

BETWEEN THE 'NO LONGER' AND THE 'NOT YET'.

SHIFTING SOVEREIGNTIES AT THE AGE OF SUPRANATIONAL CONSTITUTIONALISM

GIORGIO REPETTO^{..}

I. CONSTITUTIONAL CLAIMS AT SUPRANATIONAL LEVEL

The growing and extensive role played by supranational entities has called in the last decades for a theoretical assessment of both their normative status and their regulatory ambitions. The process of globalization has triggered a proliferation of various forms of inter- and supranational polities whose ambits of intervention and powers cut across traditional States' functions. The progressive erosion of States' regulatory powers is nowadays largely considered an irreversible process of recasting the founding rationales of constitutions and constitutionalism conceived as the basic normative frameworks that accompanied the formation of the modern State and the establishment of a political community committed to rule of law, democratic legitimacy and the protection of fundamental rights.

The distinctive character of supranational entities – as differentiated from other, rather classical, international organizations – must be seen in an institutional and regulatory framework, though differently designed, whose acts are directly binding for the member States on the basis of an original consent. European Union and World Trade Organization are the two clearest examples of this. Given the pervasiveness of their action and the allegedly (normative) superior status of their decisions, it comes as no surprise that their nature and their ultimate effects have been grasped with the theoretical lenses of 'constitutionalism'. Since constitutionalism, in its original and simplest meaning, is the theory that predicates that every government should be limited by law¹, with regard to supranational entities the question is basically twofold: 1) can the limited government doctrine, with all its corollaries (separation of powers, fundamental rights, political

^{..} Associate Professor of Constitutional Law at the University of Perugia, Italy.

¹ See on this McIlwain, CH, 'Constitutionalism: Ancient and Modern' (Cornell University Press 1947).

responsibility), be disconnected from its native context, ie the Nation-state and its constitution? 2) If so, are these entities compatible with the satisfaction of the normative claims of constitutionalism?

From both perspectives, the answers to these questions require as a first step to investigate whether and with which consequences constitutionalism should be identified or not with statehood.

II. CONSTITUTIONALISM AND/BEYOND STATEHOOD: AN EVOLUTIONARY APPROACH

The scientific debate on the connections between constitutionalism and statehood is boundless. A valid point of departure can be situated in the growing difficulty of the traditional corollaries of constitutionalism to give an account of the transformations affecting the exercise of public powers at national level. Basic political decisions are taken by national institutions on the basis of a net of normative and institutional constraints which are more and more depending upon supranational constituencies. From commercial policy to technical standard-setting, up to human rights adjudication, the influence of supranational law on domestic decision-making stresses the enduring capacity of the traditional (state-centered) notions of democracy, rule of law and fundamental rights to safeguard the ideal of limited government.

A similar state of affairs has led scholars to, alternatively, exacerbate the normative bias of constitutionalism or to emphasize its descriptive malleability *vis-à-vis* unprecedented backgrounds. On the one side of the spectrum, constitutional nostalgics witness the significant demise of democratic self-government at national level induced by supranational governance, whereas, on the other side, constitutional triumphalists welcome the radical expansion of constitutionalism as a deliverance from the chains of the State-Leviathan.² At a deeper sight, it must be noted that both approaches fail to offer a meaningful account of the reconfigurations of constitutional legitimacy. Nostalgics derive from the founding act of *pouvoir constituant* an unconvincing mix of voluntarist and positivist elements that pushes them to overemphasize the cohesion of political community with respect to democracy and fundamental rights. Triumphalists,

² See Kumm, M, 'The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia' in Dobner, P, and Loughlin, M, (eds), 'The Twilight of Constitutionalism' (OUP 2010), 201.

quite on the contrary, celebrate in a too rationalist fashion the disembodiment of law's legitimacy from a ultimate authority, whether a text (formal constitution), a given institution (a constitutional court) or a source (*We the people* or *pouvoir constituant*).³

Against this background, it appears convincing that ‘a meaningful contemporary use of the constitutional concept cannot ensue without referral to its historical meanings’⁴.

According to a first significant opinion, constitutions and constitutionalism are structurally dependant from the state fabric since statehood has been historically their necessary precondition. To say more, the state precedes the constitution since it has represented the first polity (or in Luhmann's terms: the first social system) ‘that, by its delimitation from other systems, specialized in the exercise of political rule’⁵. Only the affirmation of state as an autonomous (sovereign) polity has favored a process of epistemic self-sufficiency of law and of constitution, whose foundation did not rest anymore on God's will or on natural law, but rather on the collective will of the people (as unified in the sovereign power). The revolutionary turmoil of the second half of the XVIII century has subverted the political premises of the relationships between state and constitution, without at heart superseding the theoretical preconditions of the primacy of the latter over society. In France, where the sovereignty of the *Nation* took the place of the Crown and its primacy became evident in the *loi*, this process of substitution is quite evident. In the US, where on the contrary a state had yet to be built, the Constitution represented the basic legal framework ensuring the correspondence between the governed and the rulers. In the words of Grimm, ‘[o]nly law had the ability to elevate the consensus concerning the project of legitimate rule above the fleetingness of the moment, to make it last, and to give it binding force’⁶. In both contexts, the foundational characters of constitution and constitutionalism (the exercise of power depends upon the consensus of the governed and is as legitimate as it aims at protecting fundamental rights) are strictly linked with their primacy. Constitutionalism entails therefore a double and asymmetric primacy: over governmental powers, which are juridified under both

³ Kumm, M, ‘The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia, *supra*, note 1, 201.

⁴ See on this point, Möllers, C, ‘Pouvoir Constituant–Constitution–Constitutionalisation’ in von Bogdandy, A, and Bast, J, (eds), ‘Principles of European Constitutional Law’ (2nd revised edn Hart/Beck 2010), 170.

⁵ See Grimm, D, ‘The Constitution in the Process of Denationalization’ 12 *Constellations* (2005), 448.

⁶ Grimm, D, ‘The Constitution in the Process of Denationalization’ *supra*, note 5, 451.

procedural and substantial aspects, and over society, which is functionally separated by the state, in which all ruling authority is concentrated.

According to this stance (exemplified by the meaningful analysis of Dieter Grimm), the coupling of state and constitution is a definitional feature of constitutionalism, whose implications with regard to the ambitions of supranational organizations is quiet clear: a juridification deserves to be qualified as constitutionalisation only when it is territorially concentrated and is directed at ensuring its democratic origin, its supremacy and its comprehensiveness.

A more nuanced position is represented by scholars that highlight two different basic traditions that accompanied the emergence of constitution and constitutionalism.⁷ According to the first (that can be associated with France and the USA), constitutionalism arises as the basic doctrine called to found and justify the exercise of public power. Within this context, the essential characters of the constitution ('higher law' nature, written form and the connected symbolic relevance) ensure that it is first and foremost aimed at securing a comprehensive democratization of law-making⁸. Besides the revolutionary tradition, a second way of relating statehood and constitutionalism is at work in those contexts (like England and Germany) where constitution and constitutionalism are not called to found a new legal and political order, but rather to shape a pre-existing one through a normative framework. Here, the constitution lacks the characters of paramountcy since it does not endorse a trajectory of democratization but reflects the 'total condition of society' and is therefore to be grasped as an 'evolutionary process of political practice'⁹. Here, the equation State/constitution is devalued in favor of a structural coupling of law and politics according to which the constitution is 'an institutional setting that simultaneously guarantees the legitimacy of the legal order through democratic procedures and the organization of will-formation through legally formal procedures'¹⁰.

At the extreme edge of the spectrum is the position of those who radically question that the basic function of constitutions consists in the limitation of public power. Moving from the assumption that constitutionalism is centered upon a de-territorialization of

⁷ Möllers, C, 'Pouvoir Constituant-Constitution-Constitutionalisation' *supra*, note 4, 171.

⁸ Ackerman, B, 'Constitutional Politics/Constitutional Law' (1989) 99 Yale LJ 453

⁹ Möllers, C, 'Pouvoir Constituant-Constitution-Constitutionalisation' *supra*, note 4, 175. For further insights on this see Luhmann, N, 'Die Verfassung als evolutionäre Errungenschaft' (1990) 9 Rechtshistorisches Journal 176.

¹⁰ Möllers, C, 'Pouvoir Constituant-Constitution-Constitutionalisation' *supra*, note 4, 177

sovereignty and, through this, it reacts to the absolutist foundations of the modern state, modern constitutions are first and foremost intended to protect the autonomy of the social order in both its private and public manifestations: they establish instruments of self-guarantee for society while ensuring the necessary means for transforming the multitude in a community of equals (in the forms of *We the people*, the *Nation* or *das Volk*).¹¹

The analysis shows that the connection between constitutionalism and the state, though not historically contingent, must not be deemed as theoretically necessary, since at the core of constitutionalism is the effort to provide a community, whether state-contained or not, with some basic requirements concerning the source and the ends of political power: autonomy of the governed, democratic legitimacy and individual freedom. The same Art. 16 of the Declaration of the Rights of Man and Citizen of 1789, often invoked as the original matrix of modern constitutionalism, by stating that ‘[a] *society* in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all’ does not refer to the State as coessential with constitution.¹² In contemporary constitutionalism, this is not contradicted by the clauses of the constitutions that limit national sovereignty in view of establishing ‘an order that ensures peace and justice among the Nations’ (so Italian Constitution, Art. 11).

Against this background, the question is not whether constitutionalism can be transferred beyond the state or not, but rather which normative features of constitutionalism should be preserved in order to guarantee its enduring vitality in a period of shifting sovereignties.

III. NARRATIVES AND LAYERS

Though largely accepted, the characterization in constitutional terms of several supranational entities has not led to similar outcomes, since the pre-commitments and

¹¹ Preuss, UK, ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?’ in Dobner, P, and Loughlin, M, (eds), ‘The Twilight of Constitutionalism’ (OUP 2010). A similar stance in Tully, J, ‘Strange Multiplicity. Constitutionalism in an Age of Diversity’ (CUP 1995)

¹² See Troper, M, ‘Separation of Powers’ in ‘A Montesquieu Dictionary’ (2013, in <http://dictionnaire-montesquieu.ens-lyon.fr/>).

implications of constitutionalisation change significantly according to the different realities taken into account and the connected theoretical mindset.

European Union has proven to be the most important laboratory of constitutional ideas applied to non-state entities. With particular regard to the process of EU constitutionalisation, the recent efforts to highlight and foster its commitment to the basic requirements of constitutionalism have been driven by two main intellectual strains: constitutional pluralism and multilevel constitutionalism.

According to the first, there is a constitution whenever a normative order establishes and empowers agencies that carry out the tasks of ‘enunciating, executing, administering or judging about the norms whose institutional character is itself achieved by institutional acts’: in such a situation, the coexistence of several constitutional orders can be (and often is) driven by an inclusive pluralism, that pushes them to a mutual acknowledgment of their validity while contending the correlated superiority over each other.¹³ Further clarifications have emphasized that constitutionalism shows an increasingly relational character in that it does not coincide anymore with a given property of politics and political process but is involved in an ‘open-ended dynamic’ that furthers an ‘agonistic process of negotiation between and within different constitutional authorities’¹⁴.

Much more indebted to the German theory of the ‘partial constitution’ (*Teilverfassung*) is another widely discussed foundational model for supranational (and particularly European) constitutionalism, that of multilevel constitutionalism. At the final stage of its assessment, it depicts the European scenario as a series of normative and institutional layers placed at national and supranational level, whose interaction, guided by the will of the citizens as both citizens of their respective Member State and of the Union, forms a system of law which is continuously redefined through a steady constitution-making process.¹⁵

Whereas constitutional pluralists and multilevel constitutionalists still endorse a vision of constitutionalism as permeated by a qualified (more or less agonistic) interaction between state and supranational politics, other theories support the necessity to move toward a more realistic (ie descriptive) approach, centered upon either the

¹³ See McCormick, N, ‘Questioning Sovereignty. Law, State and Nation in the European Commonwealth’ (OUP 1999) 102.

¹⁴ See Walker, N, ‘The Idea of Constitutional Pluralism’ 65 *Modern Law Review* (2002), 359.

¹⁵ See on this point, Pernice, I, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) 11 *EuConst*, 545.

notion of *function* or a skeptic demise of the role of both constitution and supranational public law.

For global administrative lawyers, for example, the foundational aspirations of constitutionalist visions should be replaced by a more modest endeavour, which is related to the ‘mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies’¹⁶. Even if here the focus shifts from the dynamics of normative and institutional politics to the (more limited) regime of administrative bodies at global level, what makes this approach relevant for supranational constitutionalism is the effort to progressively substitute the input-oriented elements of national constitutionalism (democracy, rule of law, and so on) with clearly defined output-oriented public goods, such as transparency and accountability.

According to another paradigm often invoked to grasp the multifariousness of transnational regulatory regimes, that of societal constitutionalism, their growing functional differentiation makes every effort to revitalize a shared account of public good as encompassing a normatively-ordered political society desperate, if useful at all. Constitution (and constitutionalism) can be seen only as the incremental emergence of a multiplicity of autonomous subsystems of world society related to areas of functional intervention (such as health, sport, culture, economy).¹⁷

The different approaches toward supranational constitutionalism, before reflecting the different theoretical settings of the mentioned authors, are strictly connected with the different institutional and normative realities that are taken into account when dealing with ‘the’ supranational.

For example, functionalism and output-legitimization as the background characters of ‘new’ supranational constitutional orders are best suited to explain those transnational regulatory regimes that admittedly renounce to rule on different aspects of social and economic life, since they are committed to an admittedly non-holistic model of regulation. Whether private (like ICANN) or framed within the UN structure (like ILO and World Health Organization), these entities are vested with a set of significant powers that are growingly able to affect the effectiveness of state regulation. Within this

¹⁶ Kingsbury, B, Krisch, N, and Stewart, RB, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law & Contemporary Problems*, 17.

¹⁷ See Teubner, G, ‘Constitutional Fragments. Societal Constitutionalism and Globalization’ (OUP 2012).

framework, the effort to frame the World Trade Organization in a constitutional fashion has raised critical issues concerning the ultimate characters of constitutionalism at supranational level. In this regard, WTO is depicted as a polity charged with the task to regulate vital sectors of economical life, whose cross-cutting nature and spill-over effects (eg in the field of fundamental rights) overlap with basic normative claims traditionally associated with constitutions and constitutionalism¹⁸.

At the other side of the spectrum, one can find those normative and institutional realities whose constitutional ambitions are best served by a strong emphasis on the input-oriented features of constitutionalism, that are linked to ‘international constitutional law’ conceived as part of a more general emphasis on the ‘cosmopolitan constitution’¹⁹. In this light, the United Nations are deemed to identify a new constitutional paradigm (as embodied by the UN Charter) whose main tenets are, on the one hand, the autonomization of the international legal order thanks to the definitive overcoming of the consensual paradigm and, on the other hand, the emergence and consolidation of paramount legal principles of coexistence enshrined in *jus cogens*.²⁰

Undoubtedly, the supranational reality that best combines both perspectives of legitimacy (input and output) by showing a peculiarly advanced constitutional pace is the European Union. EU’s constitutionalism is traditionally associated with a high level of integration that has affected over time a growing number of policy areas between its Member States and has finally led to a system of authentic constitutional interdependence. This interdependence has proven to call radically into question the most basic assumptions concerning constitutionalism, starting from its persisting *sui generis* nature in the European area *vis-à-vis* the established forms governing political communities²¹.

¹⁸ Trachtman, JP, ‘The Constitutions of the WTO’ (2006) 17 EJIL 623

¹⁹ Somek, A, ‘The Cosmopolitan Constitution’ (OUP 2014).

²⁰ Fassbender, B, ‘We the Peoples of the United Nations’. Constituent Power and Constitutional Form in International Law’ in Loughlin, M, and Walker, N, (eds), ‘The Paradox of Constitutionalism. Constituent Power and Constitutional Form’ (OUP 2007).

²¹ See Weiler, JHH, ‘In defence of status quo: Europe’s constitutional *Sonderweg*, in Weiler, JHH, and Wind, M, (eds), ‘European Constitutionalism Beyond the State’ (CUP 2003); Von Bogdandy, A, ‘Neither An International Organization Nor a Nation State: the EU as a Supranational Federation’ in Jones, E, Menon, A, and Weatherhill, S, ‘The Oxford Handbook of the European Union’ (OUP 2012).

The peculiarities of the EU’s constitutional structure and its relevance for the field of supranational constitutionalism demand therefore an autonomous assessment of its main characters.

IV. THE EU AS A MODEL OF SUPRANATIONAL CONSTITUTIONAL POLITY

The evolution from the European Economic Community to the European Union has registered, alongside different institutional and normative patterns, a changing conception of the constitutional potentialities of the legal order established by the Treaty of Rome. Whereas the incremental approach of the European integration showed from the outset that the newly established polity claimed a different relationship with the Member States than other similar initiatives (like the Council of Europe), a specific level of constitutional rhetoric emerged only in the ‘60s in the ECJ’s case law. The task of providing (then) EC law with a mantle of constitutional tone could not be fulfilled but by the institution that has traditionally operated as the main motor of legal integration. The acknowledgment of sovereign rights as conferred by the States upon supranational institutions appears the first episode in which the ECJ (in *Van Gend en Loos*²²) sought to corroborate the doctrines of primacy and direct effect of supranational law with a constitutional vocabulary. Since then on, the appeal to the Treaties as the ‘constitution of the Community’ has been repeatedly confirmed until the ‘90s (as in *Opinion 1/91*: the EC Treaty, ‘albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law’²³).

With the Maastricht Treaty, the incremental approach which accompanied the establishment of the common market has been progressively enhanced by a more ambitious integrationist effort, as is demonstrated by the inclusion in the Treaties of norms concerning fields traditionally assigned to the core of sovereign national powers, such as (European) citizenship, monetary policy and fundamental rights. It comes

²² *N.V. Algemene Transport – en Expeditie Onderneming van Gend & Loos and Nederlandse administratie der belastingen* (Netherlands Inland Revenue Administration) 26/62 (5 February 1963) [1963] ECR 1

²³ *Opinion 1/91 - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* (14 December 1991) [1991] ECR I-6079.

therefore as no surprise that the entry into force of the Maastricht Treaty has occasionated stark reactions at national level, epitomized by the well-known *Maastricht* decision of the German *Bundesverfassungsgericht*. This decision played a striking role in dramatically reconfiguring the terms of the antagonism between EU and Member States, that shifted from the (mainly) normative level set out in the *Simmenthal* and the *Solange* saga to an authentic constitutional conflict involving basic parameters such as democracy, legitimacy and political responsibility²⁴.

A new paradigm shift could have occurred in the second half of 2000s with the project of a ‘Treaty establishing a Constitution for Europe’. Drafted by an *ad hoc* Convention and signed in 2004, it was however rejected by two *referenda* held in France and in the Netherlands, which have started a process of reassessment ended up with the (currently in force) Lisbon Treaty. Despite the apparent demise of a strong constitutional rhetoric, the most innovative elements of the Constitutional Treaty (such as, among others, the incorporation of the Charter of Fundamental Rights into the Treaties and the extension of majority voting) have remained untouched in the Lisbon Treaty. As regards the relationships with the constitutional structures of Member States, a central role is actually played by Art. 4, para. 2, TEU: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional’.

In the light of this evolution, if one tried to briefly summarize the main characters of the EU as a supranational constitutional entity, it would be forceful to deal with no clear-cut solutions, that have to cope with a normative and institutional reality that is not fully-fledged as a state, while not being anymore derivative by the sovereign decisions of Member States. The *Sonderweg* paradigm thus appears as the only meaningful approach capable of tackling with the specificities of EU’s constitutional structure, whose main pillars are the *legal* dimension of integration, its commitment to *fundamental rights* and the peculiar *institutional framework* regulating its decision-making process.

The constitutional nature of the EU relies, firstly, on the *autonomy of its legal order*. As noted above, European integration has from the outset made of the primacy and of uniform application of its body of law a key element of legitimacy. Although the written form of the Treaties has not made of them ‘the political catechism of a democratic

²⁴ *Maastricht* 2 BvR 2134/92 and 2 BvR 2159/92 (12 October 1993) BVerfGE 89, 155 (Ger).

polity²⁵, it has guaranteed a powerful rationalization of the enforcement of the basic aims enshrined therein and has favored the effectiveness of the constraints upon Member States and on EU institutions. The *medium* of legal integration, as boosted by both the depth of regulation's fields and by the securing of its effects provided for by the ECJ, has favored the emergence of a peculiar doctrine of limited government that is embodied in EU law conceived as, at the same time, motor and basic framework of supranational integration. For certain aspects, this could raise some similarities with a cornerstone of constitutionalism assuming the ‘rule of law, not of men’ principle²⁶. This assumption is however partly called into question if one considers that the EU version of autonomy of legal order significantly lacks of a defining feature, which is the power of constitutional self-amendment, that is still in the hand of the States as ‘masters of the Treaties’ (Art. 48 TEU).

The second defining character of the peculiar constitutional nature of the EU is related to the protection of *fundamental rights*. Since their affirmation in the case law of the ECJ at the end of the ‘60s, fundamental rights have played a pivotal role in furthering freedom and rule of law *vis-à-vis* the action of EU and Member States. The establishment of EU as a ‘community based on fundamental rights’²⁷ has been progressively reinforced by the letter of Art. 6 TEU and by the ratification (in 2001) of the Charter of fundamental rights and its later incorporation in the Treaties (2009). On the one hand, the emergence of fundamental rights as a core of European constitutional integration is demonstrated by their momentousness in several episodes of ECJ's case law (as, among others, in *Kadi*²⁸). On the other hand, their disjunction from a democratic polity has significantly weakened their capacity to act as an effective yardstick for EU policies, since the separation between these two realms (rights and policies) is inevitably blurring in a polity (like the EU) that pursues a common good whose basic aim coincides for the most part with the guarantee of individual autonomy.²⁹

²⁵ Möllers, C, ‘Pouvoir Constituant–Constitution–Constitutionalisation’ *supra*, note 4, 191.

²⁶ Pinelli, C, and Hasebe, Y, ‘Constitutions’ in Tushnet, M, Fleiner, T, and Saunders, C, (eds), ‘Routledge Handbook of Constitutional Law’ (Routledge 2013).

²⁷ Von Bogdandy, A, ‘Grundrechtsgemeinschaft als Integrationsziel? Grundrechte und das Wesen der Europäischen Union’ (2001) 56 *JuristenZeitung* 157.

²⁸ *Yassin Abdullah Kadi* Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (18 July 2013) [2013] ECR 518.

²⁹ Walker, N, ‘The European Union's Unresolved Constitution’ in Rosenfeld, M, and Sajó, A, ‘The Oxford Handbook of Comparative Constitutional Law’ (OUP 2012), 1197.

The third essential feature of EU constitutionalism is linked with the characters of its *institutional framework*. Unlike in the classical, state-fashioned, principle of separation of powers, where each institutional branch is called to reflect different paths of functional differentiation within a unitary frame of government, in the EU the presence of different overlapping layers of legitimacy has generated over the years a distinctive institutional framework often labeled in terms of ‘mixed’ or ‘compound’ polity. According to this model, each institutional agent embodies and vehiculates a different source of legitimacy of EU action: Commission, ECJ and European Central Bank represent (at different levels) the *supranational* elements of the EU construction, Council and European Council express in *intergovernmental* terms the basic interests of the States and European Parliament is called to give voice (though in a still too feeble degree) to the interests of (national and supranational) *people(s)*. Within this setting, the need to disperse in institutional terms the different sources of legitimacy has certainly promoted a pluralized frame of government and multi-polar institutional balances, but has prevented the formation of clear mechanisms aimed at making institutions answerable and (in some cases) politically responsible. The powerful increase of technocratic characters of EU’s action in managing the effects of the post-2010 economic crisis has exacerbated the problem.

Finally, as the three mentioned perspectives show, the constitutional ambitions of the EU cannot be grasped within a unified framework of analysis, as if they could be univocally placed ‘inside’ or ‘outside’ the (symbolic, normative and institutional) realm of constitutionalism. The distinctiveness of EU as a supranational constitutional polity, on the contrary, requires to take into account its ‘unfinished’ nature³⁰, whose basic characters can be comprehended within an evolutionary framework in which ‘constitutionalisation’ prevails over a static appeal to ‘constitutionalism’³¹. This outcome should be welcomed in that it celebrates the viability of a constitutional polity beyond the state, but at the same time should make aware that its vitality and endurance require a significantly higher degree of democratic politics than registered until now.

³⁰ Snyder, F, ‘The unfinished constitution of the European Union: principles, processes and culture’ in Weiler, JHH, and Wind, M, (eds), ‘European Constitutionalism Beyond the State’ (CUP 2003)

³¹ Loughlin, M, ‘What is Constitutionalisation?’ in Dobner, P, and Loughlin, M, (eds), ‘The Twilight of Constitutionalism’ (OUP 2010).