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The Many Constitutions of Europe

The plurality of constitutional pluralities

Europe is living in an era of a plurality of constitutions. But not only that: there exists even a plurality of pluralities of constitutions. There are many constitutions in Europe in at least three senses. Firstly, constitutional concepts, starting from "constitution" itself, are assigned divergent meanings and read through divergent *conceptions*. This variety can be traced back to differences in cultural backgrounds as well as strategic professional or institutional interests or polito-ideological affiliations of the discussants. Secondly, not only do conceptions of the constitution vary but we can also point to different *concepts* of constitution, with different connotations and referents. In what follows, I shall make a tentative proposal for a distinction at the European level between economic, juridical, political, social and security constitutions. And thirdly, we have the plurality of constitutions in the sense of the co-existence in Europe of transnational and national constitutions.[1]

"Plurality" is not the same as "pluralism". *Constitutional pluralism*, as the term has been used in recent European constitutional debates, is an interpretation of the plurality of constitutions especially in its last sense, as the co-existence of transnational and national constitutions. Common to the interventions espousing constitutional pluralism is emphasis on overlapping, interpenetration and dialogue. The term "plurality", in turn, is neutral with regard to the nature of the relationship between units making up the plurality. Thus, "plurality" should not be confounded

[1] A terminological clarification: When I speak of European constitution, the reference is to the transnational level. By contrast, the expression "constitutions in Europe" covers both the transnational and the national level. Correspondingly, "European law", too, involves the transnational connotation.

with an idea of a self-containment and strict boundary-maintenance of the many constitutions, either.

In the following, my focus will be on the plurality of constitutions in the second sense of the term. I shall, however, briefly comment on the plurality of constitutional conceptions as well. By contrast, the interrelations between transnational and national constitutions, the main topic of the debates on constitutional pluralism, will largely be left aside. This, however, is not due to any wish to downplay the importance of this aspect of plurality but, rather, to a wish to remind of the significance of the other aspects, too.

Constitutional vocabulary in object-language and meta-language

An integral part of European-level constitutionalisation is the constitutionalisation of the discourse on European law. Constitutional concepts have permeated the vocabulary with which legal actors – such as politicians as European and nation-state legislators, judges and scholars - express their descriptive and normative views of the past, present and future of European law and polity. Constitutional vocabulary is part and parcel of the object-language employed in the discourse which provides a theorist of European law with her source material. By the same token, this vocabulary is – or at least it should be – part and parcel of the meta-language which structures the theorist's own account of European law. The theorist is exposed to the dialectic between object-language and meta-language termed *double hermeneutics*, so characteristic of human and social sciences: through her concepts, the scholar tries to make sense of a piece of social reality which is moulded by the way the social actors themselves conceptualise and try to make sense of their social world. Thus, if a European constitution exists for the relevant actors of European law in the sense of their talking about it, then it should exist for the theorist, too. The constitution is brought into existence through the speech acts of the actors of European law.

Due to this inescapable double hermeneutics, a scholar's meta-language cannot drift very far from the object-language of social actors. The scholar shares the culture she is examining; her meta-language draws from the same cultural reservoir as the object-language of social actors. A theorist may strive for and even attain a reflexive distance to her culture, but her reflexivity, too, is subject to cultural

constraints. However, theorists maintain a two-way relationship with their cultural environment. Not only does the object-language impose constraints on a theorist's meta-language, but a theorist may well contribute to a renewal of object-language. A theorist, too, is a social actor and participant in the discourse through which society's cultural heritage is reproduced and, simultaneously, renovated. In a longer term, even an individual scholar's meta-linguistic innovation may, through a process of cultural sedimentation, leave its impact on object-language.

In legal scholarship, the borderline between meta-language and object-language may be even more fluid than in other social and human sciences. Legal scholars are not only actors in the realm of academic science. They are also legal actors, and with the very same speech acts they participate in both scholarly discourse and the discourse shaping the law; a Luhmannian systems theorist would speak here of a structural coupling. Legal scholars constitute the third main group of actors of modern law, along with legislators and judges. Not only what they say but also how they say what they say has a potential impact on future law and its cultural underpinnings.

In respect of constitutional vocabulary, the principal choice for a theorist of European law has already been made: quite simply, this vocabulary is by now too ingrained an element of the language of the (other) actors of European law to be ignored. Still, the leeway object-language leaves for a constitutional theorist of European law is wider than is usually granted to a legal scholar. This is due to the existing plurality of both constitutional concepts and conceptions of these concepts; no firmly established and univocal constitutional vocabulary exists at the level of object-language. European law, especially outside the core area of free movement of goods and competition law, is very much law in-the-making, a rather disintegrated body of legal norms with rather underdeveloped and unsteady legal-cultural underpinnings. The process of sedimentation through which a surface-level legal order is furnished with legal-cultural support is still incomplete. In many fields, European law is still in search for its generally accepted language: its conceptual framework as its vocabulary and its characteristic patterns of argumentation as its grammar. This certainly is the case with European constitutional law. For scholars, this state of affairs opens a window of opportunities: the prospects of influencing the ongoing cultural process, of having a say in the evolution of European law and its language, are brighter than in other, more developed fields. This, of course, is a major

backdrop to the lively constitutional discussion among European scholars; scholars, too, are moved by their particular professional interests.

Divergent interests and cultural backgrounds

There are two main accounts for the present polyphony – some would perhaps call it cacophony – of European constitutional discourse: a critical or realist one and a cultural-hermeneutical one.

The first of these is the narrative by Critical Legal Scholars and political scientists, especially the so-called neo-functionalists. Conceptual development is explained by the divergent interests stirring legal actors; in terms of speech act theory, the focus is on the perlocutionary aspect of speech acts making up European legal discourse. Conceptual choices are treated, not as pristine intellectual moves, but as motivated by strategic interests which are related to the interlocutors' professional or institutional status or their wider ideological or political affiliations. Conceptual field is examined as a battle-field where individual and collective parties pursue specific strategies, such as introducing new conceptual distinctions or re-defining key concepts and hijacking them from adversaries. Thus, the landmark "constitutional" decisions of the ECJ in the 1960s and their acceptance by ordinary national courts or the "invention" of fundamental-rights vocabulary by the ECJ, and its use in the dialogue with national constitutional courts, are traced back to respective courts' objectives in inter-institutional power-game. Scholarly discourse, too, is seen as engaged in "politics of (re-)description" and academic turf-fighting; through change of vocabulary, constitutional lawyers aim to conquer the field from international lawyers.

In conceptual contests, a key position is held by concepts with positive value connotations; *evaluative-descriptive* or *persuasive* concepts, to use Quentin Skinner's terms. The power to define the meaning of such concepts and to "hijack" them from adversaries is crucial for dominance in the conceptual field. Constitutional vocabulary played a prominent role in such foundational moments of legal and political modernity as the French and American revolutions. This attached to constitutional concepts a highly positive value charge, which they still possess. Constitutional concepts are used in doctrinal expositions of the law in force, and they share the

general normativity of legal-doctrinal concepts. But as persuasive, evaluative concepts, constitutional concepts display an even more profound normativity, which relates to the preferred future development of law and its object of regulation.[2] When German ordo-liberals adopted the concept of *Wirtschaftsverfassung* (economic constitution) and endowed it with a meaning decisively different from that propounded by such left-leaning Weimar scholars as Hugo Sinzheimer and Franz L. Neumann, they did not seek merely a cognitive added value in the hermetic realm of legal (and economic) science; they aimed at the realisation of a specific economic *Ordnungspolitik*, first in post-war Germany and, subsequently, at transnational European level.

However, the critical or realist account falls short of its objective even as factual description and causal explanation; the truth of this narrative is but a partial truth (perhaps distorted by the hegemonic academic aspirations of Critical Legal Scholars and neo-functionalist political scientists!). Conceptual choices are not made in a vacuum; discussants are not offered the luxury of a free choice, but the options available are culturally limited. Legal actors always approach the law and legal problems through a particular hermeneutical pre-understanding, provided by the legal culture which they have acquired and internalised through their education and professional experiences. This entails an intractable perspectivism in law, noticeable even in the nation-state context but still more pronounced in such an emergent and culturally-incomplete transnational legal system as the EU.

As has often been snoted, transnational constitutional vocabulary still bears evident traces of its original nation-state template. European legal vocabulary inevitably taps the resources of national legal cultures which constitute the only available fount for the legal Esperanto of the emerging legal system. Many of the legal concepts of modern law can be traced back to transnational origins in Roman law. Here constitutional concepts are an exception, so intimately they are – despite their eventual pre-modern background – linked to modern nation state in the worldview of both the general public and legal and political elites. European constitutional law is still in its formative phase, so that differences in national constitutional cultures are bound to influence the way the discussants conceive of the transnational European constitution and its functions. It would be surprising if the fact

[2] This comes close to the distinction Matej Avbelj has made between doctrinal and philosophical or visionary use of constitutional concepts.

the United Kingdom does not possess a unitary written constitution – a constitution in the formal sense of the term - did not colour the view British interlocutors hold of European constitution. Equally surprising would be if divergent national emphases on power-creating and polity-building or power-restricting and controlling functions of political constitutions did not leave their imprint on European-level debates as well. The typical perspectivism of European law affects constitutional law, too.

Indeed, when discussing European constitution, the level of *constitutional culture – constitutionalism*, we could also say – should always be brought in. Law does not consist merely of "surface-level" regulations and decisions; it also comprises the legal-cultural underpinnings of such legal speech acts: general legal concepts, legal principles and the like, which inform the pre-understanding of legal actors. This holds also for constitutional law. Constitution should not be reduced to formal constitution, to explicitly formulated norms; constitution includes the level of constitutionalism in the sense of constitutional culture, through which constitutional actors approach and read the formal constitution. As long as no uniform European understanding of constitutionalism exists, as long as the European constitution is a constitution without constitutionalism (Weiler) or a constitutional body without a soul (Maduro), nationally-differentiated constitutional traditions are bound to fill the vacuum.

So, the plurality of rival constitutional conceptions has two main sources: institutional, professional and ideological biases and divergent legal-cultural backgrounds of the discussants. Let us move from conceptions to concepts, to the second sense of the plurality of constitutions in Europe.

Constitution and constitutions

The polyphony (cacophony?) characteristic of European constitutional debates does not result solely from divergent conceptions of one and the same concept. Constitutional object-language also includes different *concepts* of constitution, with different connotations and referents. Thus, the concept of constitution implicit in the ordo-liberal theory of European economic constitution (*Wirtschaftsverfassung*) is not the same as the concept of constitution implicit in the writings of scholars detecting a process of constitutionalisation running through the landmark decisions of the ECJ in

the 1960s. In front of this plurality, the first task for a theorist of European law – located on her slippery meta-level - is to elaborate a taxonomy of the concepts employed at the object level, perhaps complemented by her own conceptual proposals concerning emerging but still un-named European constitutions. Existing discourse, existing linguistic usage, provides the theorist with her starting-point, but merely a starting-point. The theorist may also put forth her own conceptual suggestions, and, if she takes seriously the scholarly obligation to add to the clarity and intelligibility of European law and to give the present polyphony a contrapunctual twist, she even should. But a taxonomy is not all. Obviously, the diverse concepts must have something in common, at least in the sense of family resemblances, which accounts for and warrants the use of the same term, "constitution". What that something is makes up the general or meta-level concept of (European) constitution. Finding the common denominators of concepts of constitution and (re)constructing a meta-level concept is the second, concomitant task facing a constitutional theorist of European law. These two tasks should not be taken in isolation but, rather, as mutually presupposing and supporting each other. In order to arrive at a taxonomy of putative European constitutions, we have to start from a tentative meta-level notion, which then can be further substantiated after exploring more in depth the individual instances of constitution. The Rawlsian term "reflective equilibrium" might be appropriate for describing interaction between the two levels. It should be emphasised that I am not engaged in elaborating a universal constitutional theory, applicable as such to nation-state constitutions, too. But, undoubtedly, the original nation-state template of constitutional concepts has influenced my legal pre-understanding, too, and affects my discussion of European law. Conversely, I do not exclude the possibility that a theory of transnational or European constitution could have more general implications as well.

I take my clue for differentiating European constitutions and, simultaneously, (re)constructing a general concept of constitution from Niklas Luhmann. He examines "constitution" as a relational concept. According to him, constitution establishes a *structural coupling* between two differentiated sub-systems of modern society: the legal and political systems. I shall adopt the idea of the relational character of constitution but detach it from its Luhmannian context and give it a more general turn. "Constitution" is a relational concept: through constitution, the law relates to something else. Let us call this the *constitutional relation*. The relation may be, not

only constitutional, but even constitutive. This is the case when constitution constitutes the other pole of the constitutional relation. But constitutional relation is not necessarily constitutive; constitution may also constitutionalise something already existing. Luhmann examines merely a sub-species, albeit a paradigmatic one, of constitution: namely, political constitution. In addition, his systems-theoretical framework allows for only one particular type of constitutional relationship: namely, structural coupling.

The constitutive significance of the constitutional relation for constitutional theory implies that the taxonomy of constitutions and corresponding concepts should be based on an analysis of the other pole of the relation, that is, the "something" to which the law relates through the constitution. My proposal for a European-level taxonomy is the following:

- economic constitution,
- juridical constitution,
- political constitution,
- social constitution and
- security constitution.

Each of the fields appearing as the other pole of the constitutional relation has been discussed in constitutional terms; constitutional vocabulary, although perhaps not the very concept of constitution, is already part and parcel of the object-language. *Economic constitution* is about the relation of the law to the fundamentals of the economic system; *juridical constitution* concerns the fundamental features of the legal system, it establishes a reflexive relation of the law with itself; through *political constitution*, the law relates to the political system or – to use a different political vocabulary – to the polity and contributes to both its emergence and containment; through its *social constitution*, a polity defines its relationship to the social life-world, the social conditions of life, of its members; and, finally, through *security constitution* law is related to the security system consisting of security agencies and their interrelationships.

In its relational characteristics, the general concept of constitution I am groping for bears a resemblance to Gunther Teubner's "societal constitution". Teubner discusses constitutions in the context of global social systems which

engender their own law. He argues that the constitution of these systems relates the law to the particular reflexive mechanism of the system at issue. As is the case with Luhmann's analysis of the political constitution, Teubner examines constitutions in terms of a structural coupling between law and another social sub-system. The systems-theoretical ballast of Luhmann's and Teubner's constitutional vocabulary accounts for both its strength and its weakness. The notion of structural coupling may prove fruitful for the analysis of the constitutive relation of law with such social fields which in general are susceptible to a systems-theoretical examination. This may be the case with law and politics but hardly with the social life-world of the members of society. The systems-theoretical imaginary clearly exhausts its innovatory potential, if not sooner, then at least in front of the social constitution. So let us not burden our constitutional conceptual apparatus with too wide-reaching systems-theoretical pre-assumptions, whilst not categorically rejecting the cognitive potentials of the Luhmannian approach, either.

Relational character is not a privilege of constitutional law: as we have been taught by the institutional theory of law (and Carl Friedrich von Savigny as its predecessor!), all law can be examined from the perspective of its interaction with its object of regulation: the law generates legal-institutional facts, and this, arguably, is the very point of law. So there must be something particular in the way constitution relates to its regulatory object. Connected to the idea of constitutiveness, "constitution" invokes a sense of *"higher" law*, the observance of which is secured through particular arrangements, say, *constitutional review* by a *constitutional court*. The superiority of constitution with respect to other law may be given either a formal or substantive reading. The former is exemplified by the Kelsenian normative conception of a higher-level juridical constitution, whilst economic constitution, for instance, may be given a substantive reading by defining it as the law relating to the fundamentals of the economic system. But, clearly, the formal reading is only intelligible against a substantive backdrop: constitution is accorded a formally superior status because of the perceived substantive weight, the constitutive impact, of its normative contents. In what follows, I will understand "higher law" mainly as law whose primacy is guarded by the European Court of Justice as the constitutional court of EU law. "Higher" is not merely a substantive quality but implies the capacity to assert itself in normative conflicts. With regard to European constitution(s) this

quality of primacy points to two directions: to Member State normative acts and to inferior normative acts by EU institutions.

As a legal speech act, constitution involves a *claim to autonomy*, comparable to a Declaration of Independence. Drafting a constitution is the first thing a newly-independent nation state engages in, and in adopting the constitution, it reinforces its claim to autonomous existence. Thus, through its landmark decisions, epitomising juridical constitutionalisation, the ECJ raised a claim to independence of the Community legal order with respect to both national legal orders and (general) international law. In the European context, autonomy equals *transnationalisation*: as a transnational legal order and polity the Community or the Union asserts its distinctiveness from both national and international legal and political models.

In addition to autonomy, constitutional vocabulary implies a claim to or promise of *unity, order and coherence*: a constitution is supposed to provide for a structured unity at both ends of the constitutional relation: both in law and in its regulatory object.

As "higher law", modern constitutions include two main *constitutional elements*: an *institutional-organisational* and a *rights-oriented* one. These are related to two basic functions of constitution which in different constitutional cultures have received varying emphasis: power generation and power restriction. Through its institutional-organisational element, a constitution establishes power-wielding authorities whose authority is, however, constrained by the rights-element. Such an analytic distinction serves the examination of the diverse European constitutions, too.

The rights-dimension of modern constitutions alludes to their *individualist* or *individualising* orientation. Modern constitutions are not only about power, they are also about individuals as subjects of power in the two the meanings of the term "subject"; about the private and public autonomy of individuals. European constitutionalisation has been a process of individualisation as well: a process of establishing direct connections between the Community or the Union and "the peoples of Europe". The process lends itself to an analysis in the framework of *citizenship*: an analysis of cumulative addition of new layers to European citizenship. But European citizens are citizens of their nation states as well, and the complicated relations between the transnational and the nation-state levels also affect the constitutional claims with regard to individuals. In present-day Europe, much of the

constitutional problematics focuses on the *three-part relationship between the EU, the nation states and the individuals.*

There is one more idea which constitutional object-language evokes and which should be heeded in a meta-level constitutional discussion. At least part of the positive value connotations of constitutional concepts derives from their promise of *legitimacy*. Often enough, the aim of proponents of constitutionalisation is to enhance the legitimacy of the other pole of constitutional relationship, say, European economic order, European legal system or European polity. Accordingly, the claim of constitutionality is often translatable to a claim to legitimacy. But the criteria by which the merits of the claim are assessed or the audience to which the claim is addressed do not necessarily remain the same when constitutionalisation advances into new domains. One of the issues on the agenda of European constitutional theory is the specificity of the claim to legitimacy attached to diverse European constitutions.

Some central concepts which have played a prominent role in recent European debates are lacking from my tentative account of the general concept of constitution. The missing concepts include *constituent power* (*pouvoir constituant*), *demos* as the subject of this power and *constitutional moment* as the instance when this power is wielded. The reason for their absence is simple. These concepts have been coined in a specific branch of constitutional culture: the revolutionary American and French constitutionalism. They are not transferable to an examination of European constitutions, which have not resulted from the exercise of constituent power by a European demos at an identifiable, single constitutional moment. Instead of a revolutionary break, European constitutions are an evolving outcome of an ongoing process which does include but is not exhausted by such high-profile manifest occasions as Treaty amendments. *Constitutionalisation* is an evolutionary counterpart to the revolutionary-tuned concepts of constituent power, *demos* and constitutional moment.

"Constitutionalisation", along with its sub-concepts, such as transnationalisation and individualisation, is a pivotal concept for European constitutional analysis but of lesser use in many nation-state frameworks. It is no co-incidence that European constitutional scholarship focuses so much on the history of the legal aspect of European integration. European constitution is not a stand-still phenomenon but, rather, an ever-uncompleted series of legal speech acts. It is an evolutionary and, at the same time, a differentiated process: all the putative European

constitutions have not developed simultaneously nor at the same pace but, rather, successively, following a certain order. Especially in countries with a formal, written constitution, the tacit understanding is that, say, juridical and political constitutions emerge and develop parallel to each other. The very talk of different constitutions, distinguished by their specific regulatory objects, may sound strange in nation-state contexts. By contrast, typical of European constitutionalisation is – to borrow Ernst Blochs expression – *Gleichzeitigkeit des Ungleichzeitigen*. This entails a new task for European constitutional scholars: to track the diverse temporalities of European constitutionalisation and to detect the internal logic inherent in its course; provided, of course, that there is any such logic!

According to my (hypo)thesis, European constitutionalisation is susceptible to a periodisation where each stage receives its colouring from a particular constitution. Reflecting the temporal and functional primacy of economic integration, the first wave proceeded under the auspices of economic constitution; in the second phase, the emphasis shifted to juridical constitution; during the third wave, the focus was transferred to political constitution; and finally, in our contemporary age, the pacemaker role appears to have been taken over by security constitution. This (hypo)thesis guides my version of the narrative of European constitutionalisation. So, one more take!

In the beginning there was economic constitution

Arguably, constitutionalisation of Europe started from the economic dimension. The first to employ constitutional vocabulary in the European context were German economists and private lawyers of the ordo-liberal school, who introduced the notion of *Wirtschaftsverfassung*, economic constitution. The economic constitution, such as the ordo-liberals conceived it, was power-constraining rather than power-constituting in its orientation. What was to be constrained was economic power, and – what is important to note - economic power wielded not only by public but also – and, in a sense, even primarily – by private actors. The ordo-liberals put their faith in market economy, but they did not trust the market's capacity to ensure through its inherent mechanisms the necessary conditions for its functioning. *Competition law*, which was addressed to private economic actors, constituted an integral part of European

economic constitution. As regards public power, the major threat to free market was seen to arise from regulatory measures of the nation states and not of the Community itself. The ordo-liberal reading of the European economic constitution was based on a clear division of tasks and competences between the transnational and the national level. The Community was not supposed to assume redistributive or regulatory policies, and, in fact, in the original Treaty they were left out; the Community was to focus on establishing and ensuring a European market, while redistribution and regulation would be the province of the nation state.[3] But conflicts between the two orders of competences were more than expected, and the economic constitution provided also for their solution: as a rule, the nation-state redistributive or regulative measures were permissible only within the limits set by the overriding objective of a common market. Relying on the Treaty provisions on the *fundamental freedoms* and *state aid*, the European Court of Justice could strike down national legislation and other regulatory measures contradicting this objective, reflecting the constitutional *Gesamtentscheidung*. Thus, Art. 28 (now 30) of the Treaty on free movement of goods developed into an "economic due-process clause" (Maduro).

The economic constitution included both a rights element and an institutional-organisational element. The rights element consisted of the four market freedoms which conferred on European economic actors a *market citizenship*: they were European citizens, bearers of distinct European rights, in their economic roles. If the European constitution(s) embarked on its evolutionary road from the economic dimension, correspondingly, the European citizenship was initially instituted as an economic citizenship. In the institutional dimension, the key transnational bodies established to monitor the observance of the substantive part of the economic constitution were the Commission as the Anti-Trust authority, bearing the main responsibility in the supervision of the competition rules, and the European Court of Justice as the constitutional court.

The European economic constitution included a claim to legitimacy. This claim was addressed to European economic citizens: it was a *promise of economic prosperity*, and the long post-war period of economic growth, which for its part facilitated the building-up of the welfare state at the national level, seemed to redeem that promise. Such a legitimacy is often termed output legitimacy, in contrast to input

[3] Here common agricultural policy was the major exception, constituting a thorn in the eyes of ordo-liberals.

legitimacy derived from democratic political procedures. In a sense, the emphasis on output legitimacy involved a *negation of political constitution*, with its democratic implications. Democratic procedures and democratic legitimacy were supposed to be the preserve of the nation states, necessitated by their redistributive and regulatory activities. The expressly-defined tasks of the Community flowing from the economic *Gesamtentscheidung* were to be the domain of experts, with no need of democratic legitimation; in the ordo-liberal view, transnational democratic procedures would open channels of influence for particular rent-seeking interests and endanger the framework *ordo* required by transnational free market economy.

The "economic constitution" as propagated by the ordo-liberals economic and legal scholars was clearly a normative concept, and not only in the doctrinal but also in the "visionary" or ideological sense of normativity: it involved a *Gesamtentscheidung* in favour of free market economy. But the concept can also be used in a more neutral, doctrinal sense, stripped of its ideological connotations. The ordo-liberal understanding of the European economic constitution as a doctrinal account of EC law became more and more contrived, especially after the Treaty amendments introduced by the Single European Act of 1986 and the Maastricht Treaty. The objectives of European integration have expanded from the establishment of a common or single market to socially-oriented aims, and the EU has assumed new regulatory competencies within, say, industrial policy and R & D (research and development). The original rather clear-cut division of tasks and competencies between the Community and the nation states became increasingly blurred with the three-pillar European Union and with the expansion of transnational competences within the Community pillar. Theorists of the European economic constitution were faced with a choice: either to shed the notion of its doctrinal pretensions and retain it as an overtly ideological concept serving as a critical yardstick for the assessment of the missteps of European integration; or to delete the ideological sub-text and employ the concept as a "purely" doctrinal device for presenting existing European law, without any clear commitment to an economic *Gesamtentscheidung*. Both options have been grasped. Orthodox ordo-liberals have adopted a very critical posture towards the direction taken by European integration after, say, the Single European Act, while others have made their peace with the development and turned the concept into an ideologically-neutral doctrinal notion. Thus, there are diverse conceptions of the concept of economic constitution, too.

The first wave of European constitutionalisation was dominated by the economic aspect. During the second wave, the emphasis shifted to the juridical constitution. But this should not be taken as signifying a standstill or an eclipse of economic constitution; the latent and manifest development of economic constitution continued, and it retained its functional primacy. Juridical constitution did not topple or replace the economic one; what happened was the addition of a new layer to the existing constitution. Yet another phase was inaugurated with the Treaty of Maastricht and its provisions on the European Monetary Union. With the entering into force of these provisions, a new transnational non-political, expert institution, monitoring the new monetary dimension of the European economic constitution, was brought into existence: the European Central Bank.

The heroic saga of juridical constitutionalisation

Of all European constitutional narratives, the one about juridical constitutionalisation is perhaps the most familiar and most often recited, frequently with a heroic undertone. It is the story of the great landmark cases of the ECJ establishing Community law as an *independent legal order*; the story of *van Gend en Loos* and *Costa v. Enel*, which together make up the Declaration of Independence of Community law. The aspiration for autonomy was accompanied by a quest for order; in addition to independence, the promise of juridical constitutionalisation was the unity of European law.

Under the influence of Joseph Weiler's seminal article, the conventional account of juridical constitutionalisation points to a dead-lock in the political dimension, still dominated by intergovernmental structures and procedures, which left the field to the Court. But another explanation is possible as well, premised on the functional and temporal primacy of the economic constitution. The institutional-organisational element of the economic constitution, as conceived by the ordo-liberals, and its specific quest for legitimacy implied a negation of political transnationalisation and constitutionalisation. By contrast, what it required was juridical constitutionalisation. Arguably, an internal constitutional logic leads from economic to juridical constitutionalisation. The free transnational market economy could not be achieved without assigning the provisions of economic constitution, such

as the competition rules or rules guaranteeing the four freedoms, direct effect in the Member States and ensuring their efficacy and uniform application through the constitutional doctrine of supremacy. Indeed, the connection between the economic and the juridical constitution was clearly spelled out in *van Gend en Loos* and *Costa v. Enel*, although not in explicit constitutional terms.

The declaration of independence issued by the ECJ was addressed to two directions: towards (general) international law and towards the national legal orders of the Member States. While asserting the autonomy of Community law in respect of national legal orders, *van Gend en Loos* still characterised Community law as a "new legal order of international law". By contrast, *Costa v. Enel* dropped this expression and endowed the EEC Treaty with constitutive effects which exceeded those of "ordinary international treaties".

If the tale of juridical constitutionalisation is written in terms of the double quest for autonomy and unity, the chapters following *van Gend en Loos* and *Costa v Enel* should tell about further extension of the principle of supremacy and the effects of Community law in national legal order as applied by national courts. Central themes would include, say, the confirmation by the ECJ that Community law was to take precedence even over conflicting national constitutional law and the elaboration of the doctrine of direct and indirect effects of directives. A wholly new chapter was initiated by the Maastricht Treaty with its three-pillar structure. The third pillar was originally meant to be a domain of intergovernmentalism, but we have witnessed a process of juridical transnationalisation and constitutionalisation which has in a way reiterated the development already realised within Community law. Now the impetus for juridical constitutionalisation has not arisen from the economic constitution but what I have termed the security constitution.

In line with the economic constitution, the juridical constitution possesses both an institutional-organisational and a rights element. In the former respect, the main beneficiaries were the EJC as the constitutional court of Community law and the ordinary courts of the Member States. Juridical constitutionalisation created a unique system of judicial constitutional review which combines the German-type centralised model of constitutional court and the US-type diffused model with ordinary courts monitoring the higher law. In institutional respect, juridical constitution meant judicial empowerment, the enhancement of the position of both the ECJ and Member State ordinary courts which were entrusted the task of supervising national legislation's

conformity of with Community law. Through the principle of supremacy, established by *Costa v. Enel*, ordinary courts received norm-controlling powers over the Acts of national legislatures even in countries with no domestic system of judicial constitutional review, while in countries with a constitutional court a rival form judicial review with different institutional actors was instituted. If the ECJ and the ordinary courts of the Member States were the main winners in the institutional power game, the main losers were the national constitutional courts and legislatures.

Juridical constitutionalisation did not follow from any decision by the Council as the intergovernmental Community legislature or the Member States as the Masters of the Treaties. Juridical constitution is a reflexive phenomenon: the law, as it were, defines its own basic characteristics. This goes also for the juridical constitution of the Community: through such doctrines as direct effect and supremacy, Community law defines its relation to national legal orders and international law. But juridical constitutionalisation has been a reflexive process in another sense as well. In institutional respect, it amounted to judicial auto-empowerment; its primary mechanism consisted of the preliminary rulings procedure, based on the interplay between ordinary national courts and the ECJ. National courts and litigants invoking Community law were the immediate addressees of the speech acts by which the ECJ introduced and elaborated the doctrines promoting juridical constitutionalisation. By the same token, these courts and litigants were also the primary addressees of the legitimacy claims associated with these speech acts. That national courts and private litigants accepted these claims was crucial for the success of juridical constitutionalisation.

From the perspective of institutional turf fighting, it is not surprising that the opposition against juridical constitutionalisation did not arise so much from ordinary courts of the Member States but the constitutional courts. If the principle of supremacy reached Community law's relation to national constitution and if the supervision of Community law as a higher law fell to the exclusive jurisdiction of Community judiciary (which included the ordinary courts of the Member States when applying Community law), the competence of the constitutional courts would be notably restricted and their position as guardian of the national constitution threatened: a significant part of the law applied by national courts would be detached from their scrutiny. As we know, the German and Italian constitutional courts, for instance, did not accept this conclusion without qualifications, and after the

enlargement of the EU in 2004, constitutional courts of new Member States have adopted positions largely similar to that of the German *solange* and the Italian *controlimiti* doctrine.

In the rights dimension, juridical constitutionalisation confirmed the direct relation between the new legal order and individuals, nationals of the Member States: it confirmed their European economic citizenship and right to have economic rights under Community law. By the same token, it added a new *judicial* layer to their rights and their European citizenship by acknowledging their capacity to invoke Community law in national courts.

As constitutionalisation in general, juridical constitutionalisation expressed a quest for autonomy and unity. But actually it generated a situation of interlegality and plurality, ripe with potential conflicts. As the ECJ stated in *van Gend en Loos*, Community law is both an independent legal order and, in the domain of direct effect, part and parcel of the national legal orders of the Member States; it is simultaneously something outside and inside the national legal orders. As an insider, through the principle of supremacy it claimed for itself the top echelon of the national hierarchy of legal norms in its field of regulation, as well as the privilege to derogate from the *lex posteriori* rule. In Kelsenian terms, this was a revolutionary claim, implying a change in the national *Grundnorm*. Conceptualised in sovereignty terms, preferred by the ECJ, it was equally revolutionary: it amounted to an assertion that the Member States had irrevocably abdicated part of their legislative sovereignty, resulting in divided sovereignty. This was too much for constitutional courts to swallow; they stuck to the old *Grundnorm* and subsumed the Community law applied in national courts under the national constitution. The ensuing stalemate has provided the starting point for the still ongoing debate on constitutional pluralism, whose focus, in my taxonomy, is on juridical constitution. Without going into the details of the debate, I want only to point to one issue concerning the internal logic of European constitutionalisation. What especially the German constitutional court was worried about was the fate of the protection of basic rights if it was denied the right to review Community law applicable in national courts. In order to accommodate such worries, the ECJ introduced the doctrine of basic rights as general principles of Community law, thus extending the process of constitutionalisation from juridical to political constitution. Here the landmark cases were *Stauder*, *Internationale Handelsgesellschaft* and *Nold*

Interlegality and plurality are not confined to EU law's relation merely to national legal orders but also characterises its relation to (general) international law, which was the other addressee of the declaration of independence, implicit in *Van Gend en Loos* and *Costa v. Enel*. *Kadi*, one the most-widely debated recent rulings of the ECJ, does not concern merely the security constitution but has implications for the juridical constitution as well: it can be read as a further step in juridical constitutionalisation, as an assertion of European law's supremacy in respect of international law. It remains to be seen what will be the reaction to this claim by the actors of international law, international-law scholars included.

Political constitutionalisation as a reaction to economic and juridical constitutionalisation

Analogically to juridical constitutionalisation, political constitutionalisation involves a quest for autonomy and unity. In this process, the Union has defined itself as a *transnational polity* beyond the dichotomy of international and national law, distinct from both intergovernmental organisations of international law and nation states. In the original institutional architecture, the transnational element was manifest by the Court and the Commission. But these were meant to be non-political expert bodies, and their main function was to promote the realisation of economic constitution; they did not represent political but economic constitutionalisation. By contrast, the Community legislature adhered to intergovernmental principles, familiar from international organisations subject to international law. The main legislative body was the Council, where the veto power of every Member State was the rule. The position of the European Parliament was peripheral, and until 1979 it was not a transnational but an "interparliamentary" body, with members elected by national parliaments. Reforms weakening intergovernmentalism within the legislature can be interpreted as steps in political constitutionalisation. This goes for, for instance, the gradual extension of the majority principle in the Council and the increasing involvement of the now directly-elected European Parliament. This represents the power-constituting aspect in political constitutionalisation, polity-building at the pole of authority or sovereignty.

But, according to modern constitutionalism, polity making does not proceed merely through power-constituting or assertion of sovereignty; it also requires establishing a direct political relationship between the pole of authority and individual members of the polity. In addition to autonomy and sovereignty, political constitutionalisation implies claims of democracy and *democratic legitimacy*; it is not about transnationalisation as such but transnationalisation with a promise of democratisation. A central backdrop to European political constitutionalisation consists in the famous deficits of democracy and legitimacy.

We have noted that both economic and juridical constitutionalisation relied on specific claims and mechanisms of legitimacy. Nevertheless, their insufficiency for securing the overall legitimacy of European integration among, not only the economic, legal and political elites, but the populace at large – the "peoples of Europe" evoked in the preamble of the Treaty of Rome– became more and more apparent. The Community's competences were extended through Treaty amendments and the Court's "integration-friendly" case law. At the same time, the Court's constitutional review, in particular under Art. 28 TEC (free movement of goods) ,imposed constraints on Member States' regulatory and redistributive measures, creating a need for compensatory transnational regulation. Outcome-based legitimacy, promised by economic constitutionalisation and negating the search for direct democratic legitimacy through political constitutionalisation, might have been adequate for negative market integration but could not support the increasing tasks of positive integration. If the Community took over regulatory and redistributive functions, these raised similar requirements of input-based, democratic legitimacy as they did at nation-state level. Furthermore, juridical constitution's auto-legitimation did not reach beyond legal elites. In the rights dimension, juridical constitutionalisation merely added a judicial layer to European citizenship, which could hardly engender wider social legitimacy.

Besides outcome-based and direct democratic legitimacy, a third alternative exists to meet the legitimacy requirement of European integration; indirect democratic legitimacy channelled through nation-state governments. It is the intergovernmental alternative relied on by international organisations under international law. But in order to guarantee efficient decision-making and output-based legitimacy, majority principle was introduced to the Council, the central European legislative body, and the coverage of this principle was gradually extended. By the same token, indirect

democratic legitimacy lost in significance. Direct European democratic mechanisms also tend to diminish the indirect democratic legitimacy which can possibly be attained through intergovernmental structures. This is a general problem of legitimacy-enhancing reforms in the EU: attempts to strengthen one type of legitimacy easily may lead to contrary overall results. Furthermore, the failure of the Constitutional Treaty suggests that the general public still connects the expectation of democratic legitimacy to the nation state rather than the transnational polity; constitutional vocabulary is experienced as hinting at strengthening the transnational polity and, consequently, as a threat to the nation state as the primary object of political allegiance and loyalty.

One can also raise critical questions challenging the very possibility of democratic legitimacy at the European level, whether indirect or direct. In nation states, Europeanisation of politics seems to have enhanced the position of the executive and the judiciary at the expense of the parliamentary legislature. EU politics is typically a domain of the government, and even the formal supervisory powers of the parliament are in general more limited than in those continuously diminishing policy areas which have been left to the care of the nation state, not to speak of real chances to influence the government's behaviour in European bargaining processes. So, arguably, instead of national democratic procedures extending their legitimating effects to the European level, Europeanisation has contributed to an overall deterioration of parliamentary democracy. Here, of course, the situation in Member States varies; some countries, including Finland, have been able to develop relatively pungent parliamentary mechanisms for deliberating EU issues. At the European level, in turn, the main impediment to the functioning of direct democratic legitimising mechanisms remains the lack of a European *demos*, in the sense of a politically active citizenry, sufficiently committed to a common European project and unfolding its influence through European-wide networks of civil society and public sphere. The removal of the perceived legitimacy and democracy deficits by forging direct democratic links between the citizenry and the authority (sovereignty) poles of the European polity will, even at its best, be a very time-demanding enterprise. It is evident that because of the blockages in the channels of both direct and indirect democratic legitimacy, outcome-based legitimacy will retain its importance for the support of the European project among the "peoples of Europe".

The rights element in political constitutionalisation provides the link between the European polity and its individual members. It is also crucial for the power-constraining functions of the political constitution. Fundamental rights (civil and political rights) were introduced into Community law by the ECJ as a response to the German constitutional court's reaction to juridical constitutionalisation; in the Maastricht Treaty, their status as general legal principles of Community law was confirmed; in 2000 the Charter of the Fundamental Rights of the EU was adopted as a solemn declaration; and the Lisbon Treaty would make the Charter legally binding. As a result of this development, the EU's political constitution includes a full-blown Bill of Rights, which addresses its power-constraining effects to the EU's institutions and bodies, as well as Member States authorities when these are implementing European law. By the same token, constitutional plurality and interlegality has received a new aspect: in present-day Europe, protection of basic rights results from the interplay among three normative sources: the two transnational Bills of Rights of the Council of Europe and the EU, as well as the national constitutions.

Through the Maastricht Treaty, the term "citizenship" found its way into European law. The rights explicitly attached to European citizenship in the TEC were quite meagre and did not add very much to the already existing ones. Yet, in particular the new participatory rights of EU citizens – the rights to vote and stand as a candidate in municipal elections and in elections to the European Parliament in other Member States – did reflect the idea of a European-wide citizenry engaged in common democratic practices. Still, arguably, the main significance of the Title on Citizenship lay on symbolic level: it was intended to manifest a new type of direct relationship between the European polity and its individual members; a relationship where individuals are no longer treated exclusively in their economic roles or as litigants, promoting their economic interests by judicial means.

The creation of a European citizenry reflected the quest for unity, typical of constitutionalisation. But the Treaty of Maastricht and the subsequent developments have resulted in a rather chaotic institutional structure; a "Europe on bits and pieces" (Deirdre Curtin). This is largely due to the adoption of the pillar structure and the expansive but by no means uni-linear advance of what the Treaty of Amsterdam (1998) termed the "Area of Freedom, Security and Justice". This launched a novel process of constitutionalisation: the emergence of a security constitution, with unity-disturbing consequences within both the political and the juridical constitution.

Interlude: the weak social constitution

What, about then, the social constitution? "Social constitution" is a tricky concept; it may even appear questionable whether we can speak of a social constitution in the same relational sense as of economic, juridical or political constitution: as a "higher" law relating to a distinct extra-legal action field or – as is the case with juridical constitution - to law itself. What is the "Social" as the other pole of the constitutional relation? It is evident that it cannot be conceived of by means of systems theory and that the Luhmannian concept of structural coupling is of no help in specifying the constitutional relation. Rather, debates on social constitution concern a policy function, its status among the tasks of the European polity and the means by which it is pursued. Constitutional discourse in this dimension is premised on "social values", reflecting the need to guarantee the factual presuppositions of a meaningful and satisfactory life for individual members of society and their families. Due to this value basis, constitutional vocabulary often implies a strong normative message, in the "visionary" or "philosophical" sense. But a more doctrinally-oriented discourse is possible, too, say on the division of tasks and competences between the EU and the Member States or on the status of social rights with regard to other fundamental rights or the market freedoms.

So let us speak of social constitutionalisation but with qualifications. Both the institutional-organisational and rights-elements of this putative form of European constitutionalisation are still in a quite rudimentary state if compared with, say, the economic constitution. Again, the rights-element is related to European citizenship, adding to it a new, social ingredient. Social rights are so-called second-generation rights whose realisation requires active measures on the part of the polity. This particular character of social rights affects the respective emphasis of power-constituting and power-restricting aspects of constitutionalisation: social constitutionalisation aims mainly at creating powers and obligations at the pole of authority, while the power-restraining task is relegated to the background.

Social constitutionalisation can hardly be deemed to have ever been the pacemaker in or the primary form of European constitutionalisation and European constitutional discourse; there has been no era of predominantly social constitutionalisation. Rather, social constitution has been the constitutional underdog,

capable of asserting itself merely in the limits and on the terms of the more robust aspects of constitutionalisation, chiefly the economic one. The plurality of European constitutions is not a plurality of equals; there are stronger and weaker constitutions, and social constitution undoubtedly falls among the latter. This is manifest even by the fact that, despite the Maastricht and Amsterdam amendments, Treaty provisions alluding to a social constitution remain remarkably vague; to a large extent, they epitomise treaty-level soft law. Thus, they do not really resolve the basic constitutional issue of division of functions and competences between the EU and the Member States. No explicit choice has been made between the three models of social Europe, distinguished by Miguel Maduro: the market integration model, relying on the social effects of the economic constitution; the model of social policy harmonisation to further market integration by equalising competition conditions and preventing the "race to the bottom"; and the third model where harmonisation pursues European social values and is complemented by EU level instruments of social justice. In practice, the remaining dominance of the economic constitution, as well as ideological and institutional differences between Member States in the field of social policy, tend to tip the balance in favour of the first two options.

Security constitution as an anti-constitution

Despite the efforts in the dimension of a social constitution, the main contender for the pacemaker in European constitutionalisation in the post-Constitutional Treaty interregnum – and, arguably, even earlier – has come from another direction: from an emergent security constitution. Security is not merely a policy function among others. At the Treaty level, it was given prominence by the Maastricht's Treaty's provisions on the second and third pillars: the second pillar focusing on external and the third pillar on internal security. However, as these pillars were based on intergovernmental premises, the provisions included in the TEU provided but a starting-point for subsequent constitutionalisation in terms of transnationalisation and detachment from the orbit of both international and national law. Emphasis in constitutionalisation has lain on internal security, which is at least partly explicable by the relative minor significance of legal instruments within the second pillar. Determination of the other pole of the constitutional relation raises difficulties analogous to those discussed

above in connection with social constitution. However, a particular system of internal security seems to be arising, whose institutional core consists of nation-state and transnational police, border-control and immigration agencies, interrelated through various informational and communicative networks.

At the national level, the security system maintains a curiously ambivalent relation to the constitution. On the one hand, according to traditional liberal rule-of-law and *Rechtsstaat* constitutionalism, the agencies of internal security form the main addressee of the constitution's power-constraining function. In continental Europe, this function came to be viewed through the opposition between the *Rechtsstaat* and the police state. A central claim of constitutionalism was to subordinate the latter to the former; the police state was the Other of a *Rechtsstaat* constitution, something pre-existent which was supposed to be negated rather than constituted by the constitution. But security considerations make a (re-)entry into the constitutional sphere as a public interest justifying limitations to constitutionally guaranteed rights: what originally was supposed to be constrained through constitution is turned into a ground for restricting the protective effects of the constitution. The same logic applies to transnational human-rights protection, as can be read from the limitation clauses included in the rights provisions of the ECHR. By contrast, in the EU the security system has not preceded constitutionalisation, but has largely been brought into existence through it. At least in the initial stage, the focus has been on the power-constituting and not on the power-constraining functions of constitutionalisation. Before September 11, most of the impetus came from internal constitutional logic, from spill-over effects of the economic constitution, in particular the free movement of workers. The removal of internal border controls for the sake of a transnational market economy led to the perception of a need to coordinate external border controls, as well as other action fields of the security authorities. Even in the wording of Art. 2 TEU, the Area of Freedom, Security and Justice is defined through the overreaching aim of assuring free movement of persons.

As is the case with earlier waves of constitutionalisation, constitutionalisation of the security system has proceeded as a gradual transition from intergovernmentalism with its strong international-law traits towards transnationalisation. Here the Amsterdam Treaty was the milestone. It transferred visa, asylum, immigration and other policies related to free movement of persons from intergovernmental co-operation under the third pillar to the Community pillar. It

also subsumed the Schengen rule work under Community law and thus detached it from its international-law moorings. Furthermore, the jurisdiction of the ECJ was extended, not only to the issues transferred to the Community pillar, but also to the legal instruments available under Title VI TEU, although it remains more limited than within Community law. Nor was transnationalisation of political and legislative decision-making taken as far as in other policy fields covered by the TEC.

The particular character of the security constitution is perhaps most salient in the link it establishes with individuals. The earlier waves of constitutionalisation could be examined as a gradual enrichment of European citizenship through the addition of new layers of rights: from economic through judicial and political to social citizenship. By contrast, within the ambit of security constitution the individual is not primarily conceived of as a bearer of rights but as a *security risk*. Security talk is not rights talk; rights are neither the aim nor the means of constitutionalisation but rather its putative limit. Security constitution hints at the boundaries and the reverse of the citizenship granted under the previous phases of constitutionalisation. From the perspective of the authority, individuals are not only subjects of rights but also potential risks, and, moreover, they may be risks exactly as subjects of rights. In Michel Foucault's account, the edifice of constitutional rights was erected upon a disciplinary infrastructure, which was instrumental to producing the subject which could be endowed with the rights. Security constitution reminds of the limits citizenship in another sense, too. Citizenship both includes and excludes: it defines the membership of the polity through exclusion, by defining and maintaining the boundary towards non-citizens. The security system specifies and supervises this boundary through external border controls as well as the visa, asylum, immigration and other policies falling under Title IV TEC.

When appraised in light of the general constitutional aspirations for unity and coherence, the emerging security constitution does not fare very well. Actually, the inclusion of internal and external security in the objectives of the EU led to increasing fragmentation in the domains of political and juridical constitution, manifest by, e.g., the pillar-structure and the opt-outs allowed to Member States. In the juridical dimension, the TEU also contributed to fragmentation by introducing new second- and third-pillar instruments whose exact legal effects and relationship to Community-law instruments were far from clear. In practice, a new round of juridical constitutionalisation was launched especially within the third pillar. An important step

was taken by the Amsterdam Treaty: the removal of a significant part of former third-pillar issues under the Community pillar entailed their subsumption under the constitutional principles developed within Community law. But neither were issues still retained under the third pillar spared amounting juridical transnationalisation and constitutionalisation. The process ongoing within the third pillar bears striking similarities to what a few decades ago took place within Community law. Again, the key actor is the ECJ, who could initiate a new wave of juridical auto-constitutionalisation relying on the jurisdiction granted by the Amsterdam Treaty. Thus, the ECJ has started extending to third-pillar legal instruments general principles which have defined Community law ‘s relationship to national legal orders; such as direct effect and supremacy, as well as the overarching and legitimating loyalty principle. What is interesting as well is that during this new round of juridical constitutionalisation, Member State constitutional and supreme courts have raised similarly motivated objections as during the constitutionalisation of Community law. National controversies surrounding the implementation of the Framework Decision on European Arrest Warrant provided some courts with the opportunity to (re)declare their qualifications in respect of the principle of supremacy and to (re)affirm the national *solange* or *controlimiti* doctrine.

Intertwined but not equal

The above summary of European constitutionalisation reveals at least some rudiments of an internal logic, accounting for shifts of emphasis from one dimension to another. But, of course, we have to bear in mind that the ultimate causes of legal change always lie outside the law, in extra-legal circumstances. Still, as even Max Weber reminds us, intra-legal mechanisms may have a great impact in channeling and molding the course and influence of external factors.

The developmental logic I have tried to sketch grasps only some of the different kinds of relation the diverse European constitutions maintain with each other. In some connections, what I have treated as different constitutions might be more appropriately conceived of as aspects of or perspectives on one and the same process; thus, to take one example, constitutionalisation along the security axis involves or implies a new phase in juridical constitutionalisation. A black-box model,

with mutually impenetrable constitutional compartments, should be avoided, not only in the analysis of the interrelations between national and transnational constitutions, but in the examination of European constitutions as well. Here, too, interlegality reigns: European constitutions overlap, interpenetrate and communicate with each other. Still, not all of the discursive or contrapunctual guidelines elaborated in the debate on constitutional pluralism are transferable to the past or present plurality of European constitutions. The constitutions do converse with each other, but this is rarely a conversation among equals, and conversation may be brought to an end by a conflict calling for a legal solution.

The principal forum for conflict solution is the European Court of Justice. Accordingly, Court jurisprudence can tell us a lot about relations between diverse European constitutions and their respective strength. Often enough the controversies assume the guise of a conflict between, on the one hand, market freedoms (economic constitution) and, on the other hand, civil and political rights (political constitution) or social rights (social constitution). The methodology followed by the Court bears a clear sign of the primacy of economic integration. The ECJ has tended to frame the issue as concerning potential justification for derogating from a market freedom. The legal problem, as defined by the ECJ, has been whether respect for human rights, mandated by both the national constitution and the ECHR, constitutes a sufficiently weighty public interest for a Member State to warrant exempting from a market freedom. The final conclusion in the (fairly) recent *Omega* and *Schmidberger* rulings was in favour of the rights side, but it would be overhasty to declare a reversal in the relations between the economic constitution and civil and political rights. The framing of the legal issue still implied the primacy of the economic constitution as the default presumption: even now, the problem was whether respect for a civil or political right justified derogating from a market freedom, not whether an economic consideration warranted limiting a right. The approach is fundamentally different from that of the ECtHR or of national constitutional courts; in Ronald Dworkin's terms, we might talk of an inverse relationship between rights-related principles and economic policy factors.

A corresponding analysis could be made of tensions between the economic and social constitutions. The rather weak position of social rights in comparison with market freedoms – and of the social constitution in general in comparison with the economic constitution – comes conspicuously to the fore in *Laval* and *Viking*, both as

regards the posing of the legal issue and the conclusions of the Court. What, of course, is worrying from a Nordic perspective is that what the ECJ as a constitutional court struck down was national law epitomising the Nordic model of welfare state.