that the vast majority of those who voted (almost 75 per cent) believe that ‘politicians do not listen to people like [them]’.⁴⁶ Those who agreed with that statement voted overwhelmingly (58 per cent) to ‘Leave’ the EU.⁴⁷ Undoubtedly, this figure includes voters who in 2016, regardless of their self-identification as its members,⁴⁸ would belong to the middle class, defined as comprising those that make 75–200 per cent of the median annual income⁴⁹ as calculated by the OECD for that year (£22,044).⁵⁰ In fact, 57 per cent of those in the lower middle class (£1,377pm–£2,200pm) and 51 per cent of those in the upper middle class (£2,201pm–£3,700pm) voted against EU membership.⁵¹

Those are not necessarily ‘losers of globalisation’; they enjoy relative financial stability and the opportunities it provides within the flexible free market paradigm which the Union perpetuates. They do perceive themselves, nevertheless, as (politically) marginalised. That overwhelming self-perception of disenfranchisement reveals a crisis of the functioning of substantive democracy⁵² and a sense of alienation from its basic representative institutions. These issues cut across traditional economic demarcations and run deeper than any

⁴⁴ Hobolt (n 4) 1265.

⁴⁵ *ibid.* 1273.

⁴⁶ Swales (n 8) figure 14.

⁴⁷ *ibid.*

⁴⁸ Only 40 per cent self-identified as such: *ibid.* figure 4.

⁴⁹ OECD, *Under Pressure: The Squeezed Middle Class* (OECD Publishing 2019) 41–2.

⁵⁰ OECD Statistics <https://stats.oecd.org/index.aspx?queryid=66670#>, accessed 25 May 2020.

⁵¹ Swales (n 8) 8.

⁵² Nanopoulos and Vergis (n 29).

transient problem informing contemporary political narratives. Nevertheless, they simplistically translated into the third major driver of the 'Leave' vote, following economy and immigration considerations: the perception of losing democratic sovereignty to an unaccountable EU bureaucracy.⁵³

The 'disenfranchised', however, are not necessarily 'winners of globalisation'. It is useful to note that although those of the electorate identified as middle class still constitute the majority of the population, they belong to a middle class whose share of national income, regardless of their qualifications⁵⁴ and alleged opportunity to prosper from the dominant flexible market structure, has been steadily and rapidly shrinking⁵⁵ vis-à-vis the upper class. As a result, their influence over the economy has been waning.⁵⁶ Consequently, so has their capacity to exert any real political influence. It would not be unreasonable, therefore, to suggest that, even from the point of participatory capacity and influence in socioeconomic and political processes, the only true 'winners' of relentless transnational market (neo-)liberalism (accurately dubbed 'designer socialism'⁵⁷) have been the upper class (only 38 per cent of which voted 'Leave')⁵⁸ and financial elites.

4. INTERIM CONCLUSION

'Dys-integration', as described above, is not only at odds with popular sentiment as expressed by the reactionary decisions of electorates. It is also at odds with the declared objectives and principles of the EU as set in its primary law, and therefore, ultimately, directly antithetical to its contemporary fundamental normative framework. It might be, therefore, that there is a chance for redemption for the Union, at least in the eyes of public perception, without the need to dismantle its present basic format to start anew. There is empirical evidence from Ireland, for example, suggesting that, though lamenting the failures of the Union with regard to the recent crises and believing that market liberalism has gone too far, the same respondents hold faith that the situation could be addressed within the current institutional structures and processes of the EU.⁵⁹ The question is whether legal tools that would allow a correction exist within the confines of the current EU legal system. More interestingly, is it possible

⁵³ *ibid.*, 13.

⁵⁴ Becker, Fetzer and Novy (n 7) 628.

⁵⁵ OECD (n 49) 69.

⁵⁶ *ibid.*, 49.

⁵⁷ Michael Rustin, 'The Politics of Post-Fordism: or, The Trouble with "New Times"' (1989) 175(1) *New Left Review* 54, 63.

⁵⁸ Swales (n 8) 8.

⁵⁹ Simpson (n 41) 81–3.

that such tools, albeit legal in nature, could also provide a tangible anchor for the evolution of real deliberative and participatory processes for the development of a functional form of EU political constitutionalism?

These questions are precisely what the substantive constitutionalisation approach means to address.

5. EXAMINING THE EU IN TERMS OF SUBSTANTIVE CONSTITUTIONALISATION

5.1 Constitutionalism, Constitutionalisation and the EU

The very nature and substance of constitutionalism⁶⁰ in relation to a supranational organisation such as the EU is still contested. Constitutionalism has been traditionally linked to the state as an entrenched entity,⁶¹ and the consequent notions of national self-determination and sovereignty. However, the emergence of nuanced approaches describing the EU–Member State nexus as one of ‘constitutional tolerance’,⁶² or ascribing to theories of multi-level constitutionalism⁶³ or constitutional pluralism,⁶⁴ suggests that the statist conceptions of constitutionalism and constitutionalisation are outdated. ‘Constitutionalisation’, within the EU context, has come to reflect an evolu-

⁶⁰ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (revised edn) (Cornell University Press 1947), 21–2; Russel Hurdin, *Liberalism, Constitutionalism, and Democracy* (2nd edn) (OUP 2003).

⁶¹ See Neil Walker, ‘EU Constitutionalism in the State Constitutional Tradition’ (2006) EUI Working Paper; Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65(3) *The Modern Law Review* 317, 320–4.

⁶² Joseph H.H. Weiler, ‘Epilogue. Fischer: The Dark Side’ in Christian Joerges, Yves Meny and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Harvard Law School 2001) 235 and 244–7; J.H.H. Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional Sonderweg’ in Joseph H.H. Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 18–21.

⁶³ Inter alia, Antonio D’Atena, ‘The European Constitution’s Prospects’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basics, Economic Order and External Action* (Springer 2012) 12; Franz Mayer and Mattias Wendel, ‘Multilevel Constitutionalism and Constitutional Pluralism’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 127–52; Tanja Börzel and Thomas Risse, ‘Who Is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System’ in Joerges, Meny and Weiler (n 62) 45.

⁶⁴ Avbelj and Komarek (n 63); Matej Avbelj and Jan Komarek, ‘Four Visions of Constitutional Pluralism’ (2008) 4 *EuConst* 524. See also the Special Issue ‘Crisis and Constitutional Pluralism in the EU’ (2019) 21 *Cambridge Yearbook of European Legal Studies*.

tionary process,⁶⁵ from an intergovernmental organisation based on international law to an autonomous constitutional legal order,⁶⁶ or, more precisely, a post-national form of constitutional governance.

The EU has long understood itself as an autonomous⁶⁷ ‘new legal order’⁶⁸ and a ‘community based on the rule of law’,⁶⁹ which deserves to be analysed in constitutional terms⁷⁰ and judged against the relevant standards.⁷¹ Based on that understanding, the EU would transcend⁷² longstanding nation-state-centric⁷³ conceptions of constitutionalism. In July 2019⁷⁴ the EU appeared to proclaim itself to be under a mandate to protect and promote liberal fundamental values, and to assert for itself the role of guardian of the rule of law.⁷⁵ For the latter, it has seemingly embraced⁷⁶ a definition of the concept which implies that it is essentially to be identified with constitutional coherence and consistency. The

⁶⁵ Francis Snyder, ‘The Unfinished Constitution of the European Union: Principles, Processes and Culture’ in Weiler and Wind (n 62) 59, 62–3; Armin Von Bogdandy, ‘The prospect of a European Republic: What European Citizens are Voting On’ (2005) 42 Common Market Law Review 913, 915; Christian Joerges, ‘Das Recht im Prozess des Kosntitutionalisierung Europas’ (2001) EUI Working Paper.

See also Joseph H.H. Weiler, ‘The Transformation of Europe’ (1991) 100(8) Yale Law Journal 2403.

⁶⁶ Thomas Christiansen and Christine Reh, *Constitutionalising the European Union* (Palgrave Macmillan 2009) 4; Paul Craig, ‘Constitutions, Constitutionalism and the European Union’ (2001) 7(2) European Law Journal 125, 128.

⁶⁷ Case 6/64 *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

⁶⁸ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

⁶⁹ Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament*, ECLI:EU:C:1986:166.

⁷⁰ *ibid*; Opinion of the Court 1/91 on Draft Agreement on the creation of the EEA, ECLI:EU:C:1991:490, para 21.

⁷¹ Joined cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, paras 282, 285, 316.

⁷² Erika de Wet, ‘The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?’ (2009) 5 EuConst 284, 286.

⁷³ Anneli Albi, ‘Constitutions in the Face of Europeanising Governance: Falling behind Times?’ in Carlos Closa (ed), *The Lisbon Treaty and National Constitutions: Europeanisation and Democratic Implications* (Arena 2009) 119, 135–6.

⁷⁴ European Commission, Strengthening the rule of law within the Union: a blueprint for action COM(2019) 343 final.

⁷⁵ On the challenges of developing an all-encompassing ‘Rule of Law’ standard that would apply both to the EU and to Member States see Annegret Eppler, Andreas Hackhofer and Andreas Maurer, ‘The Multilevel Rule of Law System of the European Union: Eked Out, Contested, Still Unassured’ in Antonioli, Bonatti and Ruzza (n 21).

⁷⁶ European Commission, Further strengthening the Rule of Law within the Union: state of play and possible next steps, COM (2019) 163 final, 1.

Commission emphasised the Union's resolve to review the conduct of Member States in relation to the rule of law standard, including by flaunting the threat of procedures under Article 7 TEU. Curiously, however, it had little to offer as to how the EU's own institutions fare under that same standard.

The evolution of the concept of constitutionalism, the constitutional characteristics of the EU legal structure and a pragmatic approach based on the self-perception of the Union's own institutions indicate that constitutional theory can, and should, be applied to establish and comprehend the principles under which the EU ought to operate. In this context 'substantive constitutionalisation' is suggested as an approach to identify (constitutional) review standards that can also provide the legal anchor for a potential EU form of political constitutionalism.

5.2 Basic Terminology and Taxonomy, and the EU Framework

The idea of 'substantive constitutionalisation' of the EU draws upon the Fossum/Menendez taxonomy of the elements comprising a constitutional legal order. In line with Raz's work on the integral characteristics of any constitution (in the Razian 'thin'⁷⁷ and 'thick' senses⁷⁸), Fossum and Menendez suggested that any constitution can be roughly deconstructed into its formal, normative and material elements.⁷⁹

The *formal* aspect of the constitution refers to its codified formulation, the unique document or compilation of documents in which it is enshrined and which is in practice perceived as the fundamental and supreme law of that legal order.⁸⁰ For the EU, as acknowledged by the CJEU⁸¹ and national courts

⁷⁷ Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander Larry (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 152.

⁷⁸ *ibid*, 153–4.

⁷⁹ John Erik Fossum and Augustin Jose Menendez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman 2011) 20–7; Erik Oddvar Eriksen, John Erik Fossum and Augustin Jose Menendez (eds), *Developing a Constitution for Europe* (Routledge 2004).

⁸⁰ Fossum and Menendez (n 79) 20–1; Anne Peters, 'The Constitutionalisation of the European Union – Without the Constitutional Treaty' in Sonja Puntischer Riekmann and Wolfgang Wessels (eds), *The Making of a European Constitution* (Wiesbaden 2006) 38–9.

⁸¹ Case 294/83 *Parti écologiste 'Les Verts'* (n 69); Opinion 2/13 (Full Court) *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, para. 63.

alike,⁸² this is encapsulated by the comprehensive set of documents⁸³ consisting of the Treaties that, crucially,⁸⁴ constitute its primary law⁸⁵ and the Charter of Fundamental Rights (CFREU), regardless of the intergovernmental process by which they were adopted and can be amended.⁸⁶

The *material* aspect of the constitution refers to those norms that are considered fundamental according to social practice,⁸⁷ which compels their incorporation into legal provisions.⁸⁸ Narrowly construed, the material constitution encompasses the fundamental and superior legal norms that govern institutional and political structure,⁸⁹ legitimise and regulate the exercise of governmental organs' power⁹⁰ and manage conflicts between institutions,⁹¹ and, finally, bestow basic rights, freedoms and respective obligations upon the subjects of law.⁹²

Finally, the *normative* element of the constitution encapsulates what Raz calls 'common ideology'.⁹³ It refers to values and ideas, procedural or substantive, to which the polity aspires and that underpin the constitutional structure,⁹⁴ reflecting a certain political, philosophical or economic ideology.

The 'substantive constitution' consists of the normative and material elements systematically construed together.⁹⁵

⁸² Indicatively, BVerfG Order of 18 October 1967, 22 BVerfGE, 293, para 13: the EC treaty as 'sort of the constitution' of the EC ('*gewissermaßen die Verfassung dieser Gemeinschaft*').

⁸³ Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 69–70.

⁸⁴ Fossum and Menendez (n 79) 20–1; Peters (n 80) 38–9.

⁸⁵ See Joined Cases C-402/05 P and C-415/05 *Kadi* (n 71) para 305.

⁸⁶ cf. the 1706 Treaty of the Union that created the UK.

⁸⁷ Fossum and Menendez (n 79) 22–3.

⁸⁸ *ibid.*, 23; Francis Snyder, 'The Unfinished Constitution of the European Union: Principles, Processes and Culture' in Weiler and Wind (n 62) 56.

⁸⁹ Fossum and Menendez (n 79) 22.

⁹⁰ Peters (n 80) 41.

⁹¹ David Feldman, "'Which in your case you have not got": Constitutionalism at Home and Abroad' (2011) 64(1) *Current Legal Problems* 117, 123.

⁹² Fossum and Menendez (n 79) 22.

⁹³ Raz (n 77) 154; cf. Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 71–80 and 133–4.

⁹⁴ Fossum and Menendez (n 79) 24.

⁹⁵ *ibid.*, 20–7; Peters (n 80) 41–3.

6. SUBSTANTIVE CONSTITUTIONALISATION OF THE EU

In the context of the EU, ‘substantive constitutionalisation’ refers to the result of an evolutionary process: the fact that EU primary law has evolved to encompass clearly discernible, yet systemically integrated, normative and material elements as the basis for systematic interpretation and review of all EU law and policy. The Lisbon Treaty’s architecture endowed the Union with a singular, relatively coherent and consistent basic framework which follows the inverted pyramid structure of liberal constitutions: a Razian normative basis from which all other provisions, including those of the material constitution, stem. The consistency prescribed by Article 7 TFEU reinforces the idea of the EU framework, including provisions on economic and fiscal governance, as a coherent whole that is underpinned by the full spectrum of the normative foundations of the EU constitution.

6.1 The Normative Elements of the EU Constitution

Articles 2 and 3 TEU reveal that the post-Lisbon Treaty system is defined by specific values and an array of reshuffled fundamental objectives which reflect these fundamental values and translate them into tangible effects.⁹⁶ Together, these values and objectives reflect common aspirations of the EU order, its constitutional ‘common ideology’,⁹⁷ as they ‘express the common beliefs of the population about the way their society should be governed’.⁹⁸ They constitute the (arguably unamendable⁹⁹) basis and justification of the Union’s very existence, as well as the standard for review of all subsequent EU law norms and provisions.¹⁰⁰

In terms of constitutional architecture, placing fundamental values at the top of the text of the TEU underlines their role as the normative compass of the whole system. Respecting them is deemed a prerequisite for both acquir-

⁹⁶ Filip Dorsemont, ‘Values and Objectives’ in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 50–1.

⁹⁷ Raz (n 77) 152.

⁹⁸ *ibid.*, 154.

⁹⁹ Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart Publishing 2010) 38.

¹⁰⁰ See Stelio Mangiamelli, ‘The Union’s Homogeneity and Its Common Values in the Treaty on European Union’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basics, Economic Order and External Action* (Springer 2012).

ing (Article 49 TEU) and fully enjoying (Article 7(2) TEU) EU membership status. This pre-eminent positioning signals movement from a neofunctionalist phase, where splintered interests are moving the integration process ahead,¹⁰¹ to a phase where a Razian common ideology of values seems to be emerging.

According to Article 2 TEU, the Union is first founded upon ‘the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. However, the Lisbon Treaty went further, adding to that initial general set of values ‘pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men’.

These values are complemented by the rearrangement of the Union’s objectives (Article 3 TEU). The purely economic goal of the establishment of a common market, which previously enjoyed absolute primacy, is now downplayed. Promotion of the Union’s foundational values (Article 2 TEU) and the ‘well-being’ of the peoples of Europe (Article 3(1) TEU) has become the new primary goal. Moreover, the economic goals are themselves reorganised, slightly in wording but significantly in essence and effect. For example, reference to undistorted competition is exiled to Protocol No. 27. Although the Protocol’s provisions enjoy the same legal effect as those of the Treaty, the change in constitutional architecture is not to be overlooked. Furthermore, the Union now chooses to promote ‘development’ in every sense, as opposed to merely the development ‘of economic activities’.

Importantly, the economic goals have been infused with social objectives, resulting in a ‘competitive *social* market economy’ being essentially just the tool to attain the aim of full employment and social progress. The current prescribed formulation of the common ‘social market economy’ itself requires a balanced approach that will take into account primarily the promotion of the Union’s values, including dignity and solidarity, and also social considerations which are at least on an equal footing with the economic ones.

The Union’s values and objectives, taken together as a comprehensive normative whole, are to guide the actions of all EU institutions, setting the direction of EU law.¹⁰² Since the duty of consistent interpretation with fundamental constitutional values is inherent within all constitutional systems,¹⁰³ the CJEU is under a mandate to interpret all EU law provisions through the lens of the fundamental values and with the promotion of EU objectives in mind,¹⁰⁴

¹⁰¹ Philippe Schmitter, ‘Examining the Present Euro-Polity with the Help of Past Theories’ in Gary Marks et al (eds), *Governance in the European Union* (Sage 1996) 5.

¹⁰² Mangiamelli (n 100) 25.

¹⁰³ Rosas and Armati (n 99) 61.

¹⁰⁴ Mangiamelli (n 100) 25; Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, ECLI:EU:C:2008:54, para 68.

giving effect to the theoretical ‘inverted pyramid’ constitutional structure. Further, these values and objectives set the standard for reviewing informal institutional practices and non-legal acts based on the Treaties,¹⁰⁵ as well as institutional conduct and ‘abnormal’ acts and actions situated within the realm of EU economic governance, especially in its manifestation during the euro crisis through mechanisms on the fringe of ‘regular’ EU law.¹⁰⁶

6.2 The CFREU as the Material Aspect of the EU Constitution

As we have noted, the material constitution entails the recognition of fundamental rights and obligations for the subjects of the constitutional legal order.

The Court has reached a stage where it approaches the now binding CFREU, and the fundamental rights and freedoms therein, as the highest,¹⁰⁷ primary and absolute¹⁰⁸ standard,¹⁰⁹ and the ‘reference legislation’¹¹⁰ for its judicial

¹⁰⁵ Deidre Curtin, ‘Legal Acts and the Challenges of Democratic Accountability’ in Marise Cremona and Claire Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (OUP 2018) 9.

¹⁰⁶ Claire Kilpatrick, ‘Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis – ECB Crisis Management and the Sovereign Debt Loans’ in Cremona and Kilpatrick (n 105) 70.

¹⁰⁷ Opinion of AG Cruz Villalón in Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, ECLI:EU:C:2011:255, para 30; Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107, paras 56–8 and 60; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, paras 45–8.

¹⁰⁸ As ‘ceiling’: Bas van Bockel and Peter Wattel, ‘New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson’ (2013) *European Law Review* 866, 879 and 883; Vanessa Franssen, ‘Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights’ (European Law Blog, 10 March 2014) <http://europeanlawblog.eu/?p=2241>, accessed 16 April 2021. As ‘floor’: Filippo Fontaneli, ‘Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v Hans Åkerberg Fransson’ (2013) 9 *European Constitutional Law Review* 315, 332. See also Leonard Besselink, ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998) 35(3) *Common Market Law Review* 629, 644.

¹⁰⁹ Opinion of the Court 2/13, ECLI:EU:C:2014:2454, paras 169–74; Adam Lazowski and Ramses Wesse, ‘When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’ (2015) 16(1) *German Law Journal* 179, 208; Vassilios Skouris, ‘The ECJ: A Judiciary in Transformation’ in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 7.

¹¹⁰ Opinion of AG Bot in Case C-108/10 *Ivana Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca*, ECLI:EU:C:2011:211, para. 108.

review of EU actions. It has moved beyond relying on external sources such as the ECHR,¹¹¹ or striving to identify ‘general principles of Community law’ by diving into the vague concept of the ‘common constitutional traditions’.¹¹²

This approach could extend the reach of the CFREU even on purely domestic issues by virtue of this new EU constitutional document being at the centre of the Union polity as a ‘community of values’,¹¹³ enjoying supremacy as part of the ‘very essence of EU law’.¹¹⁴ The broad interpretation of the scope of the Charter in *Åkerberg Fransson*¹¹⁵ and *AMS*¹¹⁶ would support such an extension.

That said, the Charter provides a definitive safety net of common minimum standards, allowing for stronger protection by national constitutions. It constitutes the autonomous EU standard of protection of fundamental rights,¹¹⁷ to be respected every time EU law comes into play, without prejudice to the diversity of the relevant constitutional traditions¹¹⁸ and any potentially better standards prescribed by national constitutions.¹¹⁹ That would also apply to

¹¹¹ Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, ECLI:EU:C:2011:771, paras 41–9 and 50–4; cf. see Herwig C.H. Hofmann and Bucura C. Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9(1) *European Constitutional Law Review* 73.

¹¹² See inter alia C-400/10 *J. McB. v L. E.*, ECLI:EU:C:2010:582, para 53; C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, ECLI:EU:C:2010:811, paras 30–36; Joined Cases C-444/09 and C-456/09 *Rosa Maria Gavieiro Gavieiro and Ana Maria Iglesias Torres*, ECLI:EU:C:2010:819, para 75; Joined Cases C-356/11 *O and S v Maahanmuuttovirasto* and C-357/11 *Maahanmuuttovirasto v L.*, ECLI:EU:C:2012:776, paras 76–7; cf. C-243/09 *Günter Fuß v Stadt Halle*, ECLI:EU:C:2010:609, para 66.

¹¹³ András Jakab, ‘Supremacy of the EU Charter in National Courts in Purely Domestic Cases’ (Verfassungsblog, 10 March 2013) <https://verfassungsblog.de/supremacy-of-the-eu-charter-in-national-courts-in-purely-domestic-cases/> accessed 24 June 2021.

¹¹⁴ *Åkerberg Fransson* (n 107) para 46; cf. C-106/77 *Amministrazione delle finanze dello Stato v Société anonyme Simmenthal*, ECLI:EU:C:1978:49, para 22; C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd et als*, ECLI:EU:C:1990:257, para 20; Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*, ECLI:EU:C:2010:363, para 44.

¹¹⁵ *Åkerberg Fransson* (n 107) para 19.

¹¹⁶ C-176/12 *Association de médiation sociale v Union locale des syndicats CGT et als (AMS)*, ECLI:EU:C:2014:2, para 42.

¹¹⁷ Joseph Weiler, ‘Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights’ in Nanette Neuwahl and Alan Rosas (eds), *The European Union and Human Rights* (Kluwer 1995) 66.

¹¹⁸ See Marta Cartabia, ‘Europe and Rights: Taking Dialogue Seriously’ (2009) *EuConst* 5 5, 23. cf. Weiler (n 117).

¹¹⁹ *ibid.*, 72–3; cf. Anne-Marie Widmann, ‘Article 53: Undermining the Impact of the Charter of Fundamental Rights’ (2002) 8(2) *Columbia Journal of European Law* 342, 353.

those cases when EU institutions, creatures of EU law and thus always bound by it (Article 51(1) CFREU), act beyond their normal duties or indeed at the borders or even outside of the EU legal system's mechanisms.¹²⁰ Ultimately, the CFREU establishes a level of transparency, clarity and legal certainty that is crucial not just for the protection of fundamental rights¹²¹ but, perhaps more importantly, for firmly anchoring the legitimacy¹²² of the Union to the rule of law, thus enhancing the EU's constitutional aspirations and characteristics.

Beyond its obvious political value,¹²³ not least as a standard of accountability of EU institutions in the political sphere, the Charter's legal role and value as an integral part of the Union's substantive constitution is also critical. The Charter allows the CJEU to take a more active stance in protecting fundamental rights¹²⁴ and re-establishing a balance vis-à-vis the economic freedoms¹²⁵ by, inter alia, utilising it to strike down EU acts, including Regulations¹²⁶ and Directives,¹²⁷ or to review national implementation measures¹²⁸ or even (indirectly) national policy not necessarily lying within the narrow scope of Union competences.¹²⁹ Moreover, CFREU provisions entrench a rights ethos in a firm constitutional bedrock, requiring all exercise of EU competences to be infused with it. This ethos holds the potential to reverse the sentiment of alienation of individuals vis-à-vis the EU structures perceived to be imposing upon them.

¹²⁰ C-370/12 *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756, paras 158 and 164.

¹²¹ Skouris (n 109) 7.

¹²² *ibid.*

¹²³ cf. Heidi Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in Cardonnel, Rosas and Wahl (n 109) 308–10.

¹²⁴ *ibid.*; Sionaidh Douglas-Scott, 'The Charter of Fundamental Rights as a Constitutional Document' (2004) 37 *European Human Rights Law Review* 37.

¹²⁵ Jose Augustin Menendez, 'Chartering Europe: Legal Status and Policy Implications of the CFREU' (2002) 40(3) *Journal of Common Market Studies* 471, 477; cf. Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 *New Left Review* 5.

¹²⁶ Joint Cases C-92/09 *Volker und Markus Schecke GbR* and C-93/09 *Hartmut Eifert v Land Hessen*, ECLI:EU:C:2010:662; Joint Cases C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others* and C-594/12 *Seitlinger and Others*, ECLI:EU:C:2014:238.

¹²⁷ C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, ECLI:EU:C:2011:100.

¹²⁸ See Joined Cases C-356/11 and C-357/11 *O. S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.* ECLI:EU:C:2012:776.

¹²⁹ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department et ME and others* ECLI:EU:C:2011:865, paras 80 and 86, as to the immigration policy and respective treatment of asylum seekers in Greece; *DEB v Bundesrepublik Deutschland* (n 112).

7. THE VALUE OF SUBSTANTIVE CONSTITUTIONALISATION, AND CONCLUDING THOUGHTS

Substantive constitutionalisation, its conceptual function notwithstanding, is a tool of (legal) systematic interpretation. What use could it have to ameliorate or reverse the feelings of disconnect, disenfranchisement and abandonment which fuel centrifugal tendencies, as emblematically expressed in the Brexit referendum? It ought to be recalled that such tendencies were (and continue to be) reinforced by a series of crises, of the EU's own making (eurozone crisis) or not (refugee crisis; COVID-19), and the Union's responses to them. These fuelled the perception of the EU as an entity that lacks substantive democratic legitimacy, set to promote a particular variation of free market capitalism without much regard for social considerations and, thus, for the 'left behind'.

Substantive constitutionalisation could facilitate addressing not merely the perception but the real defects from which it sprang. The systematic reinterpretation of EU law for which it calls is based on recognising the reshuffled normative basis of the EU constitution. That basis is now one of balance between the social and the economic, the legal and the political, the national and the supranational. The values and objectives¹³⁰ of the Union that form its normative foundation, its Razian 'common ideology' and what Rawls would call the 'constitutional essentials',¹³¹ encapsulate the EU legal order's basic 'coherent set' of 'moral' overarching principles to anchor¹³² judicial intervention¹³³ and shape the conduct of policy makers.¹³⁴

Moreover, substantive constitutionalisation weaves a thread that connects fundamental rights to the values and objectives of the Union and to their crystallisation through the exercise of Union competences.

In the material/normative nexus of the EU polity, some of the CFREU rights could be considered to be 'basic liberties'.¹³⁵ Such are all those rights that accommodate and enable political participation with the aim of pursuing

¹³⁰ Including Dworkin's 'collective goals' ('nonindividuated political aims') and Sumner's 'goal-based constraints': Dworkin (n 93) 91–2; L.W. Sumner, *The Moral Foundation of Rights* (OUP 1987) 175.

¹³¹ John Rawls, *Political Liberalism* (Columbia University Press 1996) 227–30.

¹³² Roland Dworkin, *Law's Empire* (Fontana 1986) 255; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) 75–6.

¹³³ Dworkin (n 93) 81–2.

¹³⁴ *ibid.*, 84–6; 88.

¹³⁵ Rawls (n 131) 289–371.

social justice,¹³⁶ organisation and resistance¹³⁷ against arbitrary interventions that hinder the full enjoyment of liberty (political or economic)¹³⁸ and induce unfairness. Such rights should be closely protected, and restricted only insofar as they unnecessarily infringe upon other basic liberties, in pursuit of the ‘common good’ – a pattern that is indeed apparently followed by the limitation provisions of the Charter. The exercise of these rights, regarded as concretising fundamental normative values, could have the potential to fuel a political process that would in turn legitimise¹³⁹ and justify the constitutional discourse.

The EU, despite its flaws, is endowed with a foundational legal framework that prescribes certain primary values, objectives, rights and principles that underpin institutional arrangements. Neyer argues¹⁴⁰ that fairness, in the sense of legality (or ‘Justice’, as he refers to it)¹⁴¹ – that is, internal compliance with those fundamentals and consistency as regards the Union’s internal constitution – can provide for a better foundation of EU legitimacy than democracy itself. Garben sees it as not a substitute but the prerequisite for, and the expression of, a properly functioning EU democracy.¹⁴² Regardless, compliance with the substantive constitution of the Union is precisely the ‘good reason’ that would justify any EU-originated restrictions of individual freedom.¹⁴³ Further, promoting an understanding of the EU as a discernible coherent system helps frame political debate, facilitating the conditions¹⁴⁴ of effective grassroots deliberative processes that shape political constitutionalism.

Beyond Habermasian procedural approaches to the democratic process,¹⁴⁵ effective access to fundamental rights and the consequent societal embrace of the Union’s normative foundations might lead to Europeans comprehending a common sociopolitical fate and developing a transnational political consciousness. These are absolute prerequisites both for the emergence of transna-

¹³⁶ *ibid.*, 300.

¹³⁷ John Rawls, *A Theory of Justice* (rev. edn, Belknap Press 1999) 336.

¹³⁸ Rawls (n 131) 293.

¹³⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 450.

¹⁴⁰ Jürgen Neyer, *The Justification of Europe: A Political Theory to Supranational Integration* (OUP 2012) 14–15; cf Sacha Garben, ‘The Principle of Legality and the EU’s Legitimacy as a Constitutional Democracy: A Research Agenda’ in Sacha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019) 401–4.

¹⁴¹ *ibid.*, 385.

¹⁴² *ibid.*, 415–17.

¹⁴³ *ibid.*; Neyer (n 140) 8–9.

¹⁴⁴ Michael Longo, *Constitutionalising Europe: Processes and Practices* (Ashgate 2006) 6.

¹⁴⁵ See Bellamy (n 132) 128–9.

tional solidarity and for the realisation of the civic and political responsibilities of citizenship within the context of the EU as a polity. Hence, substantive, EU-focused, bottom-up political processes might emerge, becoming the basis of EU-level political constitutionalism.

Bellamy could argue that the EU in its present arrangement is a hostile environment for such a development. The prearranged set of legal values and rules to be followed would constrain democratic debate to very specific preordained boundaries.¹⁴⁶ However, neither legal nor political processes operate in a vacuum,¹⁴⁷ something even the fiercest proponents of political constitutionalism have come to accept.¹⁴⁸ They are inherently connected to one another and are influenced, if not defined, by the legal, social and economic environment in which they operate.

Moreover, democratic participation as an intrinsic gear of political constitutionalism and a barrier against arbitrary exercise of power presupposes political equality.¹⁴⁹ Although doubts have been expressed as to the suitability of a (legal) constitution to ensure true political equality and the conditions for fair political participation,¹⁵⁰ it could be argued that the suggested alternative of the 'self-regulating' capacity of any democratic system is far more dubious. Established majorities and political elites could easily dominate the system unchecked. Further, though, the question is again one of perception. A set of normative and substantive rules accessible to all subjects of the polity creates awareness of both their own basic rights and the prescribed limitations on institutional actors. Consequently it guarantees, at the very least, realisation of a minimum degree of equality that ruling majorities have accepted the surrender of. It also enhances public understanding of the nature and substance of the polity itself, informing the debate and allowing for change.

Thus, substantive constitutionalisation can serve both legal and political EU constitutionalism, potentially informing and fostering bottom-up constitutionalising processes that can shed established misconceptions and counter reactionary retreat to nationalist, xenophobic or There-Is-No-Alternative narratives and their disintegrative potential.

¹⁴⁶ *ibid.*, 82.

¹⁴⁷ Longo (n 144) 42.

¹⁴⁸ Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14(12) *German Law Journal* 2275.

¹⁴⁹ Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (OUP 2003) 85–6.

¹⁵⁰ Bellamy (n 132) 82.