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The subjectification of the citizen
in European public law

Marco Dani

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Abstract

The paper investigates the condition of the individual qua citizen as recognised and shaped by national constitutional democracies and supranational law, the legal and political orders constituting European public law. It firstly spells out the notion of ‘subjectification’ and its peculiar manifestation in the context of European public law. Then, it offers an excursus on the subjectification of the citizen by looking at its main constitutive dimensions: belonging, rights and participation. The excursus examines three distinct phases of the evolution of European integration. Firstly, it looks at the social state era and the affirmation of the constitutional subject, a type of citizen devised essentially within national constitutional democracies with supranational law offering just additional rights for the economically active. Secondly, it explores the transformation of the constitutional subject prompted by the expansion of supranational law and the emergence of the ‘advanced liberalism’ agenda. Finally, the paper evaluates the condition of the citizen during the financial crisis, a stage which probably witnesses the twilight of the constitutional subject as conceived of in the social state era. The upshot of this excursus contradicts more conventional accounts for subjectivity in the EU emphasising a civic turn in the understanding of the individual: if the relationships between individuals and the governmental projects constituting European public law are considered, the evolution of European integration is paralleled by an involution of citizenship. Or, at least, of the idea of citizenship imagined in national constitutional democracies in post-World War II.

Keywords

subjectification, citizenship, European public law, social state, advanced liberalism

TABLE OF CONTENTS

Introduction	1
Subjectification, European public law and citizenship	1
The affirmation of the constitutional subject in the social state era	3
Constitutional subjects in refounded national political communities.....	3
Human dignity, social rights and economic freedoms in the industrial society	6
The political profile of the constitutional subject.....	8
European citizenship as the synergy between the constitutional subject and economic subjectivity	10
The transformation of the constitutional subject under ‘advanced liberalism’	10
The European reframing of national political communities	11
The market metamorphosis of national welfare states	13
The corrosion of political citizenship.....	16
The transition towards ‘advanced liberalism’: the competition between economic and constitutional subjectivities	18
The twilight of the constitutional subject during the financial crisis	18
Towards national post-political communities	19
Fundamental rights under the shadow of macroeconomic indicators	21
The demise of political citizenship	23
Citizenship on the wane: transformation and resistances	24
Conclusion	25

Introduction

The condition of individuals is a key concern for both national constitutional democracies and supranational law, the legal and political orders constituting European public law.¹ Yet the relationships between individuals and those governmental projects only at a superficial level may appear similar. Despite their common acceptance of human dignity, fundamental rights, rule of law and democracy as founding values,² supranational law and constitutional democracies conceive of and govern the individual from remarkably different perspectives. Due to their institutional and ideological specificities, those projects recognize in subjects different capacities, interests and aspirations and, critically, exert on them similarly different defining pressures.

This paper analyses these processes of subjectification by taking as a focal point the individual *qua* citizen. It firstly spells out in more detail the notion of subjectification and its peculiar manifestation in the context of European public law. Then, it offers an excursus on the subjectification of the citizen by looking at its main constitutive dimensions: belonging, rights and participation. The excursus examines three distinct phases of the evolution of European integration. Firstly, it looks at the social state era and the affirmation of the constitutional subject, a type of citizen devised essentially within national constitutional democracies with supranational law offering just additional rights for the economically active. Secondly, it explores the transformation of the constitutional subject prompted by the expansion of supranational law and the emergence of the ‘advanced liberalism’ agenda. Finally, the paper evaluates the condition of the citizen during the financial crisis, a stage which probably witnesses the twilight of the constitutional subject as conceived of in the social state era. The upshot of this excursus contradicts more conventional accounts for subjectivity in the EU emphasising a civic turn in the understanding of the individual: if the relationships between individuals and the governmental projects constituting European public law are considered, the evolution of European integration is paralleled by an involution of citizenship. Or, at least, of the idea of citizenship imagined in national constitutional democracies in post-World War II.

Subjectification, European public law and citizenship

Liberal and democratic legal orders are premised on the idea that government should conform to the nature of those governed.³ Accordingly, the relationship between the individual and the legal and political order is usually construed in terms of recognition: to live up to their liberal and democratic credentials, governments are expected to reflect in their structures and policies individuals’ values, aspirations and interests. Yet, the process through which this alignment occurs is more interactive. Nikolas Rose, for instance, claims that policies and institutional arrangements do not simply recognise individuals’ preferences.⁴ The relationship between government and those subject to its rule involves also a different and opposite vector: individuals are acted upon by government and, thus, it is their preferences which are also shaped by government’s projects.⁵ Put differently, besides being recognized in our autonomy of subjects, we are also targets of regulatory strategies exerting defining pressures on us.⁶ According to this process – with Rose, we may call it ‘subjectification’⁷

¹I have investigated the composite nature of European public law in *Il diritto pubblico europeo nella prospettiva dei conflitti* (Cedam, 2013).

² Article 2 TEU.

³ N. Rose, *Inventing Our Selves – Psychology, Power and Personhood* (CUP, 1996), 119.

⁴ *Ibidem*, 119.

⁵ *Ibidem*, 121-122, where it is observed how, most of the times, alignment of individuals’ preferences with the goals of government is the product not of imposition of politically determined standards, but of free choice and rational persuasion.

⁶ *Ibidem*, 152.

⁷ *Ibidem*, 10.

– the alignment between government and governed ensues from a more circular dynamic based on both the *recognition* of individuals’ nature and its *shaping* by government operation.

When observed in the context of current European institutional settings, subjectification plays out in a rather peculiar way. It appears first of all as a complex process. Owing to the composite structure of European public law and, namely, its articulation in supranational law and national constitutional democracies, individuals are often situated at the intersection of multiple governmental strategies with distinct and not necessarily coherent policy goals, rationales and ideologies. If in principle this exposes them to both the promises and biases of each governmental project, their actual subjectification results from a more complicated equation including also structural and temporal variables. The structural element goes to the pluralist configuration of European public law.⁸ Given that neither of its constitutive components boasts exclusive authority on individuals, European public law generates fragmented subjectivities reflective of both governmental strategies. The quality and strength of the pressures effectively exerted is temporally dependent. It is so because, firstly, the nature of both supranational law and national constitutional democracies has known markedly different seasons, all registered in their currently stratified identity. Secondly, also the relationships between those governmental projects has evolved over time, alternating phases of peaceful coexistence with more turbulent phases of competition. As a result, a study of subjectivity in contemporary Europe must firstly trace the variety of defining pressures exerted over time on individuals by both national constitutional democracies and supranational law. Moreover, it is also at the varying relationships between the latter that one must look: it is by examining their particular combinations that the actual defining pressures exerted on the individual in a given period can be decoded.

A valuable focal point to test these propositions is offered by citizenship,⁹ the distinctive legal status and political ideal¹⁰ regarding the condition of the individual in a polity.¹¹ To understand the subjectification of the citizen in European public law, it is not sufficient to focus on how its core ideal of civic equality¹² is developed in, respectively, supranational law and national constitutional democracies. To account for the recognition and shaping of citizen’s qualities in Europe a broader perspective must be embraced including all the three defining dimensions of citizenship.¹³ *Belonging* is the first aspect requiring investigation. In this regard, analysis is expected to ascertain who the citizen is with a view to possible grounds of internal (gender, ethnicity, class) or external (nationality) exclusions. Pertaining to this dimension is also the detection of the locus and degree of collective identification of individuals with a particular political community. The second constitutive dimension of citizenship relates to the *rights* associated with membership in a polity. In this field, analysis indicates the set of entitlements and provisions viewed as necessary to consider each individual member worthy of equal respect and concern. Of particular importance within this set of rights are those enabling individuals to voice their interests and aspirations in the public sphere. This goes to the third dimension of citizenship, that of *participation*, a field which can be broadened to encompass also the institutional infrastructures employed to mediate the conflicts generated by participation and to translate collective self-determination into policy.

⁸ N. MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1 *European Law Journal*, 264. On pluralist paradigms, see N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (OUP, 2010), 71-78.

⁹ Alternative subjective characterizations may be equally valid and illuminating. On the subjectification of the consumer, see my ‘Assembling the fractured European consumer’ (2010) 36 *European Law Review*, 362.

¹⁰ J. Shaw, ‘Citizenship: contrasting dynamics at the interface of integration and constitutionalism’ in P. Craig, G. de Búrca (eds), *The Evolution of EU Law* (OUP, 2011), 575.

¹¹ On citizenship as a status distinct from other types of political affiliation and social relationships see R. Bellamy, *Citizenship: a very short introduction* (OUP, 2008), 2-3.

¹² *Ibidem*, 17.

¹³ *Ibidem*, 12-17.

The affirmation of the constitutional subject in the social state era

The first period reviewed in our excursus is that extending from the end of World War II to the entry into force of the Single European Act (1987). It is the period in which both the governmental projects constituting European public law are defined in their distinctive characteristics. On the one hand, national constitutional democracies institutionalise the social question by establishing legal and political orders grounded on representative democracy and the protection of fundamental rights. On the other, supranational law is the vehicle for a regulatory project promoting market efficiency through the protection of economic freedoms and executive policy-making. Throughout all the social state era, European public law gravitates mainly towards national constitutional democracies,¹⁴ with supranational law performing an accessory function. A division of labour is established between the regulatory structure of supranational law and the redistributive mechanisms incorporated in national constitutional democracies.¹⁵ It is precisely by keeping distinct the material domains of its constitutive governmental projects that European public law eschews conflicts of legal authority and secures its overall stability.¹⁶

Constitutional subjects in refounded national political communities

The years immediately following the end of World War II are rightly remembered as a period of intense reconstruction and enlightened political activity in Europe. Among the many political achievements of the time, the affirmation of the constitutional subject is one of the most telling for it has inspired legal and political thinking on citizenship up until now.

The affirmation of the constitutional subject is closely related to the refoundation of national political communities. In the last years of the war the idea of lifting individuals' collective identification up to the European level had a certain appeal only in a restricted circle of politicians and intellectuals.¹⁷ So, after the end of the war, priority was generally given to the refoundation of national polities.¹⁸ Crudely, no individual had died for a united Europe. The sacrifices of the war had been essentially made on behalf of nation states and, critically, often against other European countries. National diversities and conflicts were too tangible a reality to fall into oblivion,¹⁹ so much so that uniting Europe became an ideal and a challenge assigned to the generations to come.

The main task for the post-World War II generation was refounding national political communities. In several European countries the idea of belonging required to be re-imagined. The experience of the war had shown the dangers of building collective identification on organic factors such as ethnicity, a common language, culture and history. More efforts in legal and political imagination were required also to address the social question, a divisive issue that well before the war had disintegrated European polities.²⁰ To deal with both of these concerns the breakthrough was considering the unity of the polity and the attachment to it more as goals to be attained than prerequisites of legal and political organisation.²¹ Governmental resources were employed in educational

¹⁴ C. J. Bickerton, *European Integration. From Nation-States to Member States* (OUP, 2012), 89-90.

¹⁵ M. Ferrera, *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection* (OUP, 2005), 90-95. This division of labour found some recognition also in the case law of the Court of Justice (see, e.g. Case C-263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [1988] ECR I-5365).

¹⁶ Both the Court of Justice (Case C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585) and national constitutional courts (see, e.g., Italian Constitutional Court, sent. 183/1973 (Frontini) [1974] CMLR 372) conditioned the primacy of EU law to its limited remit.

¹⁷ See, e.g., A. Spinelli and E. Rossi, *Il Manifesto di Ventotene – Per un'Europa libera e unita* [1944] (Istituto di studi federalisti "Altiero Spinelli", 1991).

¹⁸ A. D. Smith, 'National Identity and the Idea of European Unity' (1992) 68 *International Affairs*, 62.

¹⁹ On the importance of sacrifice and oblivion in polity building, see M. Loughlin, *Sword & Scales – An Examination of the Relationship Between Law & Politics* (Hart Publishing, 2000), 142.

²⁰ R. Dahrendorf, *The Modern Social Conflict – An Essay on the Politics of Liberty* (Weidenfeld and Nicolson, 1988), 97, noting that equality had been the "hidden agenda of the second Thirty Years' War".

²¹ G. Zagrebelsky, *Il diritto mite* (Einaudi, 1992), 47-49.

and cultural projects aimed at reinforcing or re-establishing on more civilised bases the sense of national belonging.²² The main catalysts for collective identification, however, were democratic constitutions and the welfare state. Democratic constitutions came to be seen as the main political achievement of a people, the catalogue of its aspirations but also of the legal and political tensions of modernity.²³ The welfare state, instead, was the institution making tangible the promises of national membership and offering the material *quid pro quo* for citizens' loyalty.²⁴

The combined effect of democratic constitutions and the welfare state was overcoming the internal exclusions that had tainted citizenship under liberal constitutions. By entrenching civic equality and fundamental rights as founding principles, democratic constitutions outlawed race, gender and census discriminations. Redistributive mechanisms, interventionist industrial policy and welfare programmes improved social cohesion and enabled individuals to become fully-fledged political subjects.²⁵

But the refoundation of national political communities did not entail only the social-democratic redefinition of national sites of government and a corresponding transformation of citizenship. Inbuilt in democratic constitutions was also the ambition of challenging the external exclusions inherent in the idea of nationality.²⁶ National constituents were aware of the insufficiencies and dangers inherent in the latter; thus, in rehabilitating one moderate version of it, they laid also the ground for its further relativisation. Democratic constitutions contained norms referring to international law that soon were employed to legitimise supranational law,²⁷ a project that had in challenging external exclusions one of its constitutive tasks.²⁸

It is widely known that since its very beginning supranational law cultivated its particular approach to the subject. Much ink has been spilled to stress how the European Court of Justice in *Van Gend en Loos*²⁹ placed the individual at the centre of supranational law³⁰ and, by doing so, laid the ground for the creation of a transnational political community.³¹ To a large extent that is an overstated and questionable claim grounded only in the loftiest passages of that judgment.³² However, even for those subscribing to that reading, it may be interesting to dwell on the characteristics of the individual postulated by early supranational law and on the reasons justifying his centrality.³³

It may be observed that in *Van Gend en Loos*, the Court of Justice brackets the national affiliation of individuals. Those that in national quarters are considered constitutional subjects, for supranational purposes are European

²² R. Bellamy, above n. 11, 46. See also J-W. Müller, *Constitutional Patriotism* (PUP, 2007), Ch. 1.

²³ P. Costa, 'Cittadinanza sociale e diritto del lavoro nell'Italia repubblicana' (2009) XXIII *Lavoro e diritto*, 48-49.

²⁴ T. H. Marshall, *Citizenship and social class* (CUP, 1950), 47.

²⁵ *Ibidem*, 47-48.

²⁶ A. J. Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship' (2014) 15 *German Law Journal*, 911-912.

²⁷ F. Palermo, *La forma di stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale* (Cedam, 2005), 179.

²⁸ J. H. H. Weiler, *The Constitution of Europe* (CUP, 1999), 250-252.

²⁹ Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

³⁰ See D. Halberstam, 'The Bride of Messina: Constitutionalism and Democracy in Europe' (2005) 30 *European Law Review*, 775 and J. H. H. Weiler, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12 *International Journal of Constitutional Law*, 103.

³¹ W. Maas, 'The Origins, Evolution, and Political Objectives of EU Citizenship' (2014) 14 *German Law Journal*, 798-801.

³² By looking at article 48 TEU, for instance, one could persuasively argue that, despite *Van Gend en Loos*, the heart of EU law is still occupied by national governments.

³³ A. Somek, 'The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment' (2013) 4 *Transnational Legal Theory*, 272-274.

individuals. In this capacity, however, they do not constitute a people.³⁴ This is in part motivated by the fact that, as said, the European Communities could not boast the same degree of collective identification attached to national democratic constitutions. Yet this is also a consequence of the particular approach to the individual by supranational law. Early supranational law shows no interest in the political qualities of individuals for it conceives of them as factors of production. As such, Europeans are the points of imputation of a distinct catalogue of rights, but they cannot claim the same type of centrality assigned to them by democratic constitutions. The latter celebrate individuals as end-in-themselves.³⁵ Supranational law, by contrast, looks at them essentially in instrumental terms.³⁶ They are reached by Community norms to legitimise the Community as a system of governance.³⁷ They are empowered by the Court of Justice to promote the private enforcement of supranational norms against member states.³⁸ Their rights are protected essentially if coincident to supranational policy goals.³⁹ Conceived for these purposes, the engagement of supranational law with individuals generates only a multitude with a common interest in peace and prosperity,⁴⁰ a legal community grounded on the European tradition of freedom,⁴¹ where the economic potential of individuals is enhanced, while their political capacity remains unexpressed.

It will be shown how more recently this original mark has developed corroding the qualities of the constitutional subject.⁴² Yet, in the context of the refoundation of national political communities, economic subjectivity offers a valuable contribution to the construction of the latter. By means of economic freedoms, supranational law introduces powerful legal constraints on the capacity of member states to exclude or discriminate non nationals.⁴³ The result is not the complete overcoming of external exclusions; yet a discipline of openness towards the foreigner is instilled in national political communities.⁴⁴ This is probably the most distinctive contribution to citizenship by supranational law in the social state era: rather than competing with national constitutional democracies for collective identification, it is meant essentially to lessen the disabilities of alienage.⁴⁵

³⁴ This is evident already in the preamble of the Treaty of Rome establishing the goal of “lay[ing] the foundations of an ever closer union between the *peoples* of Europe” (Italic added). See J. H. H. Weiler, above n. 28, 327.

³⁵ See below section 3.2.

³⁶ M. Everson, ‘The Legacy of the Market Citizen’ in J. Shaw, G. Moore (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995), 86.

³⁷ J. H. H. Weiler, above n. 30, 98.

³⁸ P. Craig, ‘Once Upon a Time in the West: Direct Effect and Federalization of EEC Law’ (1992) 12 *Oxford Journal of Legal Studies*, 453.

³⁹ D. Chalmers and L. Barroso, ‘What *Van Gend en Loos* stands for’ (2014) 12 *International Journal of Constitutional Law*, 120-122.

⁴⁰ J. H. H. Weiler, above n. 28, 241-246.

⁴¹ D. Chalmers and L. Barroso, above n. 39, 108-109.

⁴² See below sections 4 and 5.

⁴³ See below section 3.2.

⁴⁴ J. H. H. Weiler, ‘In defence of the status quo: Europe’s constitutional *Sonderweg*’ in J. H. H. Weiler, M. Wind (eds), *European Constitutionalism Beyond the State* (CUP, 2003), 21-23.

⁴⁵ M. Everson, above n. 36, 76.

Human dignity, social rights and economic freedoms in the industrial society

The overcoming of internal exclusions as well as the challenge to external ones testify the deep moral commitment inspiring the refoundation of national polities. These achievements are certainly rooted in the particular biography of each national legal and political order, but they can also be ascribed to the normative turn of international law occurring in the same years.⁴⁶ The democratic constitutions approved immediately after the war find a common source of inspiration in the Universal Declaration of Human Rights and its underlying political culture. National constitutions incorporate the concept of human dignity⁴⁷ as their foundational principle.⁴⁸ Most importantly, they infuse into their legal orders its more profound normative claim: human beings are to be regarded as the last-order purposes of human intentions and actions; thus, any sort of objectification and instrumentalisation is prohibited.⁴⁹

All this is well known and largely uncontested. But to grasp the real nature of the normative recalibration of national constitutionalism, the discourse on human dignity requires some specification. In democratic constitutions the emerging awareness of the centrality of the individual and her rights comes in a new form. Locke's vision of the individual in a state of nature detached from reality is questioned.⁵⁰ The concern of the emerging legal and political order is the *homme situé*, the individual bound to the complex and dense net of political, social and economic relations typical of the industrial society.⁵¹ Within this framework, human dignity is filled of material content and contributes to the goal of taming the markets inherent in democratic constitutions.⁵² In other words, human dignity is established as a principle extending not only to the political, but also to the economic and social spheres.⁵³

It is against a similar normative background that the promise of social citizenship inherent in the constitutional subject becomes evident. To enable participation to the economic and cultural heritage of society,⁵⁴ democratic constitutions comprise catalogues of fundamental rights enriched with economic and social principles.⁵⁵ Precisely the promise of these documents to secure the attainment of this type of economic and social goods marks their rupture with previous undemocratic regimes.⁵⁶ Of particular significance is the key role assigned to the right to work and its corollaries,⁵⁷ premised on the idea that in the industrial society it is essentially by working that individuals achieve the effective inclusion in the polity.⁵⁸ In the ethos of the social state, work is not just instrumental to income but is vested with more profound private and public meanings. On a private level,

⁴⁶ A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization*, 217.

⁴⁷ M. Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders', in M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2013), 371.

⁴⁸ See, e.g. article 1 of the German Constitution and, subsequently, article 10 of the Spanish Constitution.

⁴⁹ M. Mahlmann, above n. 47, 377.

⁵⁰ P. Costa, above n. 23, 38.

⁵¹ G. Burdeau, *La democrazia* [1956] (Edizioni di Comunità, 1964), 25-41.

⁵² G. Amato, 'Il mercato nella Costituzione' (1992) XII *Quaderni Costituzionali*, 8.

⁵³ K. Ewing, 'Economic Rights', in M. Rosenfeld, A. Sajó, above n. 47, 1039-1040. This idea had already emerged in article 151 of the Weimar constitution, referring the concept of human dignity to the economic sphere.

⁵⁴ P. Costa, above n. 23, 38.

⁵⁵ Eloquent in this regard is the preamble of the French Constitution of 1946: "Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République. *Il proclame, en outre, comme particulièrement nécessaires à notre temps, les principes politiques, économiques et sociaux ci-après ...*" (Italic added).

⁵⁶ See, e.g., M. Brito Vieira and F. Carreira da Silva, 'Getting rights right: Explaining social rights constitutionalization in revolutionary Portugal' (2013) 11 *International Journal of Constitutional Law*, 902-904.

⁵⁷ On the individual and collective dimensions of the right to work see K. Ewing, above n. 53, 1043-1047.

⁵⁸ P. Costa, above n. 23, 43.

work is the most tangible way through which individuals express their personality.⁵⁹ On a public one, work is viewed the source of the sacrifices through which individuals contribute to the welfare of the society and, ultimately, may vindicate their fair share of it.⁶⁰

The critical role of work is not confined to national democratic constitutions. Work occupies a central place also in the set of individual rights conferred by supranational law, although in this context it develops along a trajectory alternative to that of national democratic constitutions. In supranational law workers' rights are not about redistribution and social justice but about transnational mobility.⁶¹ They are not meant to protect the individual from the risks of markets, but they offer to individuals opportunities to express themselves through markets.

In supranational law, therefore, workers are conceived as agents of market integration. The current commodification of worker can certainly be traced back to this original trait of supranational law.⁶² Yet, when looked against their historical background, the mobility rights conferred to workers contribute to their human emancipation. The period following the end of World War II is one of intense and close control of the movement of persons.⁶³ In its effort to challenge external exclusions, supranational law introduces detailed norms contrasting the key obstacles encountered by those willing to migrate to other European countries.⁶⁴ Entry permissions, discriminations on the terms of payment and working conditions, hurdles to the access to social security and the welfare state are all targets of *prima facie* prohibitions.⁶⁵ It is through their enforcement that the Court of Justice makes more inclusive national welfare states.⁶⁶ For this purpose, the Court interprets generously the individuals' economic qualifications in both their personal and objective scope.⁶⁷ The notion of worker is a case in point⁶⁸ in that it reaches prospective⁶⁹ and former workers,⁷⁰ their family members⁷¹ and extends equal treatment well beyond the working environment.⁷² This generosity in interpretation, however, does not imply a break of supranational law with its foundational market paradigm. To qualify as a point of imputation of rights and duties, an individual is always to prove its economic characterisation.⁷³ Also in this respect the key role of work (or other equivalent economic qualifications) is noticeable: underpinning this early approach to free

⁵⁹ C. Mortati, 'Il lavoro nella costituzione' (1954) XXVIII *Diritto del lavoro*, 149-156.

⁶⁰ *Ibidem*, 152.

⁶¹ The main labour law and social security instruments developed at supranational level revolve around mobility and equal treatment, see regulation 1612/1968 and regulation 1408/1971.

⁶² See below section 4.2.

⁶³ A. J. Menéndez, 'European Citizenship after *Martínez Sala* and *Baumbast*: Has European Law Become More Human But Less Social?' in M. Maduro and L. Azoulai (eds), *The Past and the Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010), 365-366.

⁶⁴ *Ibidem*, 366.

⁶⁵ See article 45 (2) TFEU and articles 7, 9 and 12 of regulation 1612/1968.

⁶⁶ See above section 3.1.

⁶⁷ J. Shaw, above n. 10, 584, defines these judgments as 'proto-citizenship' case law.

⁶⁸ But see also the broad interpretation of the notion of 'service recipient' in Joined cases C-286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 322, and Case C-186/87, *Ian William Cowan v. Trésor Public* [1989] ECR 195.

⁶⁹ See also Case C-293/83, *Françoise Gravier v City of Liège* [1985] ECR 593 and Case C-39/86, *Sylvie Lair v Universität Hannover* [1988] ECR 3161.

⁷⁰ See regulation 1408/1971.

⁷¹ See article 10 of regulation 1612/1968.

⁷² See, e.g., Case C-137/84, *Criminal Proceeding against Robert Heinrich Maria Mutsch* [1985] ECR 2681.

⁷³ See, e.g., Case C-168/91, *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191.

movement is the notion that access and equal treatment can be accorded insofar as migrants prove their contribution to the economic welfare of the host state.⁷⁴

The political profile of the constitutional subject

The portrait of the constitutional subject in the social state era would be incomplete without an insight into its capacity to participate and shape the pattern of social and political life. Also in this regard democratic constitutions experiment with innovative solutions. To deal with the conflicts of the industrial society, democratic constitutions opt resolutely for the institutionalisation of the social question.⁷⁵ Through their composite catalogues of fundamental rights, they legitimate opposing normative and political claims.⁷⁶ Through enfranchisement, they convert the institutions of representative democracy from the protection of property-holders to the mediation of conflicts.⁷⁷ As a result, the idea of freedom postulated by democratic constitutions becomes entangled with the idea of participation: citizens are not simply protected from governmental encroachments on their private lives, but they are also individually and collectively involved in decisions on the direction of government.⁷⁸

Coherent with this idea is the broad political latitude allowed by democratic constitutions to constitutional subjects and political decision-makers. To be sure, democratic constitutions establish also principles constraining political institutions to protect fundamental rights.⁷⁹ Yet, seldom such limitations compromise the freedom of action of national governments and legislatures. Fundamental rights operate essentially as presumptive shields permitting justifiable limitations,⁸⁰ and also constitutional courts tend to interpret their task as implying a corrective rather than a steering function.⁸¹ Democratic constitutions, indeed, do not mandate a particular economic model or specific policy directions.⁸² Their role is to outlaw extreme economic models that would undermine their social and political basis.⁸³ But aside from that, they only dictate governments and legislatures to pursue social justice, an open-ended goal compatible with broad political freedom and a wide spectrum of policy options.

Given their commitment to civic participation and political mediation of conflicts, democratic constitutions enhance parliaments as their main political venue. In the social state era, parliamentary assemblies receive broad legislative mandates and extensive powers to hold executives accountable.⁸⁴ For our analysis, however, an extremely important task fulfilled by parliaments in this period is that of representing and integrating the society. It is essentially through this function that democratic constitutions shape the political profile of constitutional subjects. The infrastructures devised by democratic constitutions are certainly expected to recognise the plurality of political preferences existing in the society.⁸⁵ But democratic constitutions pursue a more ambitious notion of political pluralism: by legitimating the interests and aspirations of a party, they explicitly invite its opponents to engage with them and recognise their legitimacy. Democratic constitutions, in other words, are not simply

⁷⁴ F. Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic paradigm of European Integration' (2011) 17 *European Law Journal*, 6.

⁷⁵ R. Bin, 'Che cos'è la Costituzione?' (2007) XXVII *Quaderni Costituzionali*, 19-21.

⁷⁶ P. Costa, above n. 23, 49.

⁷⁷ H. Kelsen, 'Essenza e valore della democrazia' [1929] in H. Kelsen, *La democrazia* (il Mulino, 2010), 68-69.

⁷⁸ *Ibidem*, 50-52.

⁷⁹ M. Loughlin, above n. 19, 3.

⁸⁰ S. Gardbaum, 'Human Rights and International Constitutionalism' in J. L. Dunoff, J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP, 2009), 236.

⁸¹ R. Bin, *Capire la costituzione* (Laterza, 2002), 97.

⁸² See, e.g., BVerfGE 4, 7 (Investitionshilfe).

⁸³ Both pure *laissez-faire* and socialism are economic models probably incompatible with democratic constitutions.

⁸⁴ P. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-state* (OUP, 2010), 76-78.

⁸⁵ H. Kelsen, above n. 77, 106-110.

frameworks legitimating the interests of factions impermeable to the claims of their opponents. Democratic constitutions instil in political subjects of all inclinations a discipline of recognition and, by doing so, they transform factious individuals into partisans, i.e. political subjects that, in formulating and pursuing their particular version of the public good, take into account the vital interests of their opponents.⁸⁶

The contribution of supranational law to the political profile of the constitutional subject, instead, is much less conspicuous.⁸⁷ The notion of participation suffers important limitations evident first of all in the disenfranchised condition of migrants in host states. As said, supranational law secures them access and equal treatment in the welfare of the host states but, critically, no chances of participating to its political determination.

More restrictions to political rights emerge in the structure of supranational decision-making. Unlike national governments in constitutional democracies, supranational political institutions enjoy reduced political latitude. This is in part a consequence of the administrative ethos surrounding supranational policy-making,⁸⁸ in part of the more assertive definition of regulatory strategies in the treaties. For a long time supranational political institutions will exercise their discretion in the interstices of the treaty, often codifying or articulating regulatory solutions half-backed by courts.⁸⁹

Other structural elements make political participation less significant in supranational decision-making. The reduced political capacity deriving from unanimity voting is a major obstacle to supranational policy-making and political mobilisation.⁹⁰ But also the mediated legitimacy of supranational political institutions contributes to their scarce appeal.⁹¹ In the period reviewed policy making is dominated by executives which, at best, can ensure only some degree of indirect representation to the interests of national political majorities. National political minorities, instead, are offered only the opportunity of an indirect and weak involvement through the European Parliament. Difficult to expect from a similar institutional framework the type of social integration experienced in national parliaments. In supranational policy-making, the prevalent ethos is one of negotiation, where the dynamics of partisanship are replaced by intergovernmental bargaining.⁹²

Nevertheless, it would be unfair to supranational law to disqualify entirely its participatory qualities. At least in one field – judicial politics – supranational law reveals a significant capacity of mobilisation. The enforcement of market freedoms appeals to a selected legal community interested in the reformation of the state.⁹³ Yet, if it is difficult to deny the civilising function of many of the judgments resulting from this litigation,⁹⁴ it is easy also to note that the type of participation implied by this process contradicts the political profile of the constitutional subject as shaped by national democratic constitutions. For all its merit in constraining the protectionist excesses of the states, therefore, judicial politics poses also a permanent challenge to the genuine exercise of political rights.

⁸⁶ On the distinction between partisanship and factionalism, see J. White, L. Ypi, 'On Partisan Political Justification' (2011) 105 *American Political Science Review*, 381.

⁸⁷ E. D. H. Olsen, 'The origins of European citizenship in the first two decades of European integration' (2008) 15 *Journal of European Public Policy*, 49.

⁸⁸ P. Lindseth, above n. 84, 3.

⁸⁹ P. Craig, 'The Evolution of the Single Market' in C. Barnard and J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (Hart Publishing, 2002), 4.

⁹⁰ F. W. Scharpf, *Governing in Europe. Effective and Democratic?* (OUP, 1999), 71.

⁹¹ P. Lindseth, above n. 84, 12.

⁹² U. Everling, 'The European Union Between Community and National Policies and Legal Orders' in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2007), 690-691.

⁹³ D. Chalmers and L. Barroso, above n. 39, 127-128.

⁹⁴ J. H. H. Weiler, above n. 28, 341-342.

European citizenship as the synergy between the constitutional subject and economic subjectivity

In the social state era the subjectification of the citizen in European public law gravitates towards the constitutional subject, the subjectivity defined by national constitutional democracies. This subjectivity thrives in an institutional framework providing ample resources for collective identification, a rich set of fundamental rights and extensive opportunities of political engagement. In the same period, supranational law generates a complimentary strategy of subjectification centred on the economic qualities of individuals. In all the relevant dimensions of belonging, rights and participation economic subjectivity defies the identity of the constitutional subject: it fails to generate a collective sense of belongingness, its right endowment is restricted to free movement and equal treatment, its political profile is negligible. Yet, despite all these incongruences, European public law benefits from the synergy between its constitutive governmental projects. This is ensured by the separation of competences between supranational law and constitutional democracies which minimises the episodes of conflict. Within its limited scope, supranational law increases the inclusiveness of national constitutional democracies and reduces their vulnerability to economic interdependence.⁹⁵ Economic subjectivity, therefore, complements the constitutional subject⁹⁶ without obscuring its symbolical prevalence.⁹⁷

The transformation of the constitutional subject under ‘advanced liberalism’

In the period from the ratification of the Single European Act to the entry into force of the Lisbon Treaty, European public law experiences profound changes mainly related to the evolution of its supranational component. Firstly, the Union is enlarged to include 28 member states. To strengthen its political capacity, qualified majority voting in the Council is introduced and later generalised, rendering the Union a much more effective source of governance. Secondly, successive waves of treaty amendment expand the range of EU policy objectives, extending supranational integration towards more salient policy fields such as monetary, economic and social policy.⁹⁸ Although in the newly acquired competences the Union is expected essentially to sustain⁹⁹ or coordinate¹⁰⁰ national policies,¹⁰¹ the proliferation of objectives reconfigures its original market identity and challenges the separation of competences on which the relationship between supranational law and constitutional democracies had previously rested. Thirdly, European public law experiments a new form of equilibrium resulting from the convergence between its constitutive components. Constitutional symbolism and democratic institutional formulas are appropriated by supranational law; market principles and executive law-making find their way within national constitutional orders. The common direction of these changes is the ‘advanced liberalism’ agenda,¹⁰² an ambitious programme of welfare state reform aiming at strengthening the competitiveness of national economies.¹⁰³ The embrace of advanced liberalism and convergence, however, are gradual processes in which the original identities of supranational law and constitutional democracy reveal sticky. The transition from the social state to advanced liberalism takes place more through stratification than

⁹⁵ M. Maduro, ‘Europe and the constitution: what if this is as good as it gets?’ in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (CUP, 2003), 83-86.

⁹⁶ A. J. Menéndez, above n. 63, 912.

⁹⁷ M. Ferrera, ‘Solidarity in Europe after the Crisis’ (2014) 21 *Constellations*, 225-226.

⁹⁸ A. Stone Sweet, W. A. Sandholtz, ‘European integration and supranational governance’ (1997) 4 *Journal of European Public Policy*, 297.

⁹⁹ See, e.g., article 153 TFEU on social policy.

¹⁰⁰ See, e.g., articles 120-121 TFEU on economic policy and article 145 TFEU on employment.

¹⁰¹ The exclusive competence on monetary policy for the member states participating in the Euro is the notable exception (article 3 (1) c) TFEU).

¹⁰² N. Rose, *Powers of Freedom. Reframing political thought* (CUP, 1999), Ch. 4.

¹⁰³ The role of the Union as *vehiculo externo* for fiscal discipline and administrative reform is illustrated in C. J. Bickerton, above n. 14, 131-136.

replacement of paradigms.¹⁰⁴ This causes persisting divergences between those governmental projects and a sense of unsettledness and potential conflict characterising European public law in this phase.

The European reframing of national political communities

Among the changes in supranational law impinging upon subjectivity, the appropriation of the concept of citizenship stands as the most prominent. It is through citizenship that the ambition to politicise the Union finds one of its clearest expressions;¹⁰⁵ most of all, it is through that concept that the Union manifests the aspiration to transform its governmental pressures on individuals: from economic individuals to constitutional subjects, from privileged migrants to citizens dictating the patterns of social and political life in the Union.¹⁰⁶ Within this mindset, each national is viewed as affiliated with multiple polities, and the Union imagined as a would-be supranational constitutional democracy capable of nourishing a sense of collective identification.¹⁰⁷

The impact of citizenship on the original structures of supranational law has produced more uncertain results. Already its legal definition¹⁰⁸ is ambiguous as to its actual political nature when it prioritises free movement and residence over political rights.¹⁰⁹ EU citizenship, indeed, provides elements in support of goals as disparate as building a supranational society existing alongside national polities and strengthening the protection of migrants in host member states regardless their economic qualification.¹¹⁰ More than twenty years after its introduction, it can safely be said that EU citizenship explicates its potential more as an integrative than a constitutive tool.¹¹¹ Legislation has defined it ‘the fundamental status of nationals of the member states when they exercise their right of free movement and residence’.¹¹² The Court of Justice has employed it as an autonomous source of rights,¹¹³ stretching the protection of EU law towards situations and subjects previously outside the remit of economic freedoms.¹¹⁴ EU citizenship has extended both the subjective¹¹⁵ and the objective¹¹⁶ scope of equal treatment obligations, including in national welfare states also economically inactive non-nationals insofar as they do not become an unreasonable burden.¹¹⁷

¹⁰⁴ *Ibidem*, 142.

¹⁰⁵ A. J. Menéndez, above n. 26, 913-196.

¹⁰⁶ M. Everson, above n. 36, 76.

¹⁰⁷ The argument whereby the Union is citizenship-capable is developed in N. Nic Shuibhne, ‘The resilience of EU market citizenship’ (2010) 47 *Common Market Law Review*, 1601.

¹⁰⁸ Article 20 TFEU.

¹⁰⁹ M. Everson, above n. 36, 73-74. It is telling that what is commonly known is the ‘Citizenship directive’ (Directive 2004/38) is concerned with freedom of movement and residence in other member states rather than political participation.

¹¹⁰ *Ibidem*, 76-77.

¹¹¹ J. Shaw, above n. 10, 609. See also P. Magnette, ‘How can one be European? Reflections on the Pillars of European Civic Identity’ (2007) 13 *European Law Journal*, 669-670.

¹¹² Directive 2004/38, recital 3.

¹¹³ Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691 and Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

¹¹⁴ A. J. Menéndez, above n. 63, 386-388, arguing that the EU citizenship case law is a logical extension of pre-Maastricht case law.

¹¹⁵ See, e.g., Case C-456/02, *Michel Trojani v Centre public d’aide sociale de Bruxelles* [2004] ECR I-7573.

¹¹⁶ See, e.g., Case C-184/99, *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

¹¹⁷ Directive 2004/78, articles 14 and 24. See Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, not yet reported, and Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, not yet reported. See also F. de Witte, ‘Transnational solidarity and the Mediation of Conflicts of Justice in Europe’ (2012) 18 *European Law Journal*, 706-707, claiming the emergence of a type of ‘community solidarity’.

If we move to its constitutive potential, the record of EU citizenship is far less impressive. Since its introduction EU citizenship has neither triggered a shift in collective identification towards Europe¹¹⁸ nor rivalled national citizenship as a form of belonging.¹¹⁹ This has emerged in the elaboration of the Constitutional Treaty, the most daring attempt to adopt constitutionalism as the EU form of power.¹²⁰ As widely known, a similar undertaking had been promoted to strengthen the legitimacy of the Union before the enlargement to Central-Eastern Europe.¹²¹ Constitutionalism was expected to legitimise a more majoritarian institutional setting and secure loyalty to EU law.¹²² The Constitutional Treaty was the vehicle to promote the transition from an intergovernmental to a genuinely constitutional political community conceived in political and civic rather than ethno-cultural terms.¹²³ It is telling, however, that even that document and the whole constitutional undertaking were never intended as the products of a true *pouvoir constituant* exercised in the name of a single European people.¹²⁴ In other words, the Constitutional Treaty was never meant to challenge national political communities as it was undisputed that constitutional authority resided in the member states.¹²⁵ Had the Constitutional Treaty been ratified by all member states, the EU would however have expressed an uneven and truncated form of constitutionalism.¹²⁶

The constitutional adventure proved once more that the Union does not possess a single political community,¹²⁷ and that in contemporary Europe national *demos* are entrenched and dominant.¹²⁸ Yet European citizens constitute more than a disaggregated multitude incapable of collective self-determination. The Union can be viewed as a *demoi*cracy, i.e. a polity of multiple *demos*¹²⁹ developing a distinct and discrete model of democracy antithetic to both the supranational and national versions of a single *demos*.¹³⁰ National political communities give rise no longer to self-serving constitutional democracies; they are joined together in a collective transnational political undertaking. In this perspective, EU treaties can be reconceptualised and regarded as social contracts between European peoples.¹³¹

¹¹⁸ The point that EU citizenship has not succeeded in generating an identity going beyond market participation is made by N. Nic Shuibhne, above n. 107, 1624-1625.

¹¹⁹ In the period 2010-2012, for instance, those seeing themselves as only nationals were 46-38% of Europeans, those seeing themselves as nationals (mainly) and Europeans 41-49%, those mainly Europeans and nationals 7-6% and those only Europeans 3%. See Standard Eurobarometer 77/2012 (European citizenship), available at <ec.europa.eu/public_opinion/archives/eb/eb77/eb77_citizen_en.pdf>. On the EU attempts at polity building see C. Offe and U. K. Preuss, 'The Problem of Legitimacy in the European Polity. Is Democratization the Answer?' *ConWEB No 6/2006*, 16-18.

¹²⁰ M. Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism' (2005) 2-3 *International Journal of Constitutional Law*, 332.

¹²¹ Presidency Conclusions of the European Council, 14-15 December 2001, Annex I (Laeken Declaration on the Future of the European Union).

¹²² M. Maduro, above n. 120, 345-451.

¹²³ *Ibidem*, 333.

¹²⁴ The final version of the Constitutional Treaty was negotiated in an intergovernmental conference and the resulting text required national ratifications exactly as previous treaty amendments.

¹²⁵ M. Maduro, above n. 120, 353.

¹²⁶ N. Walker, 'Reframing EU Constitutionalism' in J. L. Dunoff and J. P. Trachtman, above n. 80, 162.

¹²⁷ D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal*, 290-291.

¹²⁸ F. Cheneval and F. Schimmelfennig, 'The Case for Demoicracy in the European Union' (2013) 51 *Journal of Common Market Studies*, 337-338, observing that the EU polity is fragmented in terms of collective identity, public spheres and intermediary political structures.

¹²⁹ *Ibidem*, 343-346.

¹³⁰ K. Nicolaidis, 'European Demoicracy and Its Crisis' (2013) 51 *Journal of Common Market Studies*, 352-353.

¹³¹ J. H. H. Weiler, above n. 28, 346.

The constitutional function of Union citizenship, therefore, is not that of merging European individuals in an indistinct supranational polity. Union citizenship changes the understanding of national membership:¹³² while it leaves intact the conditions for national membership, it transforms its substantive and political substance.¹³³ In this light, EU citizenship is not ontologically independent from nationality; it becomes a constitutive element of it and contributes to its European reframing.¹³⁴

The notion and function of EU citizenship are echoed in a number of national constitutions, particularly those which have introduced integration clauses¹³⁵ devoted specifically to EU membership.¹³⁶ Such norms codify the specific status and operative properties of EU law, they interface national institutional settings with the most salient aspects of EU decision-making and they dictate the conditions under which EU membership is legitimate.¹³⁷ Most importantly, integration clauses certify that EU membership is not the product of contingent political majorities, but is a more structural decision widely shared by a national polity¹³⁸. Conceived in this way, integration clauses lay the ground for an EU-oriented redefinition of national constitutional frameworks and for a corresponding transformation of the contents and political significance of the constitutional subject.

The market metamorphosis of national welfare states

From a substantive standpoint, reframing the constitutional subject in an EU light entails a set of transformational pressures on national welfare states enhancing the economic qualities of the individual. The degree of transformation achieved depends on the varying intensity of EU policy measures and their actual implementation by the member states. Nonetheless, the main trajectories of this process can be explored by looking at the policy goals and style of intervention by the Union in a range of welfare sectors.¹³⁹

Before delving into more detailed examination, few words are needed to clarify the relationship of the Union with the social domain. As said, in the period reviewed the Union expands towards the social sphere,¹⁴⁰ but it does so without establishing a supranational welfare state system.¹⁴¹ The Union lacks the possibility to raise significant revenues through direct taxation and redistribute them as services or benefits. With a small budget (at least if compared to national ones),¹⁴² the Union approaches the social sphere through a peculiar set of tools. Initially, EU social measures are designed simply to flank the single market project.¹⁴³ Next, the Union adventures into more salient policy fields appealing to constituencies interested in welfare reform according to a new ideological paradigm termed ‘advanced liberalism’.¹⁴⁴ The focal point of the new policy agenda is

¹³² *Ibidem*, 328.

¹³³ See below sections 4.2 and 4.3.

¹³⁴ P. Magnette, above n. 111, 668. See also S. Besson, A. Utzinger, ‘Toward European Citizenship’ (2008) 39 *Journal of Social Philosophy*, 196.

¹³⁵ See, e.g., article 23 of the German Constitution, article 88-1 of the French Constitution and article 7 (6) of the Portuguese constitution.

¹³⁶ F. Palermo, above n. 27, 180, referring to these norms as ‘second generation clauses’.

¹³⁷ M. Claes, ‘Constitutionalizing Europe at its Source: The ‘European Clauses’ in National Constitutions: Evolution and Typology’ (2005) 24 *Yearbook of European Law*, 81.

¹³⁸ *Re Ratification of the Treaty of Lisbon* (2 BvE 2/08) (2010) *Common Market Law Report*, 13, § 225.

¹³⁹ On the unravelling of the post-war class compromise and transformation of national corporatist state see C. Bickerton, above n. 14, 92-110.

¹⁴⁰ It must be remembered that even before social policy measures had been sporadically adopted, see C. Barnard, ‘EU ‘Social’ Policy: from Employment Law to Labour Market Reform’ in P. Craig, G. de Búrca (eds), above n. 10, 642-647.

¹⁴¹ *Ibidem*, 660.

¹⁴² In the multiannual financial framework 2014-2020 the EU budget represents around 1% of EU-28 GDP, whereas member states’ budgets account for 44% GDP on average, see <http://ec.europa.eu/budget/explained/myths/myths_en.cfm>.

¹⁴³ G. Majone, ‘The European Community between Social Policy and Social Regulation’ (1993) 31 *Journal of Common Market Studies*, 153.

¹⁴⁴ N. Rose, above n. 102, 137.

governing through the entrepreneurship of individuals.¹⁴⁵ In the pursuit of this objective, advanced liberalism does not promote the dismantlement of the welfare state and a return to *laissez-faire*; social policies are re-oriented to create the conditions for entrepreneurship and competitiveness.¹⁴⁶ This implies several initiatives such as policies enabling a market to exist and function without disproportionate hurdles and an efficiency-driven reorganization of social government. Most importantly, governmental resources are employed to prompt an anthropological turn in the individual, increasingly pressured to envision his or herself as an entrepreneur.¹⁴⁷

At least in principle, the strongest traction towards welfare reform derives from the Economic and Monetary Union and the ensuing constraints on national budgets. Within the EMU, supranational rules are established to prevent excessive deficits and reduce public debt.¹⁴⁸ The goal of sound finances inspires policies of fiscal retrenchment favouring higher taxation and lower levels of social expenditure. But because of free movement and tax competition, higher taxes apply in particular to immobile factors of production.¹⁴⁹ No surprise that overall these policies contribute to increased inequality within national societies.¹⁵⁰

The market metamorphosis of national welfare states is also the product of a broader enforcement of market freedoms.¹⁵¹ Under EU law influence, the state monopoly on public services is challenged and private provision encouraged.¹⁵² The extension of market freedoms towards national social measures is premised on the need for national administration to control more strictly welfare expenditures. This leads to a more accurate determination of the price of any single social provision, which in the logic of the single market amounts to services remuneration.¹⁵³ Once market freedoms are triggered, individuals begin to feel entitled to an invisible welfare voucher,¹⁵⁴ to be used in other member states or private providers.¹⁵⁵ So, a market of social services emerges in which the constitutional subject is converted into a welfare consumer.¹⁵⁶ Within a similar context an alternative idea of self-determination is cultivated: while in the social state the potential of the individual was mainly channelled towards voice and collective political action, in the market of welfare services self-determination is expressed mainly through individual choice and portability of benefits.¹⁵⁷

If the EMU and the single market constrain respectively the size and structure of welfare states, their reorientation towards competitiveness and entrepreneurship is sought through EU social policy. To improve the competitiveness of national economies, EU social policy urges national social government to encourage the

¹⁴⁵ *Ibidem*, 139-140.

¹⁴⁶ *Ibidem*, 144. See also C. J. Bickerton, above n. 14, 105-106.

¹⁴⁷ *Ibidem*, 141-142.

¹⁴⁸ Article 119 TFEU.

¹⁴⁹ See Eurostat, 'Taxation Trends in the European Union. Data for the EU member states, Iceland and Norway', <http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2014/report.pdf>. Labour is the largest source of tax revenues (51%), with taxation on capital and consumption accounting respectively for 21% and 28% (*Ibidem*, 23). The top corporate income tax rate was on average 35% in 1995, while in 2013 was around 21% (*Ibidem*, 35).

¹⁵⁰ See European Commission, 'Why socio-economic inequalities increase? Facts and policy responses in Europe', available at <http://ec.europa.eu/research/social-sciences/pdf/policy-review-inequalities_en.pdf>.

¹⁵¹ And of citizenship norms, on which see above section 4.1.

¹⁵² G. Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States', *Jean Monnet Working-Paper No 2/06*, 18-21.

¹⁵³ Case C-158/96, *Raymond Kohll v Union de caisses de maladie* [1998] ECR I-1931.

¹⁵⁴ See, e.g., Case C-368/98, *Abdon Van Braeckel and others v Alliance Nationale de mutualités chrétiennes (ANMC)* [2001] ECR I-5363 and Case C-318/05, *Commission v Germany ('Deductibility of School fees')* [2007] ECR I-6957.

¹⁵⁵ G. Davies, 'Health and Efficiency: Community Law and National Health Systems in the light of *Müller-Fauré*' (2004) 67 *Modern Law Review*, 105.

¹⁵⁶ J. Baldock, 'On being a welfare consumer in a consumer society' (2003) 2 *Social Policy and Society*, 65.

¹⁵⁷ F. de Witte, above n. 117, 699-700. Mobility seems also the most immediate reaction by the Union to the malfunction of national welfare states, see Case C-268/13, *Elena Petru v Casa Județeană de Asigurări de Sănătate Sibiu, Casa Națională de Asigurări de Sănătate*, not yet reported.

participation of individuals to the economy.¹⁵⁸ Empowerment emerges as the overriding goal of welfare reform,¹⁵⁹ exposing individuals to increasing demands¹⁶⁰ of becoming well-functioning participants of the competitive market society in the making.¹⁶¹ In this logic, social policies are mobilised to assist the individual in a ceaseless work of training and retraining, enhancing its career credentials and the continuous economic capitalization of the self required by advanced liberalism.¹⁶²

Labour law and industrial relations are the privileged fields where the agenda of advanced liberalism is experimented.¹⁶³ While in the social state these branches of social organisation contributed to the overall function of redistributing power and economic resources, in the new governmental landscape they are expected to contribute to competitiveness and economic performance.¹⁶⁴ The discredit of social conflict and emphasis on social cooperation are the side-effects of this policy recalibration.¹⁶⁵ The role of social rights undergoes a complete redefinition: if social rights in the social state were both guarantees and achievements of social conflict, in advanced liberalism they are reshaped to facilitate market performances.¹⁶⁶ Thus, anti-discriminatory measures are conceived not just to contrast conducts per se despicable, but to purify the market from state measures or private behaviours which may affect negatively human capital.¹⁶⁷ This process of latent commodification marks also the restructuring of education,¹⁶⁸ and even security and public order are reframed to reassure the consumer society from the uneasiness generated by terrorism and migration.¹⁶⁹

Yet, the departure of EU social policy from the original tenet of the social state of emancipating individuals is most evident in the field of social exclusion. Combating social exclusion in the social state era entailed creating a negative freedom from the market¹⁷⁰ and striving for the inclusion of individuals in a complex web of political, economic and social relations.¹⁷¹ In the new context, instead, what is sought is not full human emancipation. Advanced liberalism contrasts social exclusion essentially to bring marginalised individuals back into the market. EU social policies may well resituate individuals in this environment,¹⁷² but they leave unaffected the competitive situation.¹⁷³ In advanced liberalism, therefore, social policy does not correct or limit the market;¹⁷⁴ it continues to be functional to its efficient operation.¹⁷⁵

¹⁵⁸ W. Streeck, 'Competitive Solidarity: Rethinking the "European Social Model"', *Max Planck Institut für Gesellschaftsforschung Working Paper 99/8*, 6.

¹⁵⁹ Article 145 TFEU.

¹⁶⁰ N. Rose, above n. 102, 145, notes that within this paradigm entrepreneurship and the pursuit of economic well-being are not only opportunities but achieve a status comparable to that of patriotic duties.

¹⁶¹ A. Somek, above n. 33, 274-275. See also S. Deakin, 'The 'Capability' Concept and the Evolution of European Social Policy' in M. Dougan and E. Spaventa (eds), *Social welfare and EU law* (Hat Publishing, 2005), 6-8.

¹⁶² N. Rose, above n. 102, 161.

¹⁶³ See Presidency Conclusions, Lisbon European Council, § 24. See also European Commission, 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' COM (2007) 359 final.

¹⁶⁴ H. Collins, 'Is there a Third Way in Labour Law?' in J. Conaghan, R. M. Fischl and K. Klare (eds), *Labour Law in an Era of Globalisation. Transformative Practices and Possibilities* (OUP, 2002) 450.

¹⁶⁵ *Ibidem*, 457.

¹⁶⁶ *Ibidem*, 463.

¹⁶⁷ A. Somek, 'From workers to migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal*, 711.

¹⁶⁸ S. Garben, 'The Future of Higher Education in Europe: the Case for a Stronger Base in EU Law', *LEQS Paper No. 50/2012*, 24-26.

¹⁶⁹ D. Chalmers, 'Political Rights and Political Reason in European Union Law in Times of Stress' in W. Sadurski (ed), *Political Rights Under Stress in 21st Century Europe* (OUP, 2006), 66-67.

¹⁷⁰ A. Somek, above n. 33, 281.

¹⁷¹ See above section 3.2.

¹⁷² P. Costa, above n. 23, 58-59.

¹⁷³ A. Somek, above n. 33, 277.

The corrosion of political citizenship

The image of individuals more active in the market while less involved in civic life is confirmed by the gradual corrosion of the political profile of the constitutional subject. The expansion of EU competences empowers national executives vis-à-vis national parliaments and restricts the room for the unfettered exercise of national political rights.¹⁷⁶ In the newly acquired policy areas national governments retain considerable control over Union decision-making.¹⁷⁷ Only rarely this results in complete pre-emption of national democratic spaces. More often EU measures allow significant margins to national policy-makers to accommodate their contents to their particular social and political context. The influence exercised by the Union, however, is by no means negligible: even in the softest of the coordinating processes specific policy directions are prescribed, enlisting national political processes in the structural change undertaking.¹⁷⁸

It could be contended that the erosion of national spaces of democratic deliberation is compensated by the politicisation of EU decision-making processes and the appropriation of constitutional symbolism. In other words, what the individual qua constitutional subject loses is regained by the individual qua EU citizen. Yet, it is doubtful that EU citizenship can make up for the losses of the constitutional subject. Notwithstanding their more pronounced involvement in the social life of the host state, EU citizens remain passive agents deprived of any meaningful political capacity.¹⁷⁹ Critically, also their actual democratic engagement with supranational decision-making can seriously be questioned.

Admittedly, in the period reviewed the Union has not only strengthened its governmental capacity, but has made major progresses in making its political process more accessible and contested. The idea of representative democracy as well as the state tradition of political rights have been appropriated leading to a profound restructuring of the EU institutional setting.¹⁸⁰ From the first direct elections onwards the European Parliament has always grown in influence up to achieving equal standing with the Council.¹⁸¹ It plays a critical role in legislation,¹⁸² especially in amending legislative proposals,¹⁸³ and it has induced a reorganization of supranational political life along the left-right divide.¹⁸⁴ But the democratic transformation of the Union has not been confined to the Parliament. The architecture of the legislative process resembles that of federal bicameral systems.¹⁸⁵ The political profile of the Commission has also been strengthened,¹⁸⁶ as witnessed by the recent

(Contd.)

¹⁷⁴ On the difference between market making and market correcting, see C. Barnard, above n. 140, 645.

¹⁷⁵ A. Somek, 'De-commodification revisited: On the absence of Emancipation in Europe', *University of Iowa Legal Studies Research Paper N. 06-04*, 14-16.

¹⁷⁶ C. Offe and U. K. Preuss, above n. 119, 4-6.

¹⁷⁷ This is particularly true in the fields where the community method does not apply. See H. Wallace and W. Wallace, 'Overview: The European Union, Politics and Policy-Making' in K. E. Jørgensen, M. A. Pollack and B. Rosamond (eds), *Handbook of European Union Politics* (SAGE, 2007), 351-354, and C. J. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2014) *Journal of Common Market Studies*.

¹⁷⁸ This expansion of EU competences can be explained as a broader commitment of national governments to limit their own powers through supranational constraints in order to contain the political power of domestic populations, see C. J. Bickerton, above n. 14, 67-70.

¹⁷⁹ EU citizenship only adds the right to vote in municipal elections in the host state (article 22 (1) TFEU).

¹⁸⁰ See article 10 TEU and articles 39-40 of the EU Charter of Fundamental Rights.

¹⁸¹ See articles 289 and 294 TFEU.

¹⁸² P. Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy' (2004) 9 *European Law Journal*, 549.

¹⁸³ D. Chalmers, G. Davies and G. Monti, *European Union Law* (CUP, 2014), 119-120.

¹⁸⁴ S. Hix, A. Noury and R. Roland, 'Power to the Parties: Cohesion and Competition in the European Parliament, 1979-2001' (2005) 35 *British Journal of Political Science*, 209.

¹⁸⁵ R. Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?' (1998) 35 *Common Market Law Review*, 603-606.

¹⁸⁶ *Ibidem*, 609-612.

imitation of practices drawn from the parliamentary government tradition as the indication of *Spitzenkandidaten*.¹⁸⁷

But for all these progresses, the democratic substance of EU citizenship remains underdeveloped if compared to that of the constitutional subject. This is not just because in areas as crucial as economic governance or foreign policy the influence of the European Parliament is feeble. Besides the formal deficiencies contained in the treaties, there are further criticalities impairing the democratic qualities of supranational decision-making. There is first of all an issue of political latitude. Because of the purposive framing of many of its competences,¹⁸⁸ EU law does not allow contestation for the direction of EU policies, but enables competition only over the means to reach pre-defined objectives.¹⁸⁹ There is then a problem of evacuation of representative democracy.¹⁹⁰ The enhanced democratic quality of legislative decision-making has been coupled by broad delegation of regulatory powers to political administration or private law-making,¹⁹¹ circuits in which democratic engagement is notoriously more difficult. There is finally an issue of legislative culture. The practice of dialogues and first-reading agreements¹⁹² has improved the productivity of the EU legislative,¹⁹³ but has also lowered its democratic quality. Because of the increased role of COREPER, the accountability of national executives has diminished;¹⁹⁴ the opacity of those processes and the reduced role of smaller political groups have also undermined the chances of meaningful political opposition.¹⁹⁵

The evacuation of legislative decision-making, restricted political latitude and consociational legislative culture are all elements converging towards the narrowing down of the scope for political contestation and opposition.¹⁹⁶ Within such a political environment, the conflictual but, in the end, integrative practices associated with partisanship are made more difficult. The discontents of the ‘advanced liberalism’ agenda and, more in general, the ‘politically other’ are viewed not as opponents bearing legitimate political claims, but as enemies obstructing or undermining the transformation promoted by the Union. Over the corrosion of the constitutional subject, therefore, looms the prospect of increased alienation and intractable antagonistic conflicts.¹⁹⁷

¹⁸⁷ J. H. H. Weiler, ‘European Parliament Elections 2014: Europe’s Fateful Choice’ (2013) 24 *European Journal of International Law*, 747 and J. H. H. Weiler, ‘Fateful elections? Investing in the future of Europe’ (2014) 12 *International Journal of Constitutional Law*, 273.

¹⁸⁸ G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 *European Law Journal*, 2.

¹⁸⁹ This is evident in the single market (articles 114-115 TFEU), employment (article 145 TFEU), monetary (article 127 TFEU) and industrial policy (article 173 TFEU).

¹⁹⁰ R. Dehousse, ‘Beyond representative democracy: constitutionalism in a polycentric polity’ in J. H. H. Weiler and M. Wind (eds), above n. 44, 135.

¹⁹¹ D. Chalmers and M. Chaves, ‘EU law-making and the state of European democratic agency’ in O. Cramme and S. B. Hobolt (eds), *Democratic Politics in a European Union Under Stress* (OUP, 2014).

¹⁹² See Joint Declaration on Practical Arrangements for the Codecision Procedure (22 May 2007).

¹⁹³ A. Héritier, C. Reh, ‘Codecision and its Discontents: Intra-Organizational Politics and Institutional Reform in the European Parliament’ (2012) 35 *West European Politics*, 1136-1137.

¹⁹⁴ H. Farrel, A. Héritier, ‘Interorganizational Negotiation and Intraorganizational Power in Shared Decision Making: Early Agreements Under Codecision and their Impact on the European Parliament and the Council’ (2004) 37 *Comparative Political Studies*, 1203-1204.

¹⁹⁵ *Ibidem*, 1201-1202.

¹⁹⁶ C. Offe and U. K. Preuss, above n. 119, 9-13.

¹⁹⁷ A. Follesdal and S. Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies*, 548-549.

The transition towards ‘advanced liberalism’: the competition between economic and constitutional subjectivities

As the Union expands its remit, national constitutional subjects are exposed to transformational pressures targeting national welfare states. The appropriation by the EU of constitutional concepts results more in their vulgarization than in a genuine democratic conversion of supranational law. Yet, that appropriation fulfils more than a decorative function. Constitutional symbolism eases the transformation of the constitutional subject and, ultimately, sustains a competing notion of freedom and self-determination in European public law.¹⁹⁸ Under EU influence, national citizenship is revisited and enhanced in its economic qualities. But enabled in the market, individuals are disabled in the political sphere. The subjectivity brought about by the Union under advanced liberalism, therefore, may be successful in countering some deficiencies of the constitutional subject, but contains also an economic bias which may threaten values such as democracy and social justice.

The transition from the social to the enabling state, however, takes place gradually and unevenly. It is marked by ambiguities inspiring divaricated political narratives. The transformation of the constitutional subject can be presented either as the purification from its original biases or the undermining of its authentic commitment to social justice and political freedom. Likewise, resistances to transformation can be described either as the reaffirmation of fundamental human values against the decline of constitutional democracy or the entrenchment of the dysfunctions of traditional welfare state. In this phase, European public law does not resolve these ambiguities. Rather, owing to its pluralist structure, it offers an institutional setting which, at least in principle, permits the representation, confrontation and mediation of the normative claims underlying the constitutional subject and its transformation. The resulting tension replaces the peaceful co-existence registered between the constitutional subject and economic subjectivity in the social state era. Yet it would be misleading to consider this competition as necessarily a source of disintegration. On the contrary, the tension between constitutional and economic subjectivities could operate as a promising antidote to resist their hegemonic temptations and counter their respective biases. However, this scenario will not be consolidated in the last evolutionary stage of European public law. Under the institutional setting developed to cope with the financial crisis, European public law begins to resolve its in-built ambiguities. Thus, most of the institutional resources will be more univocally addressed to the transformation of the constitutional subject, while the pursuit of rival claims will remain possible only in the form of unilateral reaffirmations of national constitutional identity.¹⁹⁹

The twilight of the constitutional subject during the financial crisis

The evolutionary trends registered in the affirmation of the advanced liberalism agenda come to a head with the institutional arrangements designed to cope with the ongoing financial crisis. Underpinning a similar development is a diagnosis whereby the crisis exposed structural weaknesses in national economies,²⁰⁰ especially in the countries that failed to implement the advanced liberalism agenda. Hence, institutional design and policy reactions are framed to embolden the transformational commitment of the Union: if in the short term financial stability at national level is promoted through plans of fiscal consolidation and measures of financial assistance,²⁰¹ in the medium and long term advanced liberalism is regarded as the agenda to be inculcated to recalcitrant member states through more stringent direction and control of national political economies.²⁰²

¹⁹⁸ R. Bellamy, ‘The Liberty of the Post-Moderns? Market and Civic Freedom within the EU’ *LEQS Paper No. 1/2009*, 17.

¹⁹⁹ *Re Ratification of the Treaty of Lisbon*, above n. 138, § 240 and 245-260.

²⁰⁰ European Commission, ‘Europe 2020 – A strategy for smart, sustainable and inclusive growth’ COM (2010) 2020 final, 7.

²⁰¹ See, in particular, the Treaty establishing the European Stability Mechanism (ESM). Financial assistance has also been provided by the European Central Bank through the Securities Market Programme (see Decision 2010/5/ECB).

²⁰² *Ibidem*, 7. See also article 1 (1) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) and the ‘Euro Plus Pact – Stronger Economic Policy Coordination for Competitiveness and Convergence’, 13-15.

Justified as it may be on policy grounds, however, this strategy materialises the dangers and aggravates the biases already noted in European public law before the crisis.

Looking in more detail at the changes introduced during the financial crisis, the restructuring of European public law entails first of all a further expansion of EU competences,²⁰³ in many cases beyond the limits established in the Lisbon Treaty.²⁰⁴ In expanding its scope, the Union abandons almost completely the lofty rhetoric employed before the crisis. Set aside the constitutional register, the Union shows its crudest intergovernmental and technocratic profile by extending its regulatory style to even more salient policy fields to promote the degree of convergence of national economies required by a single monetary policy.²⁰⁵ As a result, national economic and social policies are subjected to more intensive policy coordination.²⁰⁶ Multilateral surveillance on national budgets is secured through stricter sanctions²⁰⁷ and structural reforms are encouraged by the promise of more relaxed fiscal discipline.²⁰⁸ The consequence of this institutional setting is that in the pursuit of economic convergence member states will follow different routes reflecting their particular financial and economic situations. As a reflection, also the meaning of being a citizen in Europe will vary considerably from state to state implying distinct collective efforts, but also different strategies of resistance and contestation.

Towards national post-political communities

Before the financial crisis it was reasonable to believe that only political events of considerable magnitude could induce European individuals to shift their prevalent national allegiance to a supranational political community. After more than five years of economic and political distress, it can safely be said that the financial crisis has neither awoken a European demos nor encouraged the establishment of robust solidarity ties between the peoples of Europe.²⁰⁹ European integration is certainly implicated in the enormous sacrifices imposed in the management of the crisis, but the Union has failed to provide a pan-European narrative inspiring those efforts. Europeans continue to regard as predominant their national allegiances: they have made sacrifices on behalf of their national communities, and the only pan-European imperative forcing them into change has been economic necessity.²¹⁰

The incapacity of the financial crisis to prompt a shift in collective identification is easily explained by its very disparate impact on national economies. National political communities are experiencing the crisis in highly different ways. The strengths and shortcomings of the respective social models have been amplified; as a reflection, also the required degree of reformation of state structures has been variable ranging from the negligible to the almost complete. Thus, legal arrangements to cope with the crisis have been tailored to specific national situations with the result of deepening existing divides and generating new ones. The cleavage between

²⁰³ M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review*, 824-826. See also C. J. Bickerton, above n. 14, 141-150, explaining this process as the creation of more horizontal ties between national governments to shield macro-economic policy-making from the intrusion of mobilized and angry societies.

²⁰⁴ Article 9 TSCG establishes policy coordination "in all the areas which are essential to the proper functioning of the euro area". See also the 'Euro Plus Pact', above n. 202, 14-15, dictating actions in areas where the competence lies with the member states such as wage setting arrangements, education systems, pension, health and social assistance. In addition, article 4 of the regulation 1176/2011 extends policy surveillance by supranational institutions towards private indebtedness, housing market and energy. Finally, the 'Compact for Growth and Jobs', 9, calls for reform in the field of public administration and justice.

²⁰⁵ D. Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal*, 685.

²⁰⁶ See 'Euro Plus Pact', above n. 202, 13-15.

²⁰⁷ See the system of quasi-automatic approval of sanctions established by regulation 1173/2011 and article 7 TSCG.

²⁰⁸ See, for instance, article 2a of regulation 1466/97 as amended by regulation 1175/2011.

²⁰⁹ A. J. Menéndez, above n. 26, 930-931.

²¹⁰ M. Wilkinson, 'The Specter of Authoritarian Liberalism: reflections on the Constitutional Crisis of the European Union' (2013) 14 *German Law Journal*, 551-552. See also C. J. Bickerton, above n. 14, 114.

member states participating and non participating in the Euro has been widened. A more problematic divide has emerged between the member states at the supply and receiving ends of the newly introduced mechanisms of financial assistance.

The strategy to cope with the financial crisis has not only reinforced national collective identification; it has undermined the legitimacy of the Union itself. The legitimacy crisis of the Union was diagnosed well before the financial crisis. Already with the ratification of the Treaty of Maastricht it was felt that the appeal of the original ideals of peace and prosperity was declining and that the Union was becoming a source of social resentment.²¹¹ Disaffection was felt in particular by non mobile citizens: to their eyes, the Union appeared as a class project dominated by a small and economically privileged cosmopolitan elite epitomising all the dangers threatening their way of life.²¹² Economic integration did not turn these individuals into Europeans, but instead reinforced their attachment to national and local political communities.²¹³ As the financial crisis exposes the difficulties of the Union in both representing the European citizenry and delivering the promised economic and social goods,²¹⁴ the ranks of this constituency have simply engrossed. As a result, the Union has ended up catalysing more resentment: from being seen as a body helping constitutional democracies to live up to their ideals, it is increasingly viewed as an agent contributing to their dissolution.

Even without subscribing to all the claims of the old and new discontents of European integration, it can be conceded that the institutional setting introduced in response to the financial crisis, by undermining both the welfare state and national democratic constitutions, degrades the environment which initially enabled the affirmation of the constitutional subject. Particularly in the hardest hit member states, the transformation of the welfare state has been synonym for increases in taxation and drastic cuts in health-care services, pensions and social benefits.²¹⁵ This has not only had the effect of lowering the level of social protection ensured to individuals; by weakening welfare state structures, also their capacity of generating loyalty and collective identification has been dangerously compromised.²¹⁶

If possible, the impact of the new institutional arrangements on national democratic constitutions is even more alarming. Because of the expansion of EU competences, the scope of application of democratic constitutions is further reduced. As a consequence, increasing sectors of economic and social policy are subjected to the process of technocratic depoliticization inherent in EU policy-making.²¹⁷ This emerges in the degree of constraints imposed on national decision-making. Especially in the hardest hit member states, policy directions are prescribed in such a detail to pre-empt national parliaments of any meaningful role.²¹⁸ Due to their incapacity to deliver on the advanced liberalism agenda, national peoples are increasingly treated as multitudes to be ruled rather than polities to be enhanced for their efforts in collective self-determination.²¹⁹ This not only makes more

²¹¹ J. H. H. Weiler, above n. 28, 329-332.

²¹² N. Fligstein, *Euro-Clash. The EU, European Identity, and the Future of Europe* (OUP, 2008), 211-213.

²¹³ *Ibidem*, 18.

²¹⁴ M. Ferrera, above n. 97, 224.

²¹⁵ Caritas Europa, 'The human cost of austerity – A call for fair alternatives and solutions', available at <http://www.caritas.eu/sites/default/files/caritascrisisreport_2014_en.pdf>, 80.

²¹⁶ L. Beaudonnet, 'A Threatening Horizon: The Impact of the Welfare State on Support for Europe' (2014) *Journal of Common Market Studies*.

²¹⁷ P. Lindseth, above n. 84, 81-82.

²¹⁸ See, e.g., 'Portugal – Memoranda of Understanding on Specific Economic Policy Conditionality' requiring measures such as the reduction of the maximum duration of unemployment insurance benefits to no more than 18 months (4.1) and the reduction of costs in the area of education, with the aim of saving EUR 195 million by rationalising the school network by creating school clusters; lowering staff needs; centralising procurement; and reducing and rationalising transfers to private schools in association agreements (1.8).

²¹⁹ Even a cursory glance at the texts of the *Memoranda of Understanding* applying to countries receiving financial assistance justifies the question of what is left of the principle of constitutional tolerance, see J. H. H. Weiler, above n. 44, 21.

difficult for those resisting this policy agenda to identify with the Union, but it also erodes the legitimacy of national constitutional democracies.

A case in point is the prioritisation by the Union of the goal of financial stability²²⁰ and, in particular, the mandated incorporation of balanced budget rules in national constitutions.²²¹ Irrespective of its actual legal meaning, this obligation has been equated in public debates to the constitutionalisation of austerity,²²² a divisive policy goal weakening the integration capacity traditionally associated with constitutional democracy. From being documents institutionalising the conflicts between opposing views of the public good, national constitutions are transformed into documents entrenching a single vision of it.²²³ Economic and social policy are no longer regarded as the ground where alternative political views compete for political consensus; they are transformed into a more arid terrain where targets are dictated and national policy performances are measured.²²⁴

Under the public law of the financial crisis, the transformation of national political communities brought about by the Union acquires a post-political character.²²⁵ It ushers in a distinct ethos according to which partisan conflicts are regarded as a thing of the past and are silently replaced by a new common sense in which the political is played out in the moral register: in place of a struggle between right and left, post-politics unfolds as a struggle between right and wrong.²²⁶ The resulting legal and political order can hardly fit with the requirements of a democratic constitution. Post-politics, indeed, operates an inversion between the place of partisanship and the role of the constitution. The constitution is no longer the place for an open compromise between left and right; it is the locus in which what is right is uncompromisingly established. Within the post-political vision, therefore, the room for legitimate political contestation is narrowed down, relegating politics (or what remains of it) essentially to the implementation of a pre-defined constitutional project. Opponents of this project are regarded as enemies and no longer adversaries for, in the new institutional environment, their claims are illegitimate and against the course of history.²²⁷ By drawing the political frontier in this way, however, the post-political vision is not conducive to a vibrant democratic life; it generates alienation and intractable antagonism between the institutional establishment and its marginalised opponents. What is worse, post-politics resurrects internal political exclusions and, by doing so, it gives up the promise of political freedom and collective identification inherent in the idea of constitutional democracy.

Fundamental rights under the shadow of macroeconomic indicators

The impact of the public law of the crisis on the constitutional subject is visible also in her rights dimension. The most evident process taking place in this regard is the proliferation of macroeconomic indicators and the corresponding downscaling of fundamental rights.²²⁸ Admittedly, even before the crisis macroeconomic criteria and quantitative assessment of policy-making played a major role in supranational law making. The public law of the crisis buttresses and generalises this trend. National legislative processes are wrapped up in a web of thresholds and ceilings, as much more intricate as critical is the financial situation of a member state. This is can be appreciated, for instance, in the discipline of national budgets. The reformed “Growth and Stability Pact” establishes that each member state defines every three years a medium-term balance objective (MTBO) to be

²²⁰ Article 119 (3) TEU.

²²¹ Article 3 (2) and 8 TSCG.

²²² M. Dawson and F. de Witte, above n. 203, 826.

²²³ F. W. Scharpf, ‘Monetary Union, Fiscal Crisis and the Preemption of Democracy’, *LEQS Paper No. 36/2011*, 5-7.

²²⁴ See below section 5.2.

²²⁵ C. Mouffe, *On the Political* (Routledge 2005).

²²⁶ *Ibidem*, 1-5.

²²⁷ *Ibidem*, 48-51.

²²⁸ A. Morrone, ‘Teologia economica v. Teologia Politica? Appunti su sovranità dello Stato e “diritto costituzionale globale”’ (2012) XXXII *Quaderni Costituzionali*, 831.

attained in subsequent stability programmes.²²⁹ For member states participating in the Euro, the lower limit of structural deficit is 0.5% of the GDP.²³⁰ In order to achieve their MTBO, member states are required to improve annually their cyclically adjusted budget balance of 0.5% or more.²³¹ Member states whose public debt exceeds 60% of the GDP have to reduce it at a pace of one twentieth per year.²³² Further numerical criteria are laid down in the rules on the prevention and correction of macroeconomic imbalances, where a scoreboard to detect them is established.²³³ The same quantitative approach is used to measure national performances in the competitiveness agenda,²³⁴ as if, in a Union unable to sustain the conflict between alternative policy options, the only available course of action is the calculation of the progresses and delays of each member state in an uncontroversial schedule.

The rise of hyper-specialised language and the thickening of legal constraints on political freedom are just the most evident consequences of the proliferation of macroeconomic indicators. More profound are the effects in the role and degree of protection of fundamental rights. As anticipated, the rise of macroeconomic indicators entails the marginalization of fundamental rights. This is not just a matter of lexicon and institutional landscape, but it is a judicially certified reality. Unlike in other policy areas,²³⁵ when it comes to measures of macroeconomic adjustment the Court of Justice shows no anxiety to expand the reach of the EU Charter of fundamental rights.²³⁶ Also the Commission seems reluctant to export the culture of fundamental rights to the coordination of economic policies.²³⁷ Yet replacing or downscaling fundamental rights comes at a high price going beyond the deterioration of the levels of protection. Renouncing to rights means also renouncing to their structural function of representing social tensions and legitimating alternative political responses to them.²³⁸

To be sure, in the vacuum of guarantees left by supranational institutions, some degree of social protection can be regained through national constitutional courts.²³⁹ Moreover, more recent pieces of macroeconomic legislation may have the effect of enlarging the protection of the Charter precisely to the areas neglected by the Court of Justice and the Commission.²⁴⁰ Yet, both forms of rehabilitation of fundamental rights entail just a mere recalibration of the dominant institutional culture. Even the most daring judgments of national constitutional courts do not oppose fiscal retrenchment as a legitimate policy objective,²⁴¹ but they ensure a modicum of social protection against the most disproportionate legislative measures or those affecting the most vulnerable segments of the society. By re-embedding fundamental rights in the new institutional environment, therefore, these

²²⁹ See article 2a of regulation 1466/97 as amended by regulation 1175/11.

²³⁰ See article 3 (1) b) TSCG.

²³¹ See article 5 of regulation 1466/97 as amended by regulation 1175/11. An higher improvement is required to the member states whose public debt exceeds 60% of the GDP.

²³² See article 4 TSCG.

²³³ See article 4 (2)-(4) of regulation 1176/2011.

²³⁴ See, for instance, 'Europe 2020', above n. 200, 10-11.

²³⁵ Case C-617/10, *Åklagaren c. Hans Åkerberg Fransson*, not yet published.

²³⁶ Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland, The Attorney General*, not yet published, § 179-180. See also Case C-128/12, *Sindicato dos Bancários do Norte, do Centro, do Sul e Ilhas, Luís Miguel Rodrigues Teixeira de Melo c. BPN – Banco Português de Negócios SA*, not yet published, and Case C-434/11, *Corpul Național Polițistilor* [2011] ECR I-196.

²³⁷ Tellingly, the last report on the application of the EU Charter of Fundamental Rights does not cover the impact of the measures of economic policy coordination on human rights. See European Commission, '2013 Report on the Application of the EU Charter of Fundamental Rights' COM (2014) 224 final.

²³⁸ See above section 3.2.

²³⁹ Significant in this regard is the case-law of the Portuguese Constitutional Tribunal: see cases 187/2013, 474/2013; 602/2013; 862/2013 and 413/2014 available at <<http://www.tribunalconstitucional.pt/tc/acordaos/>>.

²⁴⁰ See article 7 of regulation 472/2013.

²⁴¹ See, for instance, 187/13, § 29. See also X. Contiades and A. Fotiadu, 'Social rights in the age of proportionality: Global economic crisis and constitutional litigation' (2012) 10 *International Journal of Constitutional Law*, 673.

attempts have a paradoxical effect: they make austerity more sustainable²⁴² and, ultimately, legitimate it as the exclusive policy direction.²⁴³

The demise of political citizenship

Debilitated in the rights dimension, the constitutional subject suffers from strong restrictions also on its capacity to participate to political decisions. The deterioration of its political profile is certainly the result of the more assertive definition of policy targets and the proliferation of macroeconomic criteria. But also the procedures introduced to control and steer national economic and social policy add to the disease.

This emerges in the newly adopted system of multilateral supervision of national budgets. To ensure financial stability, EU legislation establishes a system of surveillance on the budget cycle through the European semester²⁴⁴ and, for the member states participating in the Euro, the common budgetary timeline.²⁴⁵ According to these procedures, budgetary activities carried out in national parliaments are closely monitored by the Commission and the ECOFIN to secure fiscal discipline. Thus, in the event of significant deviations from the MTBO during the European semester, the Commission and the ECOFIN issue respectively a warning and a recommendation.²⁴⁶ If the deviating member state fails to take appropriate action, sanctions can be imposed.²⁴⁷ In the common budgetary timeline, the Commission contributes to the definition of the budget,²⁴⁸ to the extent that it competes with national parliaments in influencing the choices of national governments.²⁴⁹

Constitutional subjects experience more stringent constraints in case of complications in the financial situation of their member states. Supranational law prescribes enhanced surveillance for member states in financial difficulties,²⁵⁰ for those receiving financial assistance²⁵¹ or experiencing macroeconomic imbalances.²⁵² In all these circumstances, enhanced surveillance encourages member states to address the causes of their difficulties.²⁵³ If needed, the Council recommends precautionary measures or specific programmes of macroeconomic adjustment.²⁵⁴ If their financial situation becomes unsustainable, member states may even be asked to enter in specific programmes to correct their fiscal policy and recover economic capacity.²⁵⁵

The procedure leading to the adoption of these programmes is quite standardised: the interested member state formulates a proposal with the assistance of the Commission, the ECB and the IMF; on that basis, the Council establishes the guidelines of structural reform and the member state at issue agrees to implement them under

²⁴² See European Parliament, 'Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries', 13 March 2014, calling for more attention to national political self-determination and the protection of social rights.

²⁴³ M. Dani, 'Misure di aggiustamento macroeconomico e Tribunale costituzionale portoghese: il limitato potenziale controegemonico della dottrina dei controlimiti' (2014) *Rassegna di diritto pubblico europeo*, 113.

²⁴⁴ Article 2-a regulation 1466/97 as amended by regulation 1175/11.

²⁴⁵ Articles 4, 6 and 7 regulation 473/2013.

²⁴⁶ Article 121 (4) TFEU and articles 5-6 of regulation 1466/97 as amended by regulation 1175/11.

²⁴⁷ Article 4 of regulation 1173/2011.

²⁴⁸ Article 7 (1) of regulation 473/2013.

²⁴⁹ D. Chalmers, above n. 205, 686.

²⁵⁰ Article 2 (1) of regulation 472/2013.

²⁵¹ Article 2 (3) and (4) of regulation 472/2013.

²⁵² Article 5 of regulation 1176/2011.

²⁵³ Article 3 regulation 472/2013.

²⁵⁴ Article 3 (7) regulation 472/2013.

²⁵⁵ In case of request of financial assistance, member states enter in a macroeconomic adjustment programme (article 7 of regulation 472/2013), whereas in case of excessive macroeconomic imbalances, they sign a corrective plan (article 8 of regulation 1176/2011). For member states subject to excessive deficit procedure, economic partnership programmes are foreseen (article 9 (2) of regulation 473/2013).

close surveillance of the Commission, the IMF and the ECB.²⁵⁶ Nowhere supranational legislation requires the approval of these programmes by national parliaments. What is worse, the Council can decide unilaterally on any change of the programme in case of a significant gap between macroeconomic forecasts and realized figures.²⁵⁷

As a result, particularly in countries subject to these programmes, citizens are *de facto* assigned a politically diminished status. The assumption is that they will regain full political capacity only with the complete implementation of the advanced liberalism agenda. In this way, full exercise of political rights becomes a good to be deserved. In certain member states, therefore, it can be safely said that national parliaments are in control of financial decisions.²⁵⁸ In other ones, owing to the constraints imposed by supranational law, similar statements would appear devoid of substance.

The diminished political role of the constitutional subject finds little compensation in supranational decision-making processes. The public law of the crisis strengthens the role of intergovernmental and technocratic institutions.²⁵⁹ The European Council is the focal point in the articulation of both the financial stability²⁶⁰ and competitiveness strategies.²⁶¹ The Commission and ECOFIN are involved essentially for their expertise in monitoring and steering member states action.²⁶² In a similar context, ensuring parliamentary accountability and exercising some form of political opposition is extremely difficult. The European Parliament is excluded from the decisions regarding financial assistance, while its role in policy coordination²⁶³ and the surveillance of national budgets²⁶⁴ is marginal.²⁶⁵ Finally, also national parliaments are inadequately engaged in supranational decision-making, given that their only opportunity to interact with EU institutions is that of setting up hearings of those involved in multilateral surveillance.²⁶⁶

Citizenship on the wane: transformation and resistances

For all its possible merits in fostering financial stability and competitiveness, the institutional setting devised in response to the financial crisis impairs the qualities of the constitutional subject. The core institutions generating national loyalty are weakened and no supranational substitute is offered. Rights are overshadowed by an uncompromising macroeconomic *raison d'état*, and also participation is frustrated in the constrained spaces allowed by EU regulatory settings.

As the post-political order promoted by supranational law becomes hegemonic, constitutional subjects are left with the dilemma of surrendering to the transformation or resisting to it.²⁶⁷ Until now, acquiescence and political resignation have been the most widespread attitudes of those enduring the effects of the crisis and its

²⁵⁶ See, e.g., article 7 of regulation 472/2013.

²⁵⁷ See article 7 (5) of regulation 472/2013.

²⁵⁸ BverfG, 2 BvR 987/10, § 124.

²⁵⁹ M. Dawson and F. de Witte, above n. 203, 826.

²⁶⁰ Article 121 (2) TFEU.

²⁶¹ 'Europe 2020', above n. 200, 29.

²⁶² D. Chalmers, above n. 205, 687-690.

²⁶³ Article 13 TSCG.

²⁶⁴ See, e.g., article 2-ab of regulation 1466/97 as amended by regulation 1175/11.

²⁶⁵ C. Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' (2014) 20 *European Law Journal*, 164.

²⁶⁶ See, e.g., article 7 (3) of regulation 473/13 or article 3 (8) of regulation 472/13.

²⁶⁷ There is of course the option of a complete political rethinking of the normative claims of supranational law, but at the moment it seems rather unrealistic. On this see A. Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 *European Law Journal*, 162-163.

management,²⁶⁸ although clear symptoms of hostility and antagonism against the Union and national political elites have emerged too.²⁶⁹ Compared with the previous evolutionary phase, however, the EU institutional setting is less amenable to resistances. To counter the corrosion of the constitutional subject, unilateral invocations of national constitutional identity inspired by an ethic of constitutional resistance have become more common. The social and democratic claims underlying the constitutional subject are increasingly voiced²⁷⁰ in order to erect barricades against technocratic encroachment.²⁷¹ Outsiders of European integration have tried to enlist in this strategy also national constitutional courts,²⁷² even though these attempts have so far produced only limited corrections to the predominant course of action.²⁷³ Thus, as supranational law proceeds almost unhindered towards consolidating its predominance, the chances of re-establishing a more balanced relationship between political citizenship and economic subjectivity appear on the decline.

Conclusion

The proposed excursus on the subjectification of the citizen in European public law contradicts conventional understandings portraying the evolution of EU citizenship as a progressive narrative.²⁷⁴ Changes in the relationships between supranational law and constitutional democracy have generated a trajectory in which the constitutional subject, from being predominant on economic subjectivity, has become subservient to it. It is difficult to predict whether and how this trend will be reversed. Perhaps, we should start to realise that the constitutional subject is the product of particular historical circumstances and an institutional culture which in the current social, economic and political situation are difficult to replicate.

The twilight of the constitutional subject might be the price to be paid to complete the transition from the social state to advanced liberalism. This outcome will be achieved when supranational law and constitutional democracy will align completely their governmental strategies and resolve the ambiguities and competition existing between economic and constitutional subjectivity. It is clear that, at the end of this journey, we should end up with a single and unequivocal notion of citizenship conforming to the advanced liberalism paradigm. What is less clear, however, is whether at that point European public law will still be able to provide the institutional resources to counter the biases and potential for exclusion of the dominant subjectivity.

²⁶⁸ *Ibidem*, 160.

²⁶⁹ For the view that populism and technocracy have become the dominant trends in contemporary European political life see C. J. Bickerton, above n. 14, 182-183.

²⁷⁰ A. J. Menéndez, above n. 26, 933.

²⁷¹ W. Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas' (2014) 21 *Constellations*, 219.

²⁷² J. Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 *International Journal of Constitutional Law*, 539 and 543, arguing that by opposing the products of EU economic governance national constitutional courts could unleash the existing potential for a European constitutional democracy.

²⁷³ M. Dani, above n. 243, 131-137.

²⁷⁴ See, for instance, W. Maas, above n. 31, 818 and D. Sarmiento, 'The EU's Constitutional Core', in A. Saiz Arnaiz, C. Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia, 2013), 179-183.

