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European Law from the Perspective of Societal Constitutionalism

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Abstract

This paper proposes that societal constitutionalism, as elaborated by Gunther Teubner, provides a potential legal approach to understand the structure of the EU, one that can provide valuable insights into how to deal with some of the problems generating its identity crisis. The theory of societal constitutionalism provides a perspective of the EU as a flexible, malleable organization, able to maintain a certain coherence while remaining open for adaptation to different circumstances. This structure, combining flexibility with coherence, could serve as a guideline in rethinking or reforming an EU that can overcome/survive the current crisis. The paper is structured in six parts, each of them examining an issue of EU law, proposing how it would be examined in the light of Teubner's theory of societal constitutionalism. This analysis intends to reveal the EU legal *persona* that emerges from the viewpoint of social systems theory, in the context of examples that have been discussed in the scholarly legal literature on the EU crisis.

Keywords

European Union, Transnational legal theory, Societal constitutionalism, Social systems theory, Inter-systemic conflicts.

Pablo Marcello Baquero
Max Weber Fellow, 2018-2019
Ph.D. in Law (CAPES-Cambridge Scholarship, University of Cambridge). LL.M. (Harvard Law School).

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The close study of the history of political disintegration reveals that
the art of survival is an art of constant improvisation.
Flexibility – not rigidity – is what may yet save Europe. [1]

Introduction

Ranging from the alarmist concerns of disintegration[2] to the more restrained calls for reconstructive projects[3] or for particular reforms[4], there has been a growing number of displays in the public debate indicating that the European Union (henceforth, EU) is in crisis. While no consensus prevails on the roots of this crisis, there are a number of recurrently designated culprits: the EU legitimacy deficit[5], the migratory crisis[6], the policies of economic austerity[7], and the eastward enlargement of the EU[8] are often mentioned as crucial factors, all of them contributing to the rise of populist governments in different European countries.

At the same time, some of the main elements that used to cement the union have become less compelling for many Europeans: the idea that integration prevents the recurrence of war in Europe seems to have lost appeal for younger generations that have not lived through war.[9] Similarly, the past benefits of economic integration seem to have been forgotten in the backdrop of measures of economic austerity[10] and growing economic inequality.[11] At the same time, the need for geopolitical protection from Russia has become less imminent after the fall of the Berlin Wall. While Brexit has not precipitated a *domino effect*, the integrity of the EU seems more vulnerable than ever, leading to comparisons of current times with the Weimar Republic or the period immediately preceding the fall of the Habsburg empire[12] – both examples of eras when liberal values (such as ethnic and cultural pluralism) had been upheld but abruptly ended in the hands of reactionary movements. There is a feeling of *malaise*, a concern that liberal

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[1] IVAN KRASTEV, AFTER EUROPE 110 (2017).

[2] *Id.* at 108.

[3] Christian Joerges, *Integration through law and the crisis of law in Europe's emergency*, *in* THE END OF THE EUROCRATS' DREAM: ADJUSTING TO EUROPEAN DIVERSITY 299, 324–325 (2016).

[4] Such as restricting the role of the European Court of Justice by restraining the types of matters that can be deemed constitutional in the founding treaties of the EU, see Dieter Grimm, *Europe's legitimacy problem and the courts*, *in* THE END OF THE EUROCRATS' DREAM: ADJUSTING TO EUROPEAN DIVERSITY 241, 262–263 (Damian Chalmers, Markus Jachtenfuchs, & Christian Joerges eds., 2016).

[5] Either input legitimacy (democratic participation in decision-making) or output legitimacy (the potential beneficial outcomes of the integration project), see Joseph H. H. Weiler, *United in Fear – The Loss of Heimat and the Crises of Europe*, *in* LEGITIMACY ISSUES OF THE EUROPEAN UNION IN THE FACE OF CRISIS 359, 364 et seq (Lina Papadopoulou, Ingolf Pernice, & Joseph H. H. Weiler eds., 2017).

[6] KRASTEV, *supra* note 2 at 14–15.

[7] Reconfiguring notions of sovereignty, citizenship and parliament-executive relations in the EU, see Damian Chalmers, *Crisis reconfiguration of the European constitutional state*, *in* THE END OF THE EUROCRATS' DREAM: ADJUSTING TO EUROPEAN DIVERSITY 266, 266–267 (Damian Damian Chalmers, Markus Jachtenfuchs, & Christian Joerges eds., 2016).

[8] JÜRGEN HABERMAS, THE DIVIDED WEST 69 (2004); claiming that the lessons of post-communist countries have to be taken seriously by Europe, see Jan Komárek, *Waiting for the existential revolution in Europe*, 12 INT. J. CONST. LAW 190 (2014).

[9] JULIO BAQUERO CRUZ, WHAT'S LEFT OF THE LAW OF INTEGRATION?: DECAY AND RESISTANCE IN EUROPEAN UNION LAW - OXFORD SCHOLARSHIP 9–10 (2018).

[10] Chalmers, *supra* note 8 at 269 et seq.

[11] While inequality in Europe is much lower than in the US, it has been consistently growing since the 1980's, according to empirical data indicated by Thomas Piketty, INEQUALITY IN EUROPE – AND WHAT THE EU COULD DO ABOUT IT (2015), http://piketty.pse.ens.fr/files/Piketty2015EUSA.pdf (last visited May 10, 2019).

[12] *Id.* at 2.

democratic institutions and structures, apparently functioning properly, might suddenly disappear or be irreversibly fractured overnight.

Different proposals have been advanced to address this crisis, suggesting particular ways to solve the problems that are causing the EU crisis. However, this paper claims that a fragmented approach will not suffice. Rather, it becomes crucial to rethink the *persona* of the European integration project, to conceive an institutional and legal structure that could deal with these distinct problematic issues and give meaning to an integration project that might survive or move forward. *Persona* is the psychoanalytic term to describe how the individual constructs its own image to present it to the outer world. According to Carl Jung, "fundamentally the persona is nothing real: it is a compromise between individual and society as to what a man should appear to be".[13] "The term persona [...] originally meant the mask once worn by actors to indicate the role they played".[14] There are different *persona* that could potentially be displayed by the European Union.

This working paper proposes that societal constitutionalism, as proposed by Teubner, provides a potential legal *persona* or mask to understand the EU, one that can provide many valuable insights into how to deal with some of the problems generating the EU crisis and further refine some proposals circulating in the public debate about the EU crisis. As further developed throughout this paper, social systems theory provides a perspective of the EU as a flexible, malleable organization, able to maintain a certain coherence while remaining open for adaptation to different circumstances. This structure, combining flexibility with coherence, could serve as a guideline in rethinking or reforming an EU that can overcome/survive the current crisis. The paper elaborates mainly on Teubner's societal constitutionalism theory as presented in his book entitled "Constitutional Fragments".[15] Even though the book mentions the EU in passing, it does not explore in depth how many of the claims of societal constitutionalism apply in the EU context. Such is the objective of this paper.[16]

The main thesis of societal constitutionalism, as discussed in Teubner's book, is that many areas in global society nowadays are regulated by "constitutional fragments", specific subsystems or legal regimes created not only by the state, but also by sectors of the society itself and molded to a specific context.[17] The complexity of the world today requires not only the existence of a political constitution to govern society, but of different constitutions, applicable in different domains, and generated by society itself. Teubner acknowledges that, in history, society has created subsystems independent from the state – which were, to a certain extent, contained in the nation state or limited by it.[18] But with the intensification of globalization, different kinds of problems arose that could no longer be dealt with in the national context – examples involve the violations of human rights by multinational corporations, violations to freedom of expression on the internet, data and privacy protection. As a response to that, different subsystems globalized.[19] Not only were they independent from the state, but they became transnational. There are innumerable examples of these global constitutional fragments.[20] Among them,

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[13] CARL JUNG, TWO ESSAYS ON ANALYTICAL PSYCHOLOGY [THE COLLECTED WORKS OF C. G. JUNG VOLUME 7] 158 (Pantheon Books; 2nd edition, 1966).

[14] Id.

[15] GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS : SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012).

[16] The book was published in 2012, but it represents the culmination of a number of different articles Teubner published throughout the years on societal constitutionalism and constitutional fragments. For instance, Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE 3 (2004); Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, *in* PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 71 (2004); Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World-Society*, *in* GLOBAL LAW WITHOUT A STATE 3 (1996).

[17] TEUBNER, *supra* note 22 at 1–2.

[18] *Id.* at 15 et seq.

[19] *Id.* at 42 et seq.

[20] See chapter 3 in *Id.* at 42 et seq.

are some of the legal regimes created by international treaties that have, according to Teubner, become constitutional regimes to regulate a certain matter, independent from the initial agreement between the parties.[21] This is the example of the rules of the regime of international trade created by the World Trade Organization, and, for the purposes of this paper, the EU legal order. Besides being transnational, many rules applied by these regimes result from an extensive or constitutional interpretation of their founding treaties. In other words, these regimes create rules themselves; that is why Teubner uses the term "auto-poietic law", or self-created law.[22] In other words, EU law can be understood as a social system under Teubner's vision.

This working paper is structured in six parts, each of them examining an issue of EU law, proposing how it would be examined in the light of Teubner's theory of societal constitutionalism. This analysis intends to reveal the EU legal *persona* that emerges from the viewpoint of social systems theory, in the context of examples that have been discussed in the scholarly legal literature on the EU crisis. In the first part, it argues that, according to social systems theory, the EU legal order should be conceived as a postclassical legal order, formed by a plurality of subsystems, not only by the EU member states and the EU legal order, but also by other institutions such as the international standard-setting organizations of the EU and the European Central Bank, among other potentially non-state entities. Second, it claims that, under Teubner's perspective, the EU legal order would likely be considered a constitutional subject, with legitimacy to create its own communicative potential, its own rules and principles. The legitimacy of the EU would derive from its constitutional status. The achievement of a constitutional status, however, depends on the fulfillment of certain conditions that are examined. Third, it claims, based on Teubner's perspective, that any changes or limitations imposed on the different subsystems forming EU law follow a specific logic, where effective limitations depend on the internal change of the system and cannot be imposed solely through external regulation or intervention. Even though environmental external pressures may induce changes in EU legal subsystems, the way these changes will be operationalized and become effective will depend on how the legal subsystem internalizes them under its own rationality. In other words, EU law should be better understood as a normatively closed but cognitively opened system. Fourth, following Teubner's theory, the paper states that more democracy can be promoted in the European Union by guaranteeing the right for divergence of the different actors in EU law and expanding the sites for divergence to be voiced (for instance, by actors such as constitutional courts, national parliaments, sectors of the civil society, Ombudsman, etc) and multiplying inclusive decision-making procedures in different subsystems. Fifth, it advances that the divergence between the autonomous EU subsystems should be (at least regarding some topics, not in relation to all) solved through a dialogic conflicts of law approach, instead of relying on the supremacy of EU law. Sixth, a postclassical approach regarding EU law should not disregard the importance of the classical legal order.

1. The EU legal persona as a postclassical legal order

The first argument of this paper is that the EU legal persona, under Teubner's perspective, would be considered a postclassical legal order, with no legal unity, but formed by a plurality of legal subsystems. One way to explain this argument is to contrast what would be Teubner's perspective on the EU legal persona with Baquero Cruz's perspective on the EU institutional architecture, as presented in his book "What's left of the law of integration?", which could be labeled as a positivistic perspective on the law of integration.[23]

Baquero Cruz, in his book, defends and justifies the current legal structure of the European Union. For him, this structure can be symbolized by a multi-level mobile, formed by different actors, institutions, rules, procedures, values, which are in constant motion and where the movements of one

[21] *Id.* at 49–50.

[22] Gunther Teubner, *Introduction to Autopoietic Law*, *in* AUTOPOIETIC LAW - A NEW APPROACH TO LAW AND SOCIETY 1, 3 (1987).

[23] BAQUERO CRUZ, *supra* note 11.

element influences the other.[24] For him, the stability of this mobile depends, to a great extent, on the existence of an EU law with supremacy over the law of the member states and on a treaty with a rigid revision mechanism. Through different procedures, such as preliminary rulings[25], EU law creates uniformity among the laws of the different member states and reinforces the law of the Union. This is a conception of a centralizing super-state that gives stability and uniformity to the European Union overall. At the same time, it is important to acknowledge, this is not a classical formalistic, rigid perspective, as there are several instances where there is nuance. For instance, Baquero Cruz recognizes the possibility of "institutional disobedience" by member states of the EU rules in extreme cases[26] and also claims that the institutional structure of the EU should only govern the structural issues of the Union. Nonetheless, still the foundation is the idea of supremacy of EU law over the laws of the member states.

Social systems would give a very different perspective to the EU structure. Global society, the EU included, would be governed by a number of different legal subsystems, many of them not created by the state, independent of each other, with their own logic and rationality.[27] In the EU, these different subsystems would involve both EU Law and the laws of the different member states, each as a different subsystem; but also other institutions with powers to make significant decisions, such as national regulatory agencies of the different states of the EU, or the European Central Bank, for instance. But these subsystems can also comprise further "networks": according to Karl-Heinz Ladeur: "Below the level of intergovernmental institutions (such as the European Council) and supranational components, a dense, multi-level 'network of networks' that consists of state officials, experts, representatives of industry, interest groups, etc., is already emerging".[28] At the same time that these subsystems are independent, they undergo pressures and constraints from their external environment and from each other that might force them to change internally, based on their own logic.[29] In this picture, there is no supremacy, no stability provided by a supranational state; but different regimes, global, regional and national, independent, but mutually influencing each other. Furthermore, since many of these systems are not legal in the strict sense (they involve informal groups, political actors, private entities, etc), this indicates that there is an interaction between the legal and non-legal in the governance of the EU.

When we compare these two different *masks* or *persona* of the EU, they evoke the distinction between a classical and a postclassical order, as proposed in the article by Mathias Reimann.[30] On the one hand, the classical order maintains the concept of a coherent national legal order, with systematic principles and gapless, with disciplinary boundaries and a clear demarcation of what is law and what is not, establishing authoritative rules that are supposed to be followed and that are envisioned as a tool for decision making.[31] On the other hand, the postclassical order proposes that, in the current world, such coherence is no longer present. Instead of the prevalence of a unitary national order, a plurality of legal orders/rules are relevant for a case, there is no clear systematic structure or demarcation of legal topics, but an interaction between them, as well as between different disciplines, with law being potentially considered as an instrument for implementing certain policy objectives and being analyzed in practice instead of under theoretical lenses (*law-in-action*).[32]

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[24] *Id.* at 2.

[25] See chapter 4 of *Id.* at 53 et seq.

[26] *Id.* at 49 et seq.

[27] Elaborating on the different subsystems existing globally nowadays, see TEUBNER, *supra* note 22 at 43 et seq.

[28] Karl-Heinz Ladeur, *European Law as Transnational Law - Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate!*, 10 GER. LAW J. 1357, 1363.

[29] TEUBNER, *supra* note 22 at 84.

[30] Reimann, *supra* note 21.

[31] *Id.* at 6–9.

[32] *Id.* at 9–15.

Teubner's perspective applied in the context of the European Union would be close to that of a post-classical order. It presents no national uniformity or supra-national uniformity of the EU, but legal pluralism, with different legal systems potentially ruling over a particular matter; the legal categories are not clearly demarcated, but fuzzy; it would not be entirely clear what constitutes law and what not, as sometimes the standards established by international organisations might be decisive in ruling over certain matters. For Teubner, however, the law would not be seen as instrumental for certain political purposes, but as an autonomous system, with connections to other systems.[33] Still, his overall perspective has a post-classical character.

Baquero Cruz's perspective of the law of integration, in contrast, seeks to maintain the concept of EU law as a coherent order or as a classical order (but with some nuances). More specifically, the concept of EU law presented by him reminds us of the concept of neo-formalism evoked by Duncan Kennedy, in his article on the "Three Globalizations of Law". For Kennedy, neo-formalism seeks to re-enact the method of induction/deduction that prevailed in classical legal thought, but in a modified form.[34] Neo-formalism proposes that decisions should be made departing from the interpretation of rights; however, unlike rights in the period of classical legal thought (i.e. individual rights), neo-formalism normally deals with identity-based rights (such as race, gender, sexual orientation and religion) or as rights self-defined by efficiency theory. In the case of the EU, the interpretation of the Treaty of the European Union is based on the need to safeguard the four economic freedoms in the EU. Based on the interpretation of these economic rights, Grimm claims that the ECJ is undertaking an extensive form of interpretation that would be overreaching its natural jurisdiction and that should be contained.[35] This extensive interpretation of the EU Treaties, along with different mechanisms – such as preliminary rulings of the ECJ – , are being employed to reconcile the complexities existent in EU law to maintain a perspective of order or coherence in the EU legal order.

In contrast, for Teubner, there is no way back to a coherent order, especially in the intensifying context of globalization and transnational relations. The European Union would be an example of such a transnational legal order which defies coherence. According to him, there are two mainstream views seeking to maintain coherence in this transnational world.[36] The first seeks to go back to the nation state: it rejects the legitimacy of such a transnational legal order, and seeks to revert back to an order formed by different member states.[37] This would be the position, in the EU, of the Eurosceptics who seek the demise of the Union and to have, once more, a Europe where each country is sovereign and makes its own decisions. The second view is that of those that understand that globalization has changed the dynamics of the world and admit the inevitability of cooperation between countries to solve many of the contemporary emerging problems. Their proposal is to create a "global constitution" that could rule society overall.[38] In the context of the EU, that would be perhaps the position of those who sought to create a European Constitution, or a European Civil Code that could harmonize the law in all countries in the Union, proposing similar values and principles. Both were failed attempts, indicating that there is no way to impose a single legal formula upon all countries of the EU – that pluralism and divergences in each country have to be respected, at least to a certain extent.

Teubner proposes a third path – an alternative both to globalism and to the classical view of the sovereign nation-state: the coexistence of different independent subsystems with connections between them.

As mentioned, this is not a perspective of supremacy of the EU law over the laws of the member states. For Teubner, there is no hierarchy between the EU legal order and the order of the member states, but a heterarchy, where one unit does not have dominance over the others, but there is a process of

[33] Teubner, *supra* note 36 at 2.

[34] Kennedy, *supra* note 24 at 63.

[35] Grimm, *supra* note 5 at 262.

[36] TEUBNER, *supra* note 22 at 2–3.

[37] *Id.* at 2.

[38] *Id.* at 2–3.

coordination, of dialogue.[39] There is a structure of multi-level governance in the EU, similar to a network.[40] The center of the network is the European Union legal order, but that does not mean that this law is superior to the law of the member states or should necessarily prevail over them.[41] The different parts or nodes of the network have the freedom to make decisions for themselves, in a decentralized manner, in regard to many matters. But the centre of the network, the EU legal order, has to incorporate in itself the norms of the other nodes of subsystems and of the overall network. It is, therefore, a narrative of heterarchy, instead of the hierarchical view proposed by Baquero Cruz.

2. The EU as a constitutional subject, legitimate to create its own rules

The second argument is that the EU is a constitutional subject and, thus, a regime that draws its legitimacy from its own constitutional norms. Teubner claims that the nature of globalization creates a tension between the self-foundation of a global social system and its political legal constitutionalization.[42] According to Teubner, in the context of the nation state, the creation of a new social system would be legitimized through the underlying political constitution. Within national borders, there is a triangular constellation: the subsystem is created autonomously in society, the political constitution legitimizes the subsystem and the law stabilizes this relationship.[43] But such dynamics are not to be found at the global level: there is no global constitution that could serve to legitimize a global subsystem. In the case of the EU, there is no European Constitution that could legitimize the creation of a European legal order. Under these circumstances, it is questionable what gives legitimacy to an independent legal order, such as the EU, which was created without the traditional elements of a political constitution.[44]

Different concepts of legitimacy have been proposed in the context of the literature on EU law. It is worth recalling some of these more prominent concepts before examining Teubner's concept of legitimacy. First, Weiler draws a distinction between two kinds of legitimacy: input legitimacy (participation of citizens and member states in the decision making of the EU) and output legitimacy (the results and successes achieved by the integration project, which would garner support from the citizens, even when they are lacking participation in the decision-making processes).[45] For Weiler, the EU is currently in deficit of both kinds of legitimacy: its institutions do not allow for broad participation of the people in EU matters and the financial crisis seems to have created discontents with the current *status quo*. Second, Burgess, in his article "Culture and the Rationality of Law from Weimar to Maastricht", evoking Carl Schmitt, proposes a distinction between legality and legitimacy.[46] Legitimacy, historically, used to be connected with the sense of a collective identity of the people (*Volk*) in the constitutional national state. With the rise of the administrative state, this link has been severed, with the displacement of legitimacy by legality – the compliance with legal rules and procedures. In a strict sense of legality, the current structure of the EU could be justified; but it is open to dispute whether there are broadly collective shared values and culture in the EU to legitimize it in this sense (for instance, the idea that the union prevents the recurrence of war in Europe). The development of a common

[39] *Id.* at 158–159.

[40] *Id.* at 160.

[41] *Id.* at 160.

[42] *Id.* at 43.

[43] *Id.* at 37.

[44] Such as demos, a dialectic between pouvoir constitué/pouvoir constituent, a democratic consensus of the stakeholders, a collective founding myth *Id.* at 59 et seq.

[45] Weiler, *supra* note 6 at 364 et seq.

[46] J. Peter Burgess, *Culture and the rationality of law from Weimar to Maastricht*, *in* DARKER LEGACIES OF LAW IN EUROPE - THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 144–166, 156 (Navraj Singh Ghaleigh & Christian Joerges eds., 2003).

education, culture and values could be, according to Böckenförde, a way to create a legitimate integration in the EU, one that does not follow an inauthentic path (promoting political integration indirectly, through economic integration).[47] Third, Baquero Cruz seeks to place the legitimacy of the European Union in the founding treaty concluded between its six founding members.[48] For Cruz, the context in which the founding treaty was concluded implied that the parties wanted the EU to become an autonomous legal order (despite the lack of express terms in that sense), which could be developed independently from subsequent agreement between the parties, and establish a closer and more solid union. The crucial context was that of the end of the Second World War, where the members understood the importance of establishing a legal order that could prevent the horrors of wartime being repeated in the future, by fomenting cooperation and interdependence between the European countries. The signing of the founding treaty in this context would serve as a legitimating basis for the EU. Fourth, Neil Walker proposes the holistic concept of polity legitimacy, that is, the "fundamental acceptance of the entity in question as a legitimate political community", with the authority to promote collective decision making of the essential matters for the polity.[49] Walker further claims that this polity must inspire a sense of "social identity" or "we feeling" that ensures obedience to the collective decisions undertaken under the aegis of the entity.[50] Walker's concept of polity legitimation, in that sense, includes the concepts of input and output legitimacy (which he calls performance and regime legitimacy) as elements that may contribute to build the overall polity legitimacy; however, these elements are neither sufficient nor necessary to build it.[51]

Teubner proposes a concept of legitimacy that, overall, departs from all the previous ones. For Teubner, there is a number of constitutional regimes that are emerging on the global scene, disconnected from a specific nation state, which draw their legitimacy from their own established norms. There is a self-referential process through which the legitimacy of the system is established.[52] For Teubner, these constitutional regimes would be well described as constitutional fragments: they are not total constitutions, supposed to cover all areas of life. Instead, they regulate specific aspects of a system/subsystem. As they are independent from the nation state, they become more dependent on the power and interests existing in their specific context, which generates more risks of corruption.[53] In the case of the EU, it seems that a process of self-constitutionalization is to be identified, which would have similarly occurred in the context of international organizations such as the WTO. This process of self-constitutionalization is concretized with the establishment of binding norms, even against the express will of the parties to their founding treaties. As a constitutional regime, therefore, the EU derives its legitimacy from its own norms.

The challenge, however, is to convincingly argue that the EU represents a constitutional regime – since it lacks the typical elements of a national political constitution described above.

Even though these subsystems or constitutional fragments are created outside a political process institutionalized by the state, Teubner argues that many of them present a constitutional character, according to the criteria of systems theory. To argue that a certain subsystem presents a constitutional character, he proposes that we must rethink substantially the meaning and the criteria to identify constitutionality. At the outset, Teubner rejects the notion that only the state could be a constitutional subject, able to create a constitutional order.[54] The crucial function of the constitutional subject is to be able to constitute a communicative potential with its own rules and procedures (*pouvoir constituant*),

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[47] Böckenförde, *supra* note 17 at 357, 363 et seq.

[48] BAQUERO CRUZ, *supra* note 11 at 20 et seq.

[49] Neil Walker, *Europe's constitutional momentum and the search for polity legitimacy*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 211, 212 (2005).

[50] Id.

[51] Neil Walker, *Constitutionalising Enlargement, Enlarging Constitutionalism*, 9 EUR LAW J 365, 369 (2003).

[52] TEUBNER, *supra* note 22 at 65.

[53] *Id.* at 54.

[54] *Id.* at 59 et seq.

with its own rationality, and with its own collective identity.[55] The collective identity involves a self-description, a narrative about the subsystem. Under Teubner's criteria, the European Union could most likely be considered a constitutional subject. Using the arguments raised by Baquero Cruz, along with Weiler, the narrative of collective identity could be the union of the European peoples after WW2, uniting and establishing an integration process to avoid the repetition of war. The EU also unleashes a special communicative power with its own principles and rules, specific because it cannot be unleashed by the member states alone.

Teubner further questions the wisdom that the rules created by these subsystems represent only regulation and juridification, but do not involve substantial constitutional matter, which would require a political process of decision making and the involvement of public opinion.[56] He proposes that a material constitution is one "which establishes a distinct legal authority which for its part structures a societal process and is legitimized by it".[57] Teubner proposes that four criteria should be fulfilled for a regime to be considered constitutional.

First, he proposes that one of the criteria to identify a sectorial constitution would be that it should have rules to differentiate itself from other systems, constitutive norms.[58] These norms can serve both to expand the reach of the societal system or to limit it. In the case of the EU, the ECJ cases *Van Gend & Loos* and *Costa v. Eneel* have found the EU as an autonomous legal order, independent from the member states (although with interactions with them).[59] This creation has permitted the expansion of the EU as a legal subsystem. At the same time, the legal subsystem must also be able to limit itself.

Second, the transnational regime should create different arenas of constitutionalization: an organized and a spontaneous sphere, and a regulatory sphere.[60] These are further discussed in the fourth argument.

Third, they should establish a constitutional process, developing a close connection to their context, in the same way that a national constitution must become close to the nomic community of the member states.[61]

Fourth, they should provide constitutional structures, similar to the superiority of constitutional rules and the judicial review of ordinary law.[62] Additionally, Teubner mentions the requirement of hybridity of the constitutional structures: there is an ongoing process of mutual influence between different systems governed by a constitution.[63] For instance, if one considers how the EU law and the economic system of the EU interact, one is constantly re-defining the other.[64] The economic system might require that certain legal rules be created; these legal rules created, in turn, require accommodation by the economic system, in a continuous, dynamic process.

3. The logics of change in EU subsystems – true change can only come from within

The third argument is that EU law, as other (sub-)systems, has a certain logic of change, where effective modifications must be operationalized inside each system. A direct external imposition or intervention over the EU would likely not be effective. Even though environmental external pressures may induce changes in legal subsystems, the way these changes will be operationalized will depend on how the legal

[55] *Id.* at 62, 66 et seq.

[56] *Id.* at 73–75.

[57] *Id.* at 74.

[58] *Id.* at 75 et seq.

[59] Grimm, *supra* note 5 at 242–243.

[60] TEUBNER, *supra* note 22 at 88 et seq.

[61] For a further elaboration, see *Id.* at 103 et seq.

[62] *Id.* at 110.

[63] *Id.* at 111.

[64] *Id.* at 111 et seq.

subsystem internalizes them under its own rationality.[65] "The Beelzebub must cast out the devil", in the words of Teubner, but prompted to do so through external pressure.[66] A particular situation (or a "constitutional moment") when a system is forced to change (lest it is destroyed) is when it grows excessively and must then self-contain.[67] It is questionable whether this is the situation that the EU currently faces.

According to Grimm, the main driver of European Integration has been the ECJ.[68] By promoting a constitutional or extensive form of interpretation of EU treaties – different from the classical interpretation of treaties under Public International Law –, the Court has been overreaching its original matters of concern.[69] With the justification of safeguarding the four economic freedoms in the EU, it has examined several issues originally not under its scope of jurisdiction. European law has, thus, overgrown. There is a general tendency for a system to overgrow, according to Teubner. Especially in the era of globalization, this phenomenon can be clearly recognized, with the emergence of transnational regimes that cannot be contained by the nation-state.[70] This globalism is often associated with the Washington Consensus and the aim to remove any obstacles to economic liberalization and deregulation at the transnational level. For Teubner, this process of overgrowth has reached its peak. To use Karl Polanyi's expression, the "band will snap".[71] There is a need, at this moment, to create a limitation to the different systems in society. It is arguable that the EU is also in need of such limitations to its overgrowth – or, at least, that the path of integration through ECJ decisions has reached its limits.[72]

If one accepts that EU law needs to be limited (a controversial claim, as there are authors recently claiming that the ECJ is already adopting an approach of granting more discretion to member states), then the issue is how to limit a legal subsystem such as EU law, which is autonomous and is not subject to a higher power. An answer to this question passes through the understanding that a (legal sub-)system is normatively closed but cognitively opened.

As Teubner points out, the law is a closed and self-referential system, with its own logic and rationality and with its own self-created elements. In a court, what decides a legal case is the legal argument. One might even mention concepts and arguments from economics, sociology, psychology, but unless those arguments from other areas are shown to connect with the legal arguments in dispute, they will not be decisive. Within the legal system, there is a number of circular processes and relationships going on that keep on changing and modifying the elements that compose the system, from within.[73] Under social systems theory, the basic element of the law is not the legal norm, nor the actors or organizations that compose it. The basic element is the legal act, the main communicative event that can change the legal structures.[74] The law forms a system of communication. This description of the law as a closed system could give the impression that the law, for social systems theory, is about legal formalism, something closed to social reality and to the transformations occurring in the world.

However, social systems theory proposes that there is a normative closure of the legal system, and, at the same time, a cognitive openness to the outer world and to other systems. That is, the law is composed of certain elements and creates its own components, under its own logic. The external environment creates constraints and thus pressure for the law to change. The law is not indifferent to these pressures, it perceives them, it cognizes them. But how the law is going to respond and to change is not imposed externally; there is a pressure, but the legal system itself, based on its own rationality and

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[65] *Id.* at 85.

[66] *Id.* at 87.

[67] *Id.* at 81.

[68] Grimm, *supra* note 5 at 241.

[69] *Id.* at 244.

[70] TEUBNER, *supra* note 22 at 78–79.

[71] Mentioned by *Id.* at 78.

[72] Grimm, *supra* note 5 at 241.

[73] Teubner, *supra* note 36 at 1.

[74] *Id.* at 2.

logic, will itself create the elements that respond to this change. Therefore, there is normative closure, but cognitive openness. New forms of economic organization, new morals in society, all of these exert an external pressure for the law to change; but it is the law that defines how it will respond to these pressures, through which legal concepts and through what legal rationality. Thus, the law will decide how to operationalize it.

In the context of the EU, perhaps one significant example of how this can be operationalized is given by Damien Chalmers in his article "Crisis reconfiguration of the European Constitutional state".[75] Basically, so the argument goes, some of the most basic legal concepts of the member states are being resettled and changed from inside their own legal systems, as the result of the enormous external economic pressure generated in the last financial crisis. Chalmers claims that EU public finance laws are changing or resettling the elementary legal notions of sovereignty, citizenship and parliament-executive relationships in the member states.[76] For instance, under the classical perspective, the nation state was sovereign to make its own decisions with no limitations. However, according to Chalmers, EU law is changing that. By introducing the concept of risk regulation in EU law (and consequently creating a number of normative instruments institutionalizing that), decisions about budget, deficit or other financial decisions of the member states should only be valid to the extent that they do not create risks to other member states or to future generations. As a consequence, in the words of Chalmers, the sovereign as a body politic is "permeable to the external environment with there being a duty on the legal system to recalibrate this body politic in response to external jolts."[77] The legal system has to constitutionalize these changes, based upon its own rationality and legal concepts, thanks to the enormous environmental pressure generated through the financial crisis. The legal system can constitutionalize these changes in different ways and, accordingly, different EU members have responded to this culture of risk in distinct manners. Germany, for instance, has established a constitutional amendment to its Basic Law to meet an even lower deficit target than the one required by EU law – creating a clear limitation to sovereignty.[78] Others have ignored the need for change, believing their strong fiscal position would distance themselves from any actual risk.[79] Still other countries, such as Portugal and France, established the deficit rules on non-constitutional legislation, seeking to obey the rules established while maintaining the idea that there is still sovereignty to make a divergent decision, since the rules have no constitutional status.[80] In other words, the environment creates enormous pressure for the legal systems of the EU member states to change, but each of them promotes changes themselves according to the specificities of their own legal system.

4. More democracy in EU subsystems by enhancing rights and arenas for divergence

The fourth argument is that the best way to promote more democracy in the EU is by guaranteeing the right for disparity of the different actors in EU law, assuring arenas where divergent voices can be heard (by actors such as constitutional courts, national parliaments, sectors of the civil society, etc) and multiplying the sites for decision making that can include the participation of these actors. This proposal responds to the concerns raised by Habermas that, more important than discussing whether there is a common European identity, it is to discuss how to generate a "process of shared political opinion and will-formation on European issues [that] can develop above the national level".[81]

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[75] Chalmers, *supra* note 8.

[76] *Id.* at 266–267.

[77] *Id.* at 279.

[78] *Id.* at 279–280.

[79] *Id.* at 279.

[80] *Id.* at 279.

[81] HABERMAS, *supra* note 9 at 81.

One of the potential arguments that could be raised against social systems theory, argues Teubner, is that the existence of normatively autonomous subsystems, not created by traditional political institutions, represents a de-politicization of society.[82] Teubner, however, distinguishes two meanings for politics.[83] First, the political in the sense of institutionalized politics. Second, the existence of a political sphere within other systems or subsystems. The example that Teubner provides is that of the decisions undertaken by a Central Bank that affect the life of citizens.[84] Central banks require autonomy from politics to be able to fulfill their mandate fully. This raises the issue whether there is a de-politicization of an important sphere of society. As David Kennedy rightly points out, there is a connection between constitutionalization and decentralization, with the possibility of the creation of more centers for decision making.[85] Teubner proposes that democracy could be promoted by incentivizing procedures oriented towards the social responsibility of decentralized collective actors.[86] Through these mechanisms, more *politique* can be inserted in these processes, even outside institutional politics, by involving more stakeholders in decision-making processes and in monitoring the activities of such institutions,

According to Teubner, a constitutional system must possess different arenas of constitutional action. Among those, it must possess an organized arena that organizes power and rules and a spontaneous area that has the potential to diverge and to create pressure for change.[87] For example, in the political arena, the state is the organized sphere, and the citizens, the spontaneous sphere. In the economic arena, the corporation is the organized sphere and the consumers the spontaneous one. The organized sphere has the power to promote change but has bias towards maintaining the *status quo*. The spontaneous sphere often has the willingness and the initiative to promote change in the system but lacks the power to do so. A constitutional system must establish the mechanisms that will guarantee that the spontaneous sphere will have the power to diverge and to push for change.

In the case of the EU, the organized sphere can be growingly associated with the rules established by the European Court of Justice – the main driver for European integration (according to Dieter Grimm)[88] – and with the decisions of the European Commission and European Council. Nowadays, the institutional sites for divergence with this organized sphere are minimal and often have no effectiveness. As Claire Kilpatrick's argues in her article, "On the Rule of Law and Economic Emergency", there are few European institutions that can be accessed to contest, for instance, bailout measures and loan conditionalities imposed upon EU member states that could potentially violate the rule of law.[89] Kilpatrick mentioned how legal claims concerning these measures, in the context of the ECJ, have been unsuccessful, often based on procedural grounds[90]. Similarly, attempts to require clarifications or information regarding such measures from the European Central Bank have been rejected by the institution, in the context of requests addressed to its Ombudsman.[91] More specifically, the European Central Bank refused to disclose "secret" letters sent to member states with whom it was negotiating loan agreements and conditionalities. The law could devise regulations or norms that impose upon the ECB an enforceable social responsibility to disclose information, or at least revise more closely under which circumstances confidentiality is acceptable, instead of granting the institution a wide discretion to deny access to information.

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[82] TEUBNER, *supra* note 22 at 114.

[83] *Id.* at 114–115.

[84] *Id.* at 119 et seq.

[85] Cited by *Id.* at 122.

[86] *Id.* at 122–123.

[87] *Id.* at 89, 92.

[88] Grimm, *supra* note 5 at 241.

[89] Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 OXF. J. LEG. STUD. 325, 347 et seq (2015).

[90] *Id.* at 348–350.

[91] *Id.* at 350–352.

In contrast to the approach followed by Kilpatrick, focusing on European institutions, Christian Joerges, in his article on "Integration through law and the crisis of law in Europe's emergency", gives prominence to the role of national institutions of the member states in this role of contestation.[92] First, national parliaments can seek to resist austerity measures. Joerges claims that, even with the loss of political autonomy by national parliaments, because of the memoranda signed under the European Stability Mechanism, they remain powerful institutions.[93] With the legitimacy given to them through national elections, they would remain powerful actors to negotiate and impose upon the technocrats from the EU cooperative reforms and engagement to solve problems. Second, constitutional courts could defend democratic principles and fundamental rights against the measures of economic emergency being imposed.[94] This does not mean that national courts could altogether discard the measures; but they could create room for political negotiation and true cooperation. Notably, the national courts could promote a defense of the European social model, reacting through the instrumentality of human and fundamental rights against the austerity measures.[95] If the constitutional courts of different states could contest certain measures at the same time, this could help to shape democratically the Union. They could try to create a *domino* effect by acting interactively and cooperatively, creating pressure for change in the policies at the level of the EU. This is what Joerges claims is the potential of interactive or cooperative adjudication.[96]

One of the lessons of Teubner's theory is that it is necessary to create and safeguard the existing arenas for contestation against the organized sphere of a legal system – and that includes thinking about how to expand the potential spheres of contestation in the EU and how to safeguard them.

5. Inter-systemic conflicts should be resolved based on a conflicts of law approach, not on EU primacy

As previously examined, a social systems *persona* of EU law rejects the notion of primacy of EU law in relation to the laws of the member states. Instead of seeing the EU as a hierarchical network, it sees it as a heterarchical network, where the EU legal order might be the center of the system but does not necessarily impose its decisions upon the other member states.[97] The EU legal order and the order of the different member states have a similar standing. The different subsystems are to be viewed as independent, self-referential, but all cognitively opened to each other.

How to decide the conflicts that might arise between member states (and between the member states with the EU legal order) if not through a primacy of EU law over the member states? Teubner rejects the creation of a global constitution (or, in this context, an European Constitution) and instead proposes a conflict of laws approach for deciding how the disputes between different subsystems should be developed. He particularly mentions an original conflicts of laws approach developed by Christian Joerges to deal with these conflicts.[98]

The approach proposed by Joerges has different features. First, the conflicting orders themselves would have a responsibility for reaching an agreement, not a superordinate authority.[99] Second, in the case of the EU, the EU legal order would be the center of the network – not responsible to make decisions for the member states, but to coordinate the activities of the network.[100] Third, each legal order would

[92] Joerges, *supra* note 4 at 325 et seq.

[93] *Id.* at 326–327.

[94] *Id.* at 326–327.

[95] *Id.* at 328 et seq.

[96] *Id.* at 330.

[97] TEUBNER, *supra* note 22 at 158 et seq.

[98] *Id.* at 158.

[99] *Id.* at 158.

[100] *Id.* at 160.

have its own decision-making processes, and decide autonomously. At the same time, however, the decisions of the decentralized centers would be limited by the transnational "ordre public" in Europe, which would be, to a great extent, formulated by the EU legal order.[101] Overall, Joerges' model proposes a form of dialogue between the conflicting members of the EU to resolve their dispute, rather than a formula of supremacy of EU law.

According to Baquero Cruz, the EU already represents a venue for solving these kinds of dispute, and would present a nuanced approach on how to do it. Yet, his constant reminder is that any solution, except in very narrow circumstances, should respect the primacy of EU law lest it endangers the integration project. For instance, he discusses the possibility of asymmetric integration between the EU members, where a group of Member States is allowed to move ahead with particular policy measures while other Member States do not participate in them.[102] According to him, this practice should only be acceptable if it is authorized in EU primary law (eg., the adhesion to the Schengen area) or if it fulfills certain legal requirements, in the case of a form of enhanced cooperation established in EU secondary law.[103] Baquero Cruz doubts that this practice would be sustainable in the long run. Similarly, he claims that the existence of certain international agreements between groups of EU member states, outside the framework of EU law, would be an attempt to circumvent the discipline of the law of integration.[104]

However, from the point of view of systems theory, these initiatives could be seen as attempts to reach a compromise, a consensus that might be impossible to reach within a rigid framework of EU law. They might represent avenues for conflicts to be solved outside of this rigid framework of EU law, to attain a solution that might be satisfying for the different members involved. What seems to lack in systems theory, however, is a more specific and clear proposal on how these conflicts could be managed.

6. The EU postclassical legal order can only be effective if supported by a classical order

There is a need to explore how the postclassical order should interact with the classical order.[105] In the context of postclassical order, it is common to speak of the rise of a "global law without a state" (Teubner), rules that are created outside classical political institutions of the state, by private parties and private institutions. In the European Union, the relevant examples are the decisions of national regulatory agencies with significant influence over different matters and the influence of different committees of experts in the context of EU institutions, for instance. However, one important theoretical criticism of this conception is that it neglects the importance of the state law (or the classical order) for the functioning of these private orderings. Robert Wai has developed this line of criticism in different articles.[106] He claims that the postclassical literature on global orderings has the drawback of presenting this phenomenon of the postclassical order – all these private transnational orderings – as self-sufficient. It fails to connect these private orderings with the state rules that give it a necessary support, or, in his words, the competing normative systems operate in the shadow of each other.[107] The regulations established by international standard-setting organisations, if not voluntarily enforced, need the backing of state courts and state law; the postclassical order does not operate without the support of the classical.

Teubner addresses this issue in his book on societal constitutionalism. For him, even though the classical order might "review" and support the decisions of the postclassical order, this does not alter the fact that there is the creation of a legal system outside state courts, by other actors, even though there

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[101] *Id.* at 161.

[102] BAQUERO CRUZ, *supra* note 11 at 179 et seq.

[103] *Id.* at 179.

[104] *Id.* at 184 et seq.

[105] Hans-W. Micklitz, *A European Advantage in Legal Scholarship?*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE , 309 (Rob van Gestel, Hans-W Micklitz, & Edward L. Rubin eds., 2017).

[106] Such as Robert Wai, *The Interlegality of Transnational Private Law*, 71 LAW CONTEMP. PROBL. 107 (2008); Robert Wai, *Private v Private - Transnational Private Law and Contestation in Global Economic Governance*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 34 (2014).

[107] Wai, *supra* note 117 at 116.

might be a judicial review by them, only in exceptional situations. Still, I believe that the argument that there is a further need to articulate the connections between the classical and the postclassical order stands.

Conclusion

This paper has defended the idea that social systems theory can provide insightful contributions on how the *legal* persona of the EU can be restructured to address some of the different elements that, arguably, generate the EU crisis. Social systems is particularly well-equipped to rethink the EU because of the flexible approach it proposes, which seems, in many ways, compatible with the postclassical character of law in current times and with the transnational nature of the Union.

This does not mean, however, that the adoption of insights from societal constitutionalism should result in abandoning completely the EU legal architecture. The view of social systems theory could be complemented with insights from Baquero Cruz's perspective of the EU as the law of integration. In that sense, the maintenance of EU primacy in the context of the integration project regarding crucial matters (as suggested by Baquero Cruz) would be compatible with a conflicts of law approach regarding other topics, even though Baquero Cruz's perspective is critical of constitutionalism in general. It is important that, to a certain extent, primacy should be maintained to guarantee the integrity of the Union. At the same time, however, it is suggested that the EU integration project should be focused more on fostering common cultural values and education and on enhancing security[108] – instead of acquiring an overbearing economic dominance over matters of the member states.

The paper concludes, thus, with a cautious note regarding the important insights provided by social systems theory, which still have to be developed in many aspects to become functional in the EU context and which should not undermine the potential practical need for EU primacy regarding some matters. In the important and necessary move beyond legal formalism, towards a postclassical order, one should beware not to create a hollowed-out legal scholarship in Europe, which is not able to generate structural change. Roberto Unger has claimed that, in many American elite law schools, this has been a negative effect of the postclassical move:

"[There is a] hollowing out of legal thought and legal education in precisely those parts of the world where doctrinal formalism has been most unequivocally repudiated. In the elite law schools in the US now (...), the typical topic of discussion in the classroom is what to do about the problems of society. Law becomes the pretext, the point of departure for a policy debate among the insiders. This discourse is for the most part a continuation of the discourse of the newspapers, by other means, and only at a marginally higher level. What shapes it, what directs it, what imposes limits on it, absolutely nothing, other than the desire of the insiders not to become outsiders (...)."[109]

He then claims that legal scholarship in the US seeks to fill this gap by looking into other areas: sociology, psychology, economics, among others. But the problem is that these disciplines do not fulfill the main task of the law. As Unger claims:

"The trouble is, what the social sciences have to offer is not what legal thought needs. Law is about the structure of society. As the German historian (Hegel) said, law is the institutionalized form of the life of a people. (...) The contemporary social sciences are totally bereft of any structural vision. They provide no account of how structure is created or how it could be remade. They supply a naturalized patina, a mendacious semblance of necessity, imposed upon the present arrangements. Not a practice of insight, but a surrender to superstition."[110]

Therefore, in taking advantage of this broadened vision of the law typical of the postclassical move, we should not forget that the law is about the structure of society and possibilities of remaking it

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[108] Böckenförde, *supra* note 17 at 365–366.

[109] Roberto Mangabeira Unger, THE NEXT REVOLUTION IN LEGAL EDUCATION (2011), https://www.youtube.com/watch?v=rbu6DJF9oVI.

[110] *Id.*

– and not only about making amends to the existing structure. For instance, in EU law, one interesting approach mentioned by Micklitz is the idea of European integration beyond law.[111] According to this perspective, human and fundamental rights could be invoked by the European Court of Justice to counter-balance the actions of powerful economic actors or to counter-balance, more generally, the logic of economic efficiency that is gaining ground in the EU, perhaps even measures of economic austerity imposed by the Union. In other words, human and fundamental rights could become an instrument to mitigate the detrimental effects of an economic system. While this is an important role for the law, the law should not be reduced to the function of mitigating or regulating the effects of a poor economic system. It should be about rethinking and reconstructing the system. In that effort towards reconstructing the EU structure, societal constitutionalism can contribute with many insights.

[111] Micklitz, *supra* note 116 at 296.