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Dentro del viaje constitucional europeo

Inside the European Constitutional Journey

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Resumen: Este trabajo analiza el camino constitucional europeo con los conceptos de Habermas de solidaridad e integración social. Un análisis del concepto de constitución y de los tratados (económicos) europeos revela la falta de integración social como un obstáculo para una mayor integración económica. El objetivo es vincular la justicia social y la democracia a nivel constitucional europeo sobre la base común de la igualdad. Desde esta perspectiva, el objetivo es demostrar la necesidad de una constitucionalización con una fuerte huella democrática y social debido al tipo de solidaridad que se encarna en los derechos sociales.
Palabras clave: Habermas, Unión Europea, democracia, constitución, solidaridad.

Abstract: This paper analyzes the European constitutional journey with the Habermasian concepts of solidarity and social integration. An analysis of the concept of constitution and of the European (economic) treaties reveals the lack of social integration as an obstacle to further economic integration. The aim is to link social justice and democracy at European constitutional level on the common basis of equality. From this perspective, the goal is to demonstrate the need for a constitutionalization with a strong democratic and social imprint because of the kind of solidarity which is embodied in the social rights.
Keywords: Habermas, European Union, democracy, constitution, solidarity.

INTRODUCTION: WHAT DOES CONSTITUTION MEAN?

> *"The [EU] Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a [Union] based on the rule of law. As the Court of Justice has consistently held, the [European] Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the [Union] legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves"*
>
> *[Opinion 1/91 (European Economic Area), 1991 ECR I 6079, para. 21.]*

According to Dicey, a constitution refers to all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state and the members of the sovereign power, which regulate the relation of such members to each other and determine the mode in which the sovereign power, or the members thereof, exercise their authority. According to Grimm, every constitution refers to three aspects: the object, the subject matter, and the effect. With regard to the *object*, the constitution is a special set of the highest-ranking legal norms. With regard to the *subject matter*, it defines norms which delineate and regulate the creation, the organization, and the exercise of public powers and authorities in order to best serves the needs and convictions of the polity and to protect the citizens from its arbitrary power. With regard to the *integrative effect*, it develops a communal spirit and a collective identity based on values and norms that are acquired in a socialization process, a sort of document that embodies basic convictions, principles, and aspirations. We must add two further considerations that broaden this conceptual horizon, both descriptive and normative considerations. First, the constitutions are always ideological texts. According to Ewing, "like any other document, they reflect the moment when they were drafted, the values of their authors, and the purposes they are to serve. To this last end, they thus reflect the type of society for which they are designed, and the anticipated role of the state in that society" [Ewing 2012, 1037]. From this point of view, however, a differentiation between ordinary norms and constitutional ones is impossible. The descriptive perspective cannot help us to adequately define the constitution and its norms because of the lack of normative analysis. A purely descriptive analysis

is incapable of explaining the core of a constitution, differentiating it from all other types of legal sources: “Much important work is simply taxonomic, in trying to identify a specific descriptive constitution’s characteristics. Yet, closely examined many of the distinctions are unstable […]. Careful attention to the various categories regularly leads to anti-necessitarian conclusions: one can find a counterexample for every characteristic said to be necessary for understanding descriptive constitutions” [Tushnet 2012, 230-1]. The ideological dimension is possible only where there is a strong consensus on it. This consensus does not refer to a distorted representation of, and an illusory justification of, a world of a Marxian type, but to a widespread consensus, based on common sense or/and on a conscious and critically reached agreement. In according to Ackerman[1], the core of the fundamental constitutional principles persists because it is adopted in periods of heightened public deliberation over constitutional fundamentals.

The turning point is the Treaty of Maastricht: the Institutional Commission of the European Parliament presented the “Draft Constitution for the European Union” on 9 September 1993. This draft followed another similar proposal ten years earlier, but which had not met with some public response: “Even ten years ago, the draft treaty on the establishment of the European Union the European Parliament put forward, while seen in professional circles as a draft constitution, met with disinterest in political circles and got no response from the public. The international treaties were regarded as an adequate legitimising basis for the Community's sovereign powers, while the constitution as a legal form remained reserved to States” [Grimm 1995, 283].

In what has become known as the 'Maastricht II' debate, the call for a European constitution plays a crucial part. Something has changed in the perception of scholars and new European citizens and this something is still present today.

What is this "something"? The integrative effect of a constitution goes hand in hand with its "legal" aspect, namely the process of constituting, legitimizing, and regulating public authorities and powers at a juridical level. The difference between a treaty and a constitution is not in the legal perspective, but in the normative perspective.

[1] See B. Ackerman, We the People, Volume 2: Transformations, Harvard University Press, 1992.

In German thought, from Kelsen to Grimm, the substantial functional equivalence between treaties and constitutions is emphasized:

"The European Union, however, is at a particular disadvantage compared with nation-states because the nonlegal integrative factors within its borders are poorly developed or lacking altogether […] The fact that the EU has existed for so long without a constitution does not mean it has not had a basic legal framework quite the opposite. It has had one from its very inception. However, in contrast to the basic legal framework of nation-states, the legal framework of the EU is founded on international treaties. If these treaties have at times been described as constitutions, we must see this as an analogy rather than a reality. The treaties fulfil some legal functions that, in nation-states, are assigned to the constitution […]. It is important to notice, however, that the need for institutional reform does not imply the transition from treaty to constitution. Just as all previous changes to the legal foundation of the European Union were carried out within the framework of its treaties, the required reforms could have been implemented by changing the treaty texts as well" [Grimm, 196-7].

What differed from these perspectives was the emotional feeling brought towards them, i.e. the perception that citizens have of them. A normative analysis, however, must consider this "emotional feeling" not as something subjective or irrational, but as something founded on reasons.

Grimm notices a gap between the legal and supplementary functions. A hiatus that, from a legal point of view, is irrational. The perception of something as "good" seems to go beyond any "scientific" consideration, reducing itself to a mere feeling, to something that escapes both politics and reason:

"the fact that a constitution functions legally does not mean that it will have any integrative power. Because their integrative power is ensured less by the legal quality of their regulations than by the way in which the members of a constitutionally formed polity perceive them, constitutions can acquire or forfeit integrative power without prior textual changes to, or altered interpretations of, their content. In contrast, there is a much closer link between a constitution's integrative power and the polity's fundamental principles, to which it gives both legal expression and a generally binding character. As a normative text embodying these principles of order, a constitution can confer identity only as long as the

system it has established is perceived as being a 'good' one" [Grimm 2005, 199].

According to Grimm, the integrative effect of a constitution is not necessarily realized with its promulgation, but this will be the consequence of the people's attributing to the constitution a metalegal meaning.

This consequence is based upon the lack of traditional integrative factors, that is where nationhood, religion, history, culture, or a common enemy are not present or sufficiently widespread:

"the success of the projected constitution - which the convention found so urgent- depends on whether or not the document, once it has come into effect, fulfils expectations on a symbolic level and compensates for the lack of a natural basis for integration […]. [T]he lack of traditional integrative means offered the constitution an opportunity to fill the gap" [Grimm 2005, 204].

The constitution can have an integrative function only if it embodies the conception of the good, the values and principles widespread among citizens. From this point of view, the integrative function comes into play after its creation and only if the work of the constituents reflects the feelings of the subjects of the constitution: ex post integration.

Before moving on, it is important to answer the following question: Why is the integrative function of the constitution important to us?

The answer depends on how we think about the method of social integration and what kind of solidarity we refer to. According to the *action program*, social integration is primarily promoted by a consensus on values and norms. According to *systems program*, the most decisive constraints are those imposed by the various functional systems of society. These systems determine individual behaviour to such an extent that there is little room left for normative motivation. These two programs involve two different basis of integration, social (focus on norms and values) and system (focus on market): "*the social integration* of action contexts is established via normatively secured consensus, and their *system integration* via a nonnormative regulation of selfmaintenance processes. In short, the orientation of acting subjects toward values and norms is constitutive for establishing order through social integration but not for system integration. The anonymous sociative mechanism of the market has served as a model for the latter"

[Habermas 1985, vol. 2 202][2]. Depending on which approach we choose, we determine not only the importance of the integrative effect of the constitutions, but also the very nature of the constitution. The answer, however, must be shaped on the history and development of the European project and, therefore, it must necessarily emerge as an exhaustive answer to the problems that arise *hic et nunc*.

1. THE EUROPEAN ECONOMIC CONSTITUTIONALIZATION

> *"From a legal viewpoint, the form of a treaty did not preclude any reform measure; neither did the form of a constitution add anything to the legal validity of the reforms. Hence, legal considerations did not make a constitution necessary" [Grimm 2005, 197].*

The demand and need for a constitution emerges in response to the lack of social integration, because "a divide is opening up between economic and political integration, on the one hand, and social integration" [Grimm 2005, 197].

Therefore, this gap represents an obstacle to further economic integration. The constitution, in this conceptual horizon, emerges as "the last brick in the building of European integration, namely political integration"[3].

My aim is to link social justice and democracy at European level on the common basis of equality. My concept of constitutionalization does not include every constitution, but only a specific type of constitution that embraces and expands a specific type of solidarity. From this perspective, I would like to demonstrate the need for a constitutionalization with a strong democratic and social imprint because of the kind of solidarity which is embodied in the social rights. The latter, in fact, in order to play its role, require and spread a type of solidarity

[2] Moravcsik perfectly understood what was at stake: "The idea was to legitimate the EU not through trade, economic growth and useful regulation, as had been the case for 50 years, but by politicising and democratising it. This was to be done via a constitutional convention"
(https://www.prospectmagazine.co.uk/magazine/europewithoutillusions)

[3] Speech by Joschka Fischer at the Humboldt University: "*From Confederacy to Federation – Thoughts on the finality of European integration*" (Berlin, 12 May 2000).

that is antithetical to the solidarity required and spread by economic integration.

Economic integration represents the backbone of the European project, pervading it completely. Its political and social insufficiency reverberates with all its destructive potential in social policies and, above all, in the instrumentalization of socio-economic rights:

"European integration has primarily been an economic project, and in spite of the expansion of EU activities into new policy domains, economic integration still retains a dominant position. This has left its imprint on inter-dimensional relations within the European constitution. The economic constitution has benefited from a functional primacy with regard not only to the framing juridical and political constitutions but to other sectoral constitutions as well. Thus, the social policy provisions of the Treaty of Rome already had an economic rationale: they served the free movement of workers or secured a level playing field for the industries of different Member States." [Tuori 2019, 2-3]. Against this primary development, from the Maastricht Treaty social rights have obtained a dynamic of autonomous constitutionalization that clashes with the fundamental economic core of the EU: "Increasing autonomy may lead to normative results which contradict the requirements of the economic constitution" [Tuori 2019, 3].

The core European conception is that the increased economic prosperity produced by European common market would then be redistributed through national welfare mechanisms. This interlink between various dimension leads to a struggle that underlines the difficulty of the social dimension of European constitutionalism: the primacy of the national welfare state is inconsistent with the prevalence of the economic constitution and, on the other hand, from the European private law emerges a conception of justice that conflicts with the solidaristic social justice underpinning national welfare regimes:

"Social policy, especially in the key areas of social security and healthcare, is about redistribution based on value choices, and such redistribution entails an enhanced need for democratic legitimacy. As long as the EU is afflicted by a democratic deficit, this need can only be met at the national level […]. Member State legitimacy problems would have repercussions at the European level as well" [Tuori 2019, 7].

The EU has acted on national welfare through the microeconomic constitution: a) the ECJ, through the *Dassonville doctrine* and the prism of negative integration, treats the national social policy measures as

restrictions on free movement or competition; b) to subject the health and social care to free movement and competition law.

According to Tuori, the perspective we derive from it is very clear: "This has cleared the ground for the primacy of the economic constitution over the social constitution and for a corresponding internal hierarchy in Treaty law" [Tuori 2019, 11]. The fundamental problem is a matter of priority: “in conflicts of rights, what needs justification is restricting not a fundamental right but an economic right?” [Tuori 2019, 4]. There are three important aspects that we should consider in order to reinforce our critics on the EU: the primacy of the national welfare state and the lack of a shared normative vision of social Europe are linked with the subordination of social policies and rights to the needs of economic integration.

The economic primacy implies two outcomes: a) social policy as a means serving economic integration and social policy decisions have been taken outside the Treaty framework for social policy; b) a liberalization as modernization through the ECJ constitutional jurisprudence that “may function as an efficient brake to introducing new benefits, or enlarging the scope or raising the level of existing ones. Instead of upgrading, the general tendency in Member States seems rather to be towards downgrading” [Tuori 2019, 22].

We should see the “official” primacy of the economic integration in the field of labour rights. In fact, the EU simply cannot act as a transnational welfare state. The latter is a prerogative of the individual states: “Social policy in the EU jargon means policy relating to labour relations. It was the subject of a Protocol to the Maastricht Treaty, signed by all the member states save the UK, because the then British government did not accept it. The Labour government elected in May 1997, however, accepted it as a section of the Amsterdam Treaty. EU social policy focuses on several areas: improvement of the working environment to protect workers’ health and safety; working conditions; information and consultation of workers; equality between men and women at work; integration of people excluded from the labour market. This is done by supporting and co-ordinating national policies and by legislation, enacted in certain areas by co-decision between Council and Parliament. The Commission is required to encourage cooperation among member states in matters such as training, social security, accident prevention. Amsterdam also authorized the Council, acting unanimously,

to take action to combat discrimination ‘based on sex, racial or ethnic origin, religion or belief, age or sexual orientation” [Pinter 2007, 97].

In a nutshell, EU social policy does not focus on redistribution requests and claims, but refers to regulatory measures in the four fields of private law: labour law, consumer law, antidiscrimination law and law on universal services.

The economic primacy, that is the supremacy of economic freedom over the fundamental rights, could be approached with a splitting within the concept of “*economic constitution*”.

This concept concerns the constitutionalization of social and economic rights. The constitutions, in fact, include two types of economic rights: "the first being the rights of property of traditionally to be found in liberal constitutions, and the second being the rights of labour which traditionally are not to be found in liberal constitutions" [Ewing 2012, 1037], but in social democratic constitutions. The first type of rights includes economic rights related to contract and economic freedom, while the second includes economic rights related to two types of labour rights, that is both the workers’ rights (the right to work, the right to just conditions of work, and the right to safe and healthy working conditions) and the trade union rights (the right to organize in a trade union, the right to bargaining collectively, and the right to strike).

My point of view is that labour rights and the redistribution are both part and parcel and the outcome of the socio-political integration, that is the democratic debate as the main source of solidarity and integration:

“if the residents of a country are hungry, ill, thirsty, or could and living under a constant threat of poverty, it is extremely difficult to see how they could decide on any meaningful conception of a good life for themselves and further, to what extent the first generation of rights would have significant meaning for them, living as they do in parlous conditions. Arguably, the existence of these rights justifies a move away from a narrow conception of individual right holders so central to first-generation rights. Ultimately socio-economic rights promote a sense of community, and thus are claimed by group of impoverished and marginalized people who seek to preserve a sense of dignified community. In turn, this compels a different vision of rights, one which is not based exclusively upon an individual rights bearer” [Davis 2012, 1034].

Paradigmatically, the chapter about workers and trade unions rights in the CFREU is called "solidarity". If solidarity is a central European

issue, it becomes important to understand whether the constitutionalization of socio-economic rights is capable of holding back and guiding the development of the EU: "[t]hat principle is to be found in the TEU, where it is referred to on 15 occasions in the treaty and its protocols, the term being used in multiple different ways to express a foundation value of the EU, solidarity between people and generations, and solidarity between Member States. The principle also finds expression in the EU Charter of Fundamental Rights, with a chapter on Solidarity consisting of 12 separate articles of varying degrees of precision. But although haphazard, wide-ranging and opaque, it is nevertheless crucial that in both of these texts we can find solidarity as a constitutional principle to mean both the negative and positive obligations of the 'State' and its constituent parts, to the significance of which we return" [Ewing 2020, 4-5].

If solidarity has become a central chapter in the EU, the institutions will have negative and positive duties regarding this principle and in order to develop it: "the State [in our case the EU and its Members States] has a negative duty to refrain from any regulatory or other activity that would undermine solidarity as a principle. In the case of labour law, this would mean steps taken to restrict trade union freedom and the capacity of trade unions to engage in solidarity activities. But it also suggests a duty on the part of the State to encourage, facilitate and promote solidarity activities, whether by (i) voluntary institutions such as trade unions and employers' associations; or (ii) the State acting as an agent independent of workers, citizens, trade unions and civil society organisations. Solidarity as an instrument of public policy promoted by the State - in fields such as health care or social insurance - is likely to be based on reciprocity rather than altruism. Perhaps requiring a sharing of financial resources, it is also likely to be obligatory rather than voluntary, and indeed coercive in terms of sanctions for failure to comply with solidarity obligations." [Ewing 2020, 3-4].

In addressing the Eurozone crisis, social and labour rights were put under pressure. This direction, however, that is the fiscal constraints, was introduced by the Maastricht EMU provisions (European macroeconomic constitutionalization) and have only been strengthened with the crisis: "In addition to the requirements of labour market and wage-setting liberalization and flexibilization, austerity programmes have curbed the social policy sovereignty of crisis states through detailed and focused obligations to cut social expenditure and public sector wages (Busch et

al. 2013). Indeed, social spending has been a major target in measures aiming to reduce the budget deficit and public debt" [Tuori 2019, 24]. The theoretical means of this perspective is embodied in the principles of Limburg where, in times of austerity, social rights become the criteria for the allocation of spending cuts.

Tuori's European reconstruction is perfect for our purpose, since, albeit with great descriptive clarity, it highlights gaps precisely in the scope of his solutions.

He described three ideal model of justice which are linked to Market, European Union, and Member States: "The first of these is *market justice or allocative justice*: whatever is the outcome of market mechanisms is just. Here the role of the state or the transnational polity is reduced to securing the general framework conditions for market mechanisms, such as the rights to property and freedom of contract […]. The second alternative is *access justice* (as Micklitz has defined it). As a rule, functioning markets do not emerge spontaneously but presuppose particular market-constructing measures by a polity. Furthermore, left to themselves, market mechanisms may lead to self-detrimental results by eliminating some economic agents from the marketplace and barring the (re)entry of others. Public policy that promotes access justice furthers market construction, combats exclusion and seeks to facilitate the (re-)entry of economic agents to the marketplace as entrepreneurs, workers or consumers. The third alternative is *social justice*, which implies the correction of the distributive outcomes of the markets and, obviously, presupposes *solidarity in both a financial and a socioethical sense*" [Tuori 2019, 27-8].

"Market justice" is linked to a minimal liberal state (see Hayek's conceptions of law), the national welfare states are linked with "solidaristic social justice", and the "access justice" - namely the reintegration into the labour market and its efficiency - is linked to the regulatory private-social law of the European Union.

With this framework, we can not only explain the cultural background of *Viking and Laval decisions*, but also the inner structure of the European Pillar of Social Rights.

The latter question is easier than the former: Social Pillar was a recent (2015) initiative introduced by Commission which was done for a "labour markets agenda". This text differs from other social documents, e.g. 1961 European Social Charter, 1989 Community Charter of the Fundamental Social Rights of Workers and multiple ILO declarations.

The former was done for a "labour markets agenda", the latter were done for the protection of labour rights and for a "labour rights agenda", that is, *access justice against solidaristic social justice*. A labour markets agenda is not specifically designed to protect workers and trade unions. It is designed to ensure that the labour market performs with much more efficiency. The Social Pillar, as a labour market initiative, is not designed primarily for the protection of the workers, but it is mainly designed for the operation of the labour market, and market justice in general, and a wider range of interests which have at stake in the common market.

The second question is more complicated and requires a broader debate. Tuori describes Viking and Laval decisions as a clash on two levels, i.e. between two types of rights - economic rights established by free movement law/access justice and social rights/solidaristic social justice - placed at two different institutional levels - European economic rights and national social rights. This clash, however, rests on a conceptual fabric that is also on two levels: transnational markets should produce increased prosperity, while national redistributive mechanisms should ensure the correction of the distributive outcomes of the European markets.

His conclusion regarding this problematic separation of powers is the following: "Whether or not Union social rights will attain a role in the defense of national welfare regimes remains to be seen. The fact that they have been almost totally ignored by both EU institutions and Member States as a potential counterweight to the implications of the macroeconomic constitution during the recent Eurozone crisis does not give reason for much optimism among the defenders of social rights" [Tuori 2019, 30].

In my opinion, here we encounter several errors:

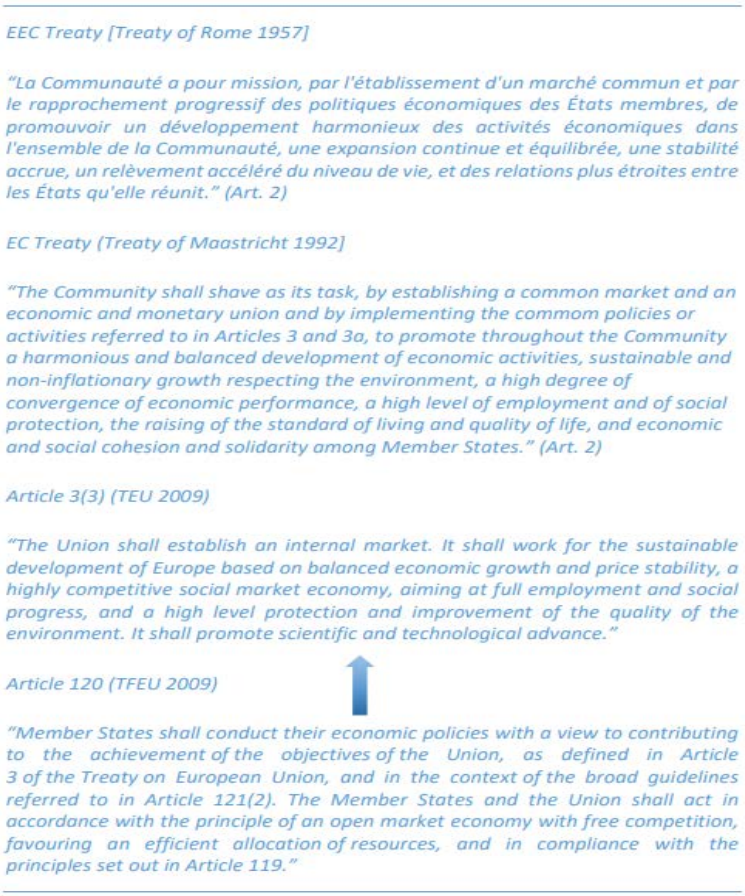
1) First of all, this territorial division is structurally a cause of tensions: the fiscal constraints introduced by the Maastricht EMU provisions, the EU primacy and its direct effect implode the possibilities of this functional separation. The litigations before national court and international supervisory bodies have produced no serious effect. Furthermore, austerity policies have undermined both the national social ground and the social power of workers: "The European Committee of Social Rights, in relation to a number of collective

complaints, has found, for example, Greek reforms to be in violation of the right to a fair remuneration and the right to social security. The ILO Committee of Experts has expressed deep concern about the Greek developments in relation to Conventions No 87 and No 98 and the freedom of association and right to collective bargaining, and has stated that the reforms of collective bargaining and negotiations structures are 'likely to have a significant - and potentially devastating - impact on the industrial relations system in the country" [Rönmmar 2020, 631].

2) Secondly, the EU Social Rights have been systematically evaded by European governance, considering that no reference to either the Solidarity chapter of the CFREU or to the 1961 European Social Charter can be found in the legal documents produced during the Eurozone crisis.
3) Thirdly, in a global economic the possibilities of social justice go beyond the scope of state powers and borders. Social rights can only be affirmed within the ECJ and with an expansion of European legislation and jurisdiction, in order to balance and standardize social conditions and prevent social dumping in a democratic, not an economic, perspective. Tuori, to criticize the negative integration of the Court of Justice, states not only that social integration is possible only through social and cultural developments, but also that social integration supports and enables economic integration and welfare states. The deterritorialization and denationalization of welfare state services could corrode that solidarity at the national level. Only social integration at European level can replace it without downgrading its services: "Denationalization and deterritorialization expand financial solidarity beyond national citizenry and territory. This may corrode the socio-ethical solidarity which made financial solidarity - and the welfare state in general - possible in the first place. Of course, no a priori obstacles exist to extending the boundaries of the solidarity community

too. But this cannot be done overnight, by fiat, and requires arduous social and cultural developments. Here, European integration still has a long way to go" [Tuori 2019, 23].

2. INSIDE THE EUROPEAN TREATIES: TRICK OR TREAT?



While the Art. 3 of TEU is a really impressive statement about the values and functions of the Union and it is very similar, in its principles and in the formulation, to the ILO's declaration arguments, the Art. 120 of TFEU is emblematic of a shift and embodiment of economic integration.

An “highly competitive social market economy” is completely different from an “open market economy with free competition”.

Are we facing a contradiction or something different?

First of all, “[t]he objectives laid down in Article 3 TEU do not have an independent function in EU law. According to the Court, they ‘merely lay down a programme’, so that the implementation of the objectives is to be achieved through the policies and actions of the Union as well as those of the Member States” [Klamert 2019 (EU Treaties), 32].

But what interests us most is the definition of the type of European market. Towards which type does the scales tip? "Objectives mentioned in the second sentence of Article 3 (3) TEU not directly reflected in other places of the Treaty are 'a highly competitive social market economy, aiming at full employment and social progress', and' scientific and technological advance '" [Klamert 2019 (EU Treaties), 33].

The social market is not directly mentioned in the other treaties and this should tip the balance towards the TFEU.

The art. 119 TFEU, with the art. 120 TFEU, strongly affirms the true economic conduct of EU. Here the link with art. 3 TEU is purely nominal, lacking any substantial strength.

The Social Europe succumbs to another vision of Europe, founded on a different type of solidarity and another system of integration:

“Article 119 TFEU embodies an essentially (ordo-)liberal vision, reiterating in paragraphs 1 and 2 that the economic and monetary policies whose broad parameters it lays down are to be conducted ‘in accordance with the principle of an open market economy with free competition’. Those mentions are expanded in Article 119(3) TFEU, which underlines principles of stable prices, sound public finances, and monetary conditions, and a sustainable balance of payments. A common feature of the principles set out in Article 119(3) TFEU is that they are essentially quantitative in nature and therefore focus on nominal convergence between MS. The balance between ‘economic Europe’ and ‘social Europe’ is a matter of political vision rather than of legal technique: however, it is notable that the primary objective of the Union’s monetary policy is ‘to maintain price stability’. For many that prioritization expresses a view that such stability is the sine qua non for social cohesion and progress rather than an indifference to such matters, but the centrality of price stability reflects a choice that colours the actions of the Union and its institutions” [Flynn 2019 (EU Treaties), 1273].

European "constitutionalization" continues on a well-defined track and with its own precise method:

"Economic policy is based in large part on methods that resemble intergovernmental decision making: the main tools available rest on mechanisms of peer-pressure and encouragement (rather than sanctions), the role of the ECJ is very much limited, the EP is variously informed or consulted but generally does not have the status of co-legislator, and the Council and the Commission are given roles of working in tandem with one another. In the realm of monetary policy, the traditional 'Community method' prevails with the notable qualification that the ECB is given a large degree of autonomy with correspondingly reduced roles for the other institutions" [Flynn 2019 (EU Treaties), 1272-3].

The surveillance system also involves the European Council. This system seeks to ensure that Member States collectively take full ownership of the coordination process by bringing in Heads of State or Government and not leaving the process at a lower political level, in the hands of ministers:

Art. 121(3) "In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment. For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary".

Art. 121(4) "Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public."

The Council, under the Art. 121(2), "shall adopt a recommendation setting out these broad guidelines".

On the side of social policies, we can see the Title X TFEU which incorporates the Social Protocol of the Maastricht Treaty. Indeed, the social policy protocol was removed from its position in Maastricht and put into the body of the treaties themselves. It became TFEU TITLE 10, a set of powers to develop social policies along the different grounds (some topics with qualified majority, some topics with unanimity, and other ones was excluded) and a set of procedures for law-making by social dialogue: the development of social agenda through an alternative to legislative-parliamentary path, that is between social partners that represent the two sides of economic sphere.

Three important aspects are to be underlined in Title X:

a) in its first article, art. 151, both the 1961 ESC and the 1989 Community Charter are named in the present article, but more generally throughout Title X there is no explicit reference to the EUCFR.

b) Art. 151(3) makes an emblematic reference to the internal market, "expressing the belief that the harmonization of living and working conditions will 'ensue' from the internal market's functioning, and that the internal market will 'favour' the harmonization of social systems. The idea is that economic integration through regulatory competition will ensure the optimum allocation of resources and increase economic growth and thereby an optimum social system without the need for EU social measures, thus reflecting a classic neo-liberal market tradition" [Gabben 2019 (EU Treaties), 1359].

c) the social dialogue outcomes and social policies in general has to be made effectively by hard law in the form of directives.

Title VIII and Title X are in open contradiction to each other. Their legal means, *recommendations vs directives*, reflect two different and contradictory types of integration and source:

- Guidelines formulated through recommendations are a technocratic product of the Commission. Their genesis is a fundamental part of the so-called European semester: the procedure begins in January,

when the Commission issues its Annual Growth Survey, with the EU priorities for the coming year to boost growth and job creation. In February, the Council and the European Parliament discuss the Annual Growth Survey. In March, the European Council discusses a conclusion on the broad guidelines of national and Union economic policies on the basis of the Annual Growth Survey. In April, Member States submit their plans for sound public finances. In May, the Commission assesses those Stability or Convergence Programmes and National Reform Programmes and proposes country-specific recommendations as appropriate. In June the European Council discusses and endorses the recommendations, and in July the Council adopts the country-specific recommendations. Those country-specific recommendations are intended to form the basis for Member States to draw up their draft budgetary plans in the second half of the year (national semester).

Broader economic guidelines can be used for pressure on Member States, discretionary interventions on state-by-state basis under guidelines which failure to comply with basic rule of law initiative or understanding, because of economic policies can be made and implemented by vague and abstract economic guidelines. The implementation of these soft law is guaranteed by the “multilateral surveillance” based on “economic sanctions”.

- The directives are the outcomes of a rigid approach to social policy, based on the ordinary legislative procedure or on the social dialogue, which can only develop through hard law mechanism legislation across the Union as a whole.

In accordance with art. 288 TFEU, "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Instead "recommendations and opinion shall have no binding force".

This contradiction reflects the longtime social Zeitgeist of European Union. How could the European market-attitude towards social policy change with a European constitution?

3. FROM EUROPEAN ECONOMIC UNION TO EUROPEAN SOCIAL UNION: EUROPEAN CONSTITUTION AS A PROJECT OF SOCIAL JUSTICE AND SOLIDARITY

The last step will then be completion of integration in a European Federation. Let's not misunderstand each other: closer cooperation does not automatically lead to full integration, either by the centre of gravity or straight away by the majority of members. Initially, enhanced cooperation means nothing more than increased intergovernmentalization under pressure from the facts and the shortcomings of the "Monnet Method". The steps towards a constituent treaty – and exactly that will be the precondition for full integration – require a deliberate political act to reestablish Europe. This, ladies and gentlemen, is my personal vision for the future: from closer cooperation towards a European constituent treaty and the completion of Robert Schuman's great idea of a European Federation.

[J. Fischer, From Confederacy to Federation – Thoughts on the finality of European integration, Berlin, 12 May 2000]

The citizens of Europe are entitled to expect two things that their governments have so far denied them.
The first is a vigorous debate, starting from first principles and with the widest possible participation, about what the future of the European Union should be.
The second is an intelligible account, capable of commanding popular agreement, of the rules by which the future of the Union will be shaped. The right way to meet both needs is to discuss and then frame a written constitution for the EU.

[The Economist, 26th October 2000]

It is time to view Europe as it really is. Far from demonstrating that the EU is in decline or disarray, the crisis demonstrates its essential stability and legitimacy. The central error of the European constitutional framers was one of style and symbolism rather than substance. The constitution contained a set of modest reforms, very much in line with European popular preferences. Yet European leaders upset the emerging pragmatic settlement by dressing up the reforms as a grand scheme for constitutional revision and popular democratisation of the EU.

[A. Moravcsik, A Category Error, Propect, July 2005, 22]

The above quotations are taken from famous interventions, each in turn paradigmatic of a certain constitutional perspective. From an overview of these paradigms we can draw elements for a different vision of the European constitution.

In order to better and critically address these paradigms, we must first put forward a more complete explanation of the socialdemocratic concept of a constitution.

This general overview opens the way for us to connect with the setting of D. Grimm and J. Habermas. Moracvsik, The Economist, and Fischer focus their view on the legal value of the constitution, but it is appropriate to broaden our view to its integrative function.

As said by Grimm, "a large part of the problems needing political treatment can no longer be effectively solved in the narrow State

framework of the European countries. This finding creates the pressure for supranational integration. If this is nonetheless not to be pushed as far as a European State, that is because it could not meet the democratic requirements of the present. Its level of legitimation would be lower than a nation-State's, also lessening its capacity to solve problems, something that has not just technical but also legitimatory prerequisites. The need is instead to retain the European Union in its special nature as a supranational arrangement, and to build on this special nature; not to copy national patterns" [Grimm 1995, 297-8].

Habermas goes beyond a liberal constitution, penetrating more deeply into its integrative function: "If […] one wants to hold on not only to government by law but to democracy as well, and thus to the idea of the legal community's self-organization, then one can no longer maintain the liberal view of the constitution as a "framework" regulating primarily the relation between administration and citizens. Economic power and social pressure need to be tamed by the rule of law no less than does administrative power […]. Rather, the constitution sets down political procedures according to which citizens can, in the exercise of their right to selfdetermination, successfully pursue the cooperative project of establishing just (i.e., relatively more just) conditions of life" [Habermas 1996, 263].

Every democratic constitution has a double-face, because it is both a historical document and a project of justice: "as a historic document, it recalls the foundational act that it interprets - it marks a beginning in time. At the same time, its normative character means that the task of interpreting and elaborating the system of rights poses itself anew for each generation; as *the project of a just society*, a constitution articulates the horizon of expectation opening on an everpresent future". [Habermas 1996, 384].

In a fundamental point of his work, Habermas manages to explain the reciprocal interplay of civil and social rights in the realization of social justice: "*The idea of a just society* is connected with *the promise of emancipation and human dignity*. The distributive aspect of equal status and equal treatment - the just distribution of social benefits - is simply what results from the universalistic character of a law intended to guarantee the freedom, and integrity of each. The normative key is autonomy, not wellbeing. In a legal community, *no one is free as long as the freedom of one person must be purchased with another's oppression*" [Habermas 1996, 418].

In a liberal view, the Rule of Law is the differentiation criteria between a "free country" and those countries subject to arbitrary government because it is deemed as “the legal embodiment of freedom” [Hayek 2006, 85]. The rule of law, consequently, should advance a differentiation between formal and substantial equality, that is between civil, social, and labour rights: “*formal equality* before the law is in conflict, and in fact incompatible, with any activity of the government deliberately aiming at *material or substantive equality* of different people, and that any policy aiming at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law” [Hayek 2006, 82].

Therefore, “[t]he Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law, and *excludes legislation either directly aimed at particular people, or at enabling anybody to use the coercive power of the state for the purpose of such discrimination*. It means, not that everything is regulated by law, but, on the contrary, that the coercive power of the state can be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used” [Hayek 2006, 87].

The logical consequence of this position is the rejection of the trade unions and their social strength: [“for Hayek and his disciples, the question of trade union power was compounded by the legal protection of trade unions in the form of what was perceived to be ‘immunity’ from common law liability” [Ewing & Hendy 2015, 85].

For our purposes it is important to raise a theoretical objection that emerges from practical and concrete life: social rights are not privileges, but must be considered as “the clothes for the protection of freedoms” [Ewing & Hendy 2015, 85]. Social rights, consequently, are based on the fact that “lack of money, poverty, carries with it lack of freedom. I regard that as an overwhelmingly obvious truth, one that is worth defending only because it has been so influentially denied. Lack of money, poverty, is not, of course, the only circumstance that restricts a person’s freedom, but it is, in my view, one of them, and one of the most important of them. To put the point more precisely – there are lots of things that, because they are poor, poor people are not free to do, things that non-poor people are, by contrast, indeed free to do” [Cohen 2011, 2]

The interlink between civil and social rights, with their promise of social justice, is achievable only with public autonomy, that is political

rights: “rights can be ‘enjoyed’ only insofar as one exercises them. Moreover, individual self-determination manifests itself in the exercise of those rights derived from legitimately produced norms. For this reason the equal distribution of rights cannot be detached from the public autonomy that enfranchised citizens can exercise only in common, by taking part in the practice of legislation” [Habermas 1996, 419].

Against T.H. Marshall, Habermas claims that “only the rights of political participation ground the citizen's reflexive, self-referential legal standing. Negative liberties and social entitlements, on the contrary, can be paternalistically bestowed. In principle, the constitutional state and the welfare state can be implemented without democracy” [Habermas 1996, 78].

In this context, the constitution is positioned as an all-encompassing practice - that is, capable of developing civil and social rights - perpetuated by all citizens through their political participation. Consequently, the constitution comes to be a 'demanding process of realizing rights' and, in a constitutional democracy, this process "concerns all participants, and it must not be conducted only as an esoteric discourse among experts apart from the political arena" [Habermas 1996, 395].

Having defined this democratically strong concept of a constitution, we must now release it in the European context. A democratic European constitution, in the Habermasian sense, emerges from the conceptual weaknesses of the different perspectives of the European constitution mentioned above.

1) The Economist focused on the European Constitution as a “constraints placed on governments by citizens”, an instrument for the stabilization of European status quo against an “ever closer union”. The finality of the EU is the single market and, once this is achieved, institutional brakes must be placed on ever greater political integration: “Europe's most exciting opportunity in the years ahead is to let competition among policies flourish inside the single economic space that it has created—a possibility largely denied to the United States, with its overwhelmingly mighty federal government. Europe should seize the chance: out of this untidy rivalry could come great things”.

2) Moravcsik's perspective is based on the "liberal intergovernmentalism". The core of this thesis is that "States are the driving forces behind integration, that supranational actors are there largely at their behest and that such actors as such have little independent impact on the pace of integration. The demand for integration is said to depend on national preferences, which are aggregated trough their political institutions [...]. The supply of integration is said to be a function of interstate bargaining and strategic interaction" [Craig 2020, 35-6]. In this view, "the European Community is best seen as an international regime for policy co-ordination" […]. Liberal integovernmentalism simply acknowledges a blunt empirical fact about contemporary institutions like the EU: member states are 'masters of the treaty' and continue to enjoy preeminent decision-making power and political legitimacy" [Moravcsik & Schimmelfennig 2019, 65].

Moravcsik's perspective is the most dominant one among EU Member States. The German Constitutional Court, in one of its latest judgments, underlines the decision-making power of the Member States: "Nevertheless, where they do occur, the constitutional perspective might not perfectly match the perspective of EU law given that, *even under the Lisbon Treaty, the Member States remain the 'Masters of the Treaties' and the EU has not evolved into a federal state* (cf. BVerfGE 123, 267 <370 and 371>). In principle, certain tensions are thus inherent in the design of the European Union; they must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding. *This reflects the nature of the European Union, which is based on the multi-level cooperation of sovereign states, constitutions, administrations and courts* (*Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund*)"[4].

Moravcsik identifies EU problems, but considers them solvable within the status quo and, above all, without the need for democratization: "Some democratic enthusiasts proposed jump-starting EU democracy by incorporating hot-button issues like social policy and immigration, despite the lack of popular support for doing so. This is, in essence, Habermas's vision. Yet anyone except a philosopher can see that

[4] Judgment of 5 May 2020 (2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15). https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html

this is the sort of extreme cure that will kill the patient. There is little that could lead the European public to decisively reject an institution as deeply embedded as the EU, but transferring controversial issues like social policy to it without justification might just do it".

Its solution is based on two main errors: a) the confusion between democratic and liberal legitimacy; b) the confusion between legitimacy and popularity of institutions.

a) "The notion of imposing democratic control through multiple checks and balances, rather than through elections to a single sovereign parliament, is more American than European — but it is no less legitimate for that": checks and balances are different from democratic legitimacy, as they do not imply the participation of citizens in the formation of collective choices and public institutions. Liberal legitimacy must be added to democratic legitimacy, but the former cannot replace the latter.

b) "More sober voices propose to empower national parliaments, which the constitution sought to do in a modest way. Yet this reveals a final fallacy of the democratisers. For there is little reason to believe that turning policy over to a legislature makes it more legitimate. In western democracies, popularity is inversely correlated with direct electoral accountability. The most popular institutions are courts, police forces and the military. Parliaments are generally disliked. Whatever the source of Europe's declining popularity — a general decline in political trust, unfamiliarity with institutions, xenophobia, discontent with economic performance — it has little to do with its democratic mandate": those institutions are popular because, and as long as, they do not make their own at the heart of the public political debate and/or take on the burden of decisions binding. The European Union is not one of those institutions and, therefore, the issue is democratic legitimacy. If we take Moravcsik's critique for real, either we should abolish all national parliaments or we should choose their members through co-option or state public competition.

3) Fischer's perspective is proper to another point of view, much closer to us., That is "the transition from a union of states to full parliamentarization as a European Federation". In my view, however, this project is wrong in placing excessive weight on Nation-states: “Only if European integration takes the nation states along with it into such a Federation, only if their institutions are not devalued or even made to

disappear, will such a project be workable despite all the huge difficulties. In other words: the existing concept of a federal European state replacing the old nation states and their democracies as the new sovereign power shows itself to be an artificial construct which ignores the established realities in Europe. The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation state".

The viability or non-viability of the national entities is not the problem. The goal is not to eliminate the national entity, both legal and cultural, but to assign it a different functional place within the political domain. Today's politics starts from the nation-states and spreads to the European level, while a reverse path is more appropriate, starting from a European vision to reach the national perspective.

This different approach allows, in my viewpoint, to continue the European project while remaining within Fischer's coordinates: "these three reforms – the solution of the democracy problem and the need for fundamental reordering of competences both horizontally, i.e. among the European institutions, and vertically, i.e. between Europe, the nation state and the regions – will only be able to succeed if Europe is established anew with a constitution. In other words: through the realization of the project of a European constitution centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation state level".

The EU, over the past twenty years, has increased its importance and the scope of its powers. This increase seems difficult to reverse from a national point of view, since the national democracies are entangled in problems that emerge from the growing discrepancy between a global economy that is becoming increasingly interdependent at the systemic level and a world of states fragmented with less and less power.

This *fact* has caused an ever greater independence of European institutions which, in Fischer's words, are still "viewed as a bureaucratic affair run by a faceless, soulless Eurocracy in Brussels - at best boring, at worst dangerous". Despite various advances, there is a steady increase in the distance that separates the decision-making processes of the EU-autorities from the political will-formation of European citizens at national level.

This outcome is due to three causes:

a) The immunization of a particular pattern of policies through the judgments of the ECJ. The direct actionability of economic freedoms against social rights results in "the negative integration of different national societies through market freedoms took priority over a positive integration which is accomplished politically through the will-formation of citizens themselves" [Habermas 2014, 2].

b) The unpolitical way of a policy-making at the European level based on institutions which are not under any legitimation pressure (i.e. the ECJ and the Commission) or on decisions that are not sufficiently legitimized (the European Council and the Council): "Heteronomy becomes unavoidable when the body of citizens who elect representatives and legitimize their decisions does not coincide with the range of citizens who are affected by these decisions" [Habermas 2014, 2].

c) The distance between European Parliament and the European citizens. It is necessary “a European electoral law with European political parties that field pan-European lists of candidates. European parties have to organize and conduct election campaigns that are recognizably different in themes and personnel from national elections” [Habermas 2014, 3].

This type of European policy is disintegrating the achievements of the welfare state, while the neoliberal economic globalization has increased the social-gap within individual states. The solution is “a shift to solidarity-based policies for mastering the continuing crisis will not be possible without transferring additional sovereignty rights to the European level, which in turn requires an institutional reform that strengthens the European Parliament” [Habermas 2014, 5].

It is in this crisis scenario that Habermas places the need for a European constitution as a legal and integrative framework, ‘constitution as catalyst’: “an *institutional fix*—a technical device for facilitating new policy outputs aimed at securing European public goods beyond the staples of peace and economic growth. It must also be *a means of generating the input legitimacy* necessary to motivate and guarantee the delivery of more ambitious outputs” [Walker 2019, 509].

The European constitution, in fact, should not work to elaborate and strengthen economic cooperation and interdependence in order to

"confirm the solidarity which binds Europe and overseas countries, and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations" [1957 Rome Treaty].

Van Rompuy has used the concept of "economic solidarity" numerous times within a series of "aid" measures that have undermined the social rights of the countries most affected: "I strongly disagree with those who conclude hastily that the crisis has killed solidarity between European countries. Not at all! The crisis has revealed what it takes to be in a Union. In fact this is the very first real test of solidarity in the history of the Union! […] And I insist: in no way is this just a question of technical problem solving, it is just as much – and even more so – a work of political conviction. It is about the choice of which Europe we want to live. Just listen to all those voices in the euro debates these days across European countries. Beyond acronyms and jargon – EFSF, SMP, OMT and all the rest – the talk is about what is fair, about responsibility, solidarity, about being – yes or no – part of a wider European community beyond your own national borders"[5].

What is astounding in this concept is how it is possible to link solidarity, lower labour rights and social justice[6]: "Spain and Portugal have made their labour markets more efficient and this is already showing in lower labour costs, and over time, it will contribute to job creation. […] The unique fabric of our societies is our utmost strength. It is woven with the strands of peace, of economic progress, of social justice, of human dignity. We are proud to wear it. It is our message to the citizens and to the world at large, today and tomorrow"[7].

Contrary to (ordo- or neo- does not change the question) liberal conception, but in affinity with the 1944 Ilo Declaration of Philadelphia where "lasting peace can be established only if it is based on social justice", Habermas replaces economic solidarity with social solidarity, that is a kind of solidarity based on dialogue and democratic procedures: "in a secularized society that has learned to deal with its complexity consciously and deliberately, the communicative mastery of these conflicts constitutes the sole source of *solidarity among strangers* - strangers who renounce violence and, in the cooperative regulation of

[5] Speech by Herman Van Rompuy, President of the European Council, at the Ambrosetti Forum, 8 September 2012.

[6] The report of Council of Europe is very impressive: https://rm.coe.int/report-onthe-visit-to-greece-from-25-to-29-june-2018-by-dunja-mijatov/16808ea5bd

[7] Ibidem.

their common life, also concede one another the right to remain strangers" [Habermas 1996, 308].

This social solidarity, at European level, promotes a European political debate which, based on the discursive exchange between European citizens, could and should strengthen European solidarity and citizenship: "democratic citizenship establishes an abstract, legally mediated solidarity among strangers. This form of social integration which first emerges with the nation-state is realised in the form of a politically socialising communicative context […]. Therefore, it is to be expected that the political institutions to be created by a European constitution would have an inducing effect. Europe has been integrating economically, socially and administratively for some time and in addition can base itself on a common cultural background and the shared historical experience of having happily overcome nationalism. Given the political will, there is no a priori reason why it cannot subsequently create the politically necessary communicative context as soon as it is constitutionally prepared to do so" [Habermas 1995, 305-7].

In doing so, "European constitutional initiative as an opportunity for the "social" to catch up through a process of democratically generated and democratically generative political integration" [Walker 2019, 509].

As Habermas succinctly stated: "the only way to get democracy in Europe is through a deepening of European co-operation"[8].

In sum, economic growth vs social democratic growth.

CONCLUSION: OLD BUT (NOT) GOLD. A CURSE IN DISGUISE?

Habermas's thesis is intrinsically dialogic and aimed at tackling European problems from a European point of view, with solutions based on social dialogue and consensus, solidarity and a European project of social justice, beyond and against the particular interests of individual states and their corresponding power:

"The Union is put together in such a way that basic economic decisions that affect society as a whole are removed from democratic choice. This technocratic emptying out of the daily agenda with which citizens are confronted is no fate of nature but the consequence of a design set out in

[8] https://www.socialeurope.eu/core-europe-to-the-rescue

the treaties. In this context the politically intended division of power between the national and European levels also plays a role: the power of the Union is concentrated there where nation state interests mutually block each other. A transnationalisation of democracy would be the right answer to this"[9].

Returning to the differentiation between Title VIII and X, we can see how Title VIII is proper to economic cooperation and international power relations, while Title X represents, even with all its limitations, the project of democratization at European level of social policy.

As Habermas argues, "a technocracy without democratic roots would not have the motivation to accord sufficient weight to the demands of voters for the just distribution of income and property, security of living standards, public services and collective goods, when these they conflict with the competitiveness and growth needs of the economic system "[10].

As claimed by Tuori, "the rise of new intergovernmentalism, reliance on intergovernmental legal and institutional structures, is especially conspicuous in the creation and administration of financial stability mechanisms […]. The federalist structures which the crisis has gradually engendered are largely based on intergovernmentalism, supported by expertise-based institutions, such as the Commission and the ECB" [Tuori 2014, 217].

While the Fiscal constraints of the Maastricht Treaty reduced the scope for national social policy, the Title VIII reinforce the fragmentation of Member States and their nationalism against an 'ever closer Union'. Whereas businesspeople, the educated elite and wealthier Europeans favoured the EU, those fearful of unemployment, labour market reform, globalisation, privatisation and the consolidation of the welfare state opposed it. As stated by Fischer, "the introduction of the euro was not only the crowning point of economic integration, it was also a profoundly political act, because a currency is not just another economic factor but also symbolizes the power of the sovereign who guarantees it. A tension has emerged between the communitarization of economy and currency on the one hand and the lack of political and democratic structures on the other, a tension which might lead to crises within the EU if we do not

[9] https://www.socialeurope.eu/core-europe-to-the-rescue
[10] Habermas's lecture on European Union (Leuven, April 2013)

take productive steps to make good the shortfall in political integration and democracy, thus completing the process of integration".

The position of social rights in EU law is still rather weak because "Union social policy has suffered from a fundamental imbalance between Treaty provisions on social and economic issues […]. This disparity between economic and social constitutional law is a European-level phenomenon unknown to national constitutions […]" [Tuori 2014, 233].

The weak formal position of the European Parliament in the European economic governance and, at the same time, the strong importance of European Fiscal constraints, make the European Social Constitution "the eternal loser"[11]:

"Here market-liberal economic reason has conspicuously overruled the European social constitution. With the constitutionalisation of strict conditionality and its interpretations in a market-liberal spirit, the social constitution has once more proved to be the loser, now in relation to the macroeconomic constitution" [Tuori 2014, 238-9].

The problem is that, on the basis of widespread liberal intergovernmentalism, Title VIII continues to persist, threatening social rights. The issue is not its possible good or bad use, but its existence.

As claimed by Rainone, the 2020 country-specific recommendations (CSRs) aim to reinforce social protection: "regarding, more specifically, the social aspects, the Commission commits to strengthening European social and labour policies by implementing the European Pillar of Social Rights. In particular, fair working conditions, the provision of skills and the promotion of inclusiveness are identified as crucial ingredients for improving living and working standards across Europe"[12].

This change of focus is certainly something positive, but it is the framework that worries: measures created and implemented on the basis of the "labour market agenda".

[11] Expression taken from the title of a paragraph by Tuori.

[12] S. Rainone, *An overview of the 2020-2021 country-specific recommendations (CSRs) in the social field*. (https://www.etui.org/publications/overview-2020-2021-country-specific-recommendations-csrs-social-field)

In more theoretical and abstract terms, the political decision is between democracy and capitalism: what wins in the increasingly frequent occasions of clash?

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