



iCourts

iCourts Working Paper Series, no. 232, 2021

The European Union as ‘Militant Democracy’?

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IMAGINE Paper No. 15

Conference EU Constitutional Imagination: Between Ideology and Utopia

iCourts – The Danish National Research Foundation’s
Centre of Excellence for International Courts

January 2021

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KEYWORDS: anti-totalitarian constitutionalism, back-sliding, constrained democracy, postcommunist constitutionalism, varieties of constitutionalism

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iCourts is funded by the Danish National Research Foundation Grant no. DNRF105.

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iCourts opened in March 2012. The centre is funded by a large grant from the Danish National Research Foundation (for the period 2012-18).

The European Union as 'Militant Democracy'?

Signe Rebling Larsen*

Abstract

In response to the rise of authoritarianism in Poland and Hungary, several prominent scholars have called upon the EU to intervene in order to protect its constitutional values. One of the strongest albeit controversial arguments in favour of an intervention is that the EU is a form of transnational 'militant democracy'. This chapter partly agrees with this assessment. The post-WWII European 'constitutional imagination' is shaped by the interwar collapse of the European legal and political order. This led to the development of a new form of post-fascist constitutionalism founded upon a 'fear of the people'. Within post-fascist constitutionalism, 'Europe' promises to save the European peoples from themselves. Nevertheless, this type of constitutionalism is not dominant in all the Member States. At least two other varieties of constitutionalism influence the EU Member States – 'evolutionary constitutionalism' and 'post-communist constitutionalism' – both of which have an ambiguous, yet intimate, relationship to the project of European integration.

Introduction

In response to the coronavirus outbreak in Europe, the prime minister of Hungary, Victor Orbán, declared a state of exception *without any time limitation*, raising the question of whether the European Union (EU) now has a dictatorship in its midst.¹ The recent state of exception, notwithstanding its extremity, is not an altogether new development but rather the culmination of the turn to authoritarianism that has characterised Hungary's (and Poland's) recent past. In the last

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¹ The literature on the relationship between the state of exception and dictatorship is vast. Important works are Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press 1948); Ernst Frankel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press 1941); Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle* (Polity Press 2014); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2010); Giorgio Agamben, *State of Exception* (University of Chicago Press 2005).

decade, both Hungary and Poland have undergone constitutional transformations², formal or informal³, to such an extent that the scholarly consensus is now that these regimes are no longer compatible with the ‘constitutional values’ of the EU that the Member States are presumed to share⁴ and that is the foundation of their mutual trust.⁵

The overwhelming response from legal and political academia alike has been to call for an intervention from the EU, in one form or another. The EU Treaties allow for the Union to sanction a Member State that is persistently breaching the constitutional values of the Union as defined by Article 2 of the Treaty on European Union (TEU). Most importantly, the recalcitrant Member State can have certain Treaty rights suspended, including its political representation in the Council.⁶ Moreover, many different approaches within the current ‘toolbox’ of the EU have been suggested ranging from social pressures and shaming⁷, recommendations via the Commission’s

² For an authoritative account of the constitutional transformation of Poland, see Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019). For an account of Hungary’s constitutional transformation, see Gábor Attila Tóth, *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Central European University Press 2012); Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, ‘Hungary’s Illiberal Turn: Disabling the Constitution’ (2012) 23 *Journal of Democracy* 138.

³ ‘Many changes which are part of democratic backsliding occur *without a formal change* of institutions and procedures, so they are invisible to a purely legal account’, see Wojciech Sadurski, ‘How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding’ (2018) 18 *Sydney Law School Research Paper* 1, 5, italics in original. See also Gábor Halmai, ‘The Making of “Illiberal Constitutionalism” with or without a New Constitution: The Case of Hungary and Poland’ in David Landau and Hanna Lerner (eds) (Edward Elgar Publishing 2019).

⁴ Following Article 2 of the Consolidated version of the Treaty on European Union [2016] OJ C202/13 (hereafter TEU), ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

⁵ As argued by the ECJ, ‘mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU’, see C-64/16 *Associação Sindical Dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, para 30. See also C-216/18 *PPU Minister For Justice And Equality* [2018] ECLI:EU:C:2018:586, para 35.

⁶ Article 7 TEU.

⁷ Ulrich Sedelmeier, ‘Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure’ (2016) 24 *Journal of European Public Policy* 337.

‘rule of law framework’⁸ and systematic infringement actions⁹, to the protection of fundamental rights by national courts acting in their capacity as European courts. Attempts have been made to tie the EU Covid-19 Recovery and Resilience Facility as well as the EU budget to rule of law conditionality, however, as of yet with no success.¹⁰

It is, however, by no means clear that the ‘tools’ currently available to the EU can deal effectively with the situation in Poland and Hungary. The Article 7 procedure is seen as ineffective for at least two reasons. First, because of the impossibly high threshold for the ‘sanctioning arm’ (unanimity minus the recalcitrant Member State).¹¹ Second, even if this obstacle could be overcome, withholding rights does not amount to an actual intervention that would remedy the situation; the EU might end up with a *de facto* authoritarian dependency rather than an authoritarian Member State. Neither has the Union as of yet been capable of sanctioning Poland and Hungary with any of the other ‘tools’ available to it. The limitations of using the infringement procedure is neatly illustrated by the fact that the ECJ could only deal with Orbán’s court packing as a matter of age discrimination.¹² The ineffectiveness of this approach is highlighted by the fact that the judgement did not reinstate the Hungarian judges. Proposals such as ‘reverse Solange’¹³ and other schemes that rely on Member State courts have the obvious weakness that the turn towards authoritarianism in Poland and Hungary has undermined the independence of the judiciary.

Several scholars are therefore calling for more drastic measures, some of them beyond the current framework, ranging from financial sanctions,¹⁴ such as withholding EU structural funds,

⁸ Communication from the European Commission to the Council and the Parliament, ‘A New EU Mechanism to Strengthen the Rule of Law’ (COM(2014) 158 final/2, 10 March 2014).

⁹ Kim Lane Scheppele, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

¹⁰ ‘COVID-19 Emergency Measures Must Comply with the Rule of Law’ (*European Economic and Social Committee*, 14 December 2020) <<https://www.eesc.europa.eu/en/news-media/news/covid-19-emergency-measures-must-comply-rule-law>> accessed 14 December 2020; ‘EU Budget Plan Lets Hungary, Poland off the Rule-of-Law Hook (for Now)’ (*POLITICO*, 9 December 2020) <<https://www.politico.eu/article/eu-budget-plan-lets-hungary-poland-off-the-rule-of-law-hook-for-now/>> accessed 14 December 2020.

¹¹ Articles 7(2) and 7(3) TEU.

¹² C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687.

¹³ Armin Von Bogdandy and others, ‘Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *Common Market Law Review* 489.

¹⁴ Gábor Halmai, ‘The Possibility and Desirability of Rule of Law Conditionality’ (2019) 11 *The Hague Journal on the Rule of Law* 171; R Daniel Kelemen and Kim Lane Scheppele, ‘How to Stop Funding Autocracy in the EU’ *Verfassungsblog* (10 September 2018).

to expulsion.¹⁵ Jan-Werner Müller has been one of the most vocal scholars in this debate, calling upon the EU to act as a constitutional guardian of liberal democracy, not merely for the Union but also for the Member States.¹⁶ Müller's argument, in a nutshell, is that one of the most important reasons for the Member States in creating as well as in joining the EU is to protect themselves against constitutional developments such as those in Hungary. The Union's *raison d'être* is to make sure that the experience of fascism and authoritarianism – the 'dark side' of democracy – does not repeat itself. The EU, as it were, is an additional layer of constitutional guarantees to those of the domestic constitutions of 'substantive democracy' and 'value order constitutionalism'.¹⁷ Following this argument, the Union has not merely a right but also a duty to intervene in the Member States to 'save them from themselves'.

Though widely discussed, Müller's argument regarding the post-WWII era as heralding a new chapter of 'constrained' or 'militant' democracy still needs to be fully incorporated into the constitutional scholarship on European integration. The project of European integration and post-WWII developments of a new form of 'value order' constitutionalism at the domestic level are often treated as two parallel endeavours rather than as inherently connected. This chapter suggests that these two projects are constitutive elements of a broader WWII constitutional project of 'post-fascist constitutionalism' (part I). As such, it lends credibility to Müller's analysis that the EU is part of the project of 'constrained democracy'.

Nevertheless, this chapter asks whether the tale of 'post-fascist constitutionalism' is a particularly *German* story; or, at least, whether it applies equally to all the Member States. The article suggests that together with 'post-fascist constitutionalism', the Member States of the EU are characterised by (at least) two additional 'varieties of constitutionalism': 'evolutionary constitutionalism' (part II) and 'post-communist constitutionalism' (part III). These varieties of constitutionalism are not characterised by a foundational 'fear of the people' or 'constrained

¹⁵ Jan-Werner Müller, 'Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order' (2013) 3 *Transatlantic Academy* 1, 23; Jan-Werner Müller, 'Protecting the Rule of Law (and Democracy!) In the EU: The Idea of a Copenhagen Commission' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 212.

¹⁶ Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141, 147; Jan-Werner Müller, 'The EU as a Militant Democracy, Or: Are There Limits to Constitutional Mutations Within EU Member States?' (2014) 165 *Revista de Estudios Políticos* 141. See also Ulrich Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania' (2014) 52 *Journal of Common Market Studies*.

¹⁷ For a discussion of the notion of the constitution as an order of values, see Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *International Journal of Constitutional Law* 922.

democracy'. For that reason, they do not look towards the EU as a guarantor of democracy at the domestic level. The argument of the EU as a 'transnational militant democracy'¹⁸ is therefore less convincing for the Member States that are not influenced by post-fascist constitutionalism.

I: The Reconstitution of Europe

With the end of WWII, a new form of constitutionalism was born. In contrast to the constitutional project of the republican revolutions that sought to harness the power of the people and create a stable system of checks and balances, the post-WWII constitutional project was founded on a fear of the people and concerned with permanently constraining or even destroying the potential for the exercise of *political* power. Alexander Somek has described it as a new 'stage' in the constitutional imagination, 'constitutionalism 2.0',¹⁹ and Christoph Möllers captures this with his catch-phrase 'We (are afraid of) the people'.²⁰ I suggest the label 'post-fascist constitutionalism' for this form of constitutionalism, but the prefixes 'anti-totalitarian' or even 'anti-revolutionary' would also be fitting. Jan-Werner Müller describes this project as 'militant democracy'²¹ or 'constrained democracy'.²²

This constitutional project was shaped by a specific interpretation of the origins of the interwar breakdown and WWII as the 'excess' of democracy, or what José Ortega y Gasset called 'hyperdemocracy'.²³ Within this constitutional project, the aim of the constitutional order is to make sure that the people does not commit 'democratic suicide' by electing an anti-constitutional party to power that will use the rules of constitutional democracy to introduce an anti-democratic constitutional order via 'unconstitutional constitutional amendments'.²⁴ Democracy has to be disciplined, the argument goes, otherwise its dark side, 'totalitarianism', will prevail, either in its

¹⁸ Ulrich Wagrandl, 'Transnational Militant Democracy' (2018) 7 *Global Constitutionalism* 143.

¹⁹ Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) ch 2.

²⁰ Christoph Möllers, "'We Are (Afraid of) the People': Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

²¹ With reference to the term coined by Karl Loewenstein's two-part article 'Militant Democracy and Fundamental Rights, I' (1937) 31 *The American Political Science Review* 417; 'Militant Democracy and Fundamental Rights, II' (1937) 31 *The American Political Science Review* 638.

²² Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press 2011).

²³ José Ortega y Gasset, *The Revolt of the Masses: Authorised Translation from the Spanish* (Norton & Company Inc 1932).

²⁴ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

left-wing or right-wing incarnation: communism or fascism. This merging of fascism and communism into a unitary political phenomenon is part of a broader movement of ‘anti-totalitarian constitutionalism’²⁵ that came to influence European as well as American post-WWII constitutionalism.²⁶

The aim of this constitutional project became not so much to stabilise political power, but to permanently constrain or even repress it. In contrast to revolutionary constitutionalism, in which every generation should have its own revolution, this constitutional project aims to eliminate what it sees as ‘extra-constitutional’ manifestations of power.²⁷ The German Basic Law took this a step further with the introduction of an ‘eternity clause’ that made some aspects of the constitution unamendable, importantly the core constitutional value of the new order that gives everything else its meaning: human dignity.²⁸ The constitution is understood as an order of values that have to be balanced against one another.²⁹ Democracy is merely one ‘value’ amongst others. Moreover, the political power of the people was ‘disciplined’ by empowering the constitutional court, by strengthening the judiciary vis-à-vis the executive and the legislature, and by banning ‘anti-constitutional’ political parties (mostly former fascist ruling parties or collaborating parties but also a few communist parties). Without constant vigilance, Dr. Jekyll (democracy) will turn into Mr. Hyde (fascism or communism).

This story is hardly new. It has been told, and told well, by constitutional scholars like Alexander Somek and Christoph Möllers.³⁰ However, the role of European integration in the emergence of this post-WWII constitutional project is often left out, or in Somek’s account, portrayed as a later ‘stage’ of ‘cosmopolitan constitutionalism’.³¹ What is sometimes ignored by constitutional scholars is that, from the very beginning, the post-WWII constitutional project was

²⁵ Richard Primus, ‘A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought’ (1996) 106 *The Yale Law Journal* 423.

²⁶ Les K Adler and Thomas G Paterson, ‘Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930’s–1950’s’ (1970) 75 *The American Historical Review* 1046.

²⁷ Michael Wilkinson and Alexander Somek have recently coined the term ‘unpopular sovereignty’ to describe this constitutional project, see Alexander Somek and Michael A Wilkinson, ‘Unpopular Sovereignty?’ (2020) 83 *The Modern Law Review* 955.

²⁸ Dieter Grimm, Alexandra Kemmerer and Christoph Möllers, *Human Dignity in Context: Explorations of a Contested Concept* (Nomos Verlagsgesellschaft 2017).

²⁹ Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press 2013).

³⁰ Somek (n 19); Möllers (n 20).

³¹ Somek (n 19) chs 4–5.

not merely concerned with the creation of a new form of constitutionalism at the domestic level. Equally important was the creation of a ‘European Constitution’, a new European order that was no longer built on the principle of a balance of powers between the European empires.³² A key insight from *Contesting Democracy*, despite the fact that Müller only refers to it in passing, is the interpretation of the rise of a new form of constitutionalism at the domestic level together with the project of European integration as part of the same post-WWII project of ‘reconstituting’ Europe.³³ The post-war ‘reconstitution of Europe’ has to be understood as constitution-building at both the domestic and the European level.³⁴

The view of the post-WWII constitutional project was that democracy’s enemy – ‘totalitarianism’ – could only be conquered through the creation of a strong union between the former enemies on the European continent. For the European Christian Democrats,³⁵ but perhaps to an even greater extent to the Americans, the creation of a federation in Europe became understood as the legal and political protection against the totalitarian subversion of democracy.³⁶ The fear in the post-WWII era was not merely, or even primarily, directed towards the return of Nazism in Germany or German aggression, but also to the ‘communist threat’ from without as well as within.³⁷

³² Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) ch 2.

³³ Müller, *Contesting Democracy* (n 22) 5, 141–2, 148–9, 157, 238–9.

³⁴ Peter L Lindseth, *Power and Legitimacy Reconciling Europe and the Nation-State* (Oxford University Press 2011) 3 describes this integrated system as the ‘postwar constitutional settlement of administrative governance’. In Lindseth’s view, European integration is integral to the development of the domestic constitutional settlement. However, the European level, Lindseth argues, cannot be conceived of as genuinely ‘constitutional’ but should rather be understood as conferred ‘administrative’ power that relies on Member State legitimacy for its efficacy and legitimacy.

³⁵ Wolfram Kaiser, *Christian Democracy and the Origins of European Union* (Cambridge University Press 2007).

³⁶ Antonin Cohen, ‘Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)’ (2007) 32 *Law & Social Inquiry* 109, 125.

³⁷ Alan S Milward, *The European Rescue of the Nation-State* (Routledge 1992) xi, 333–7; E Timothy Smith, ‘United States Security and the Integration of Italy into the Western Bloc, 1947–1949’ in Francis H Heller and John R Gillingham (eds), *NATO: The Founding of the Atlantic Alliance and the Integration of Europe* (MacMillan 1992); Klaus Schwabe, ‘The Origins of the United States’ Engagement in Europe, 1946–1952’ in Francis H Heller and John R Gillingham (eds), *NATO: The Founding of the Atlantic Alliance and the Integration of Europe* (MacMillan 1992); Ronald EM Irving, ‘Italy’s Christian Democrats and European Integration’ (1976) 52 *International Affairs* 400, 406.

The overall aim of the project of European integration was to stabilise and constrain the post-WWII regimes to ward off any form of political extremism on either the right or the left.³⁸ European integration had to provide the material conditions that would allow Western Europe to provide its people with a living standard that could outcompete the promises of material well-being made by the USSR.³⁹ Moreover, until the collapse of the project of the European Defence Community, or arguably until the collapse of the negotiations around the Fouchet Plans, a defence union among the central European states was understood as a means to protect Western Europe from any kind of Soviet aggression.⁴⁰ Finally, Europe became the ‘Sorelian myth’⁴¹ for the post-WWII era in the eyes of Europe’s ‘founding fathers’. ‘Europe’ had to fill the void left after the experience of totalitarianism; it was heralding a ‘spiritual renewal’ for a new generation of Europeans that would transcend the world of the nation-state.⁴²

The centrality of the creation of a new form of legal order beyond the state is manifest in the constitutional provisions of several ‘core’ European states, which allow for the limitation of public authority in order to establish a new form of international order.⁴³ The most striking provisions are found in the preamble to the German Basic law stating that ‘the German people, in the exercise of their constituent power’ constitute the Federal Republic on the basis of their ‘determination to promote world peace as an equal partner in a united Europe’.⁴⁴ A united Europe is one of the core aims of the German Basic law, or in the words of the German Constitutional Court, ‘the Basic Law calls for European integration’.⁴⁵ The Treaty of Rome, as argued by John

³⁸ Thomas Risse and Daniela Engelmann-Martin, ‘Identity Politics and European Integration: The Case of Germany’ in Anthony Pagden (ed), *The Idea of Europe: From Antiquity to the European Union* (Cambridge University Press 2002).

³⁹ Mark Gilbert, *European Integration: A Concise History* (Rowman & Littlefield Publishers 2011) 12.

⁴⁰ Edward Fursdon, *The European Defence Community: A History* (Macmillan 1980); Anthony Teasdale, ‘The Fouchet Plan: De Gaulle’s Intergovernmental Design for Europe’ [2016] LEQS 1.

⁴¹ Georges Sorel, *Reflections on Violence* (Cambridge University Press 2004) 20–4.

⁴² See, eg, Konrad Adenauer, *World Indivisible – With Liberty and Justice for All* (George Allen & Unwin Ltd 1956) 6–7.

⁴³ Bruno De Witte, ‘The EU as an International Legal Experiment’ in Joseph HH Weiler and Gráinne De Búrca (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

⁴⁴ The Preamble of the 1949 German Basic Law opens with the following statement: ‘Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law’.

⁴⁵ BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 (*Lisbon Ruling*), para 225.

Erik Fossum and Agustín José Menéndez, is made with ‘implicit reference to the six national constitutions of the founding member states’.⁴⁶

Nevertheless, within EU law scholarship, the inherent connection between the emergence of a new form of constitutionalism at the domestic level with the project of uniting Europe is often ignored. Perhaps because of the failure of Europe’s ‘first constitution’,⁴⁷ the European Political Community and the European Defence Community, the story told by EU lawyers often begins, almost *ex nihilo*, with the ‘constitutionalization’ of EU law through the case law of the ECJ starting in the 1960s (‘integration through law’).⁴⁸ The political origins of the project of European integration are not discussed to any significant degree. EU law and European integration has overwhelmingly been interpreted as a form of ‘freestanding constitutionalism’ committed to market integration and universal cosmopolitan values.⁴⁹ For that reason, the roots of European integration in a particular ‘anti-totalitarian’ constitutional project (encompassing fascism as well as communism) is not fully appreciated in EU legal scholarship.⁵⁰ That European integration and the domestic constitutional regimes that emerged in Western Europe have to be understood as part of the same broad constitutional project, what this article calls ‘post-fascist constitutionalism’, is therefore not yet fully incorporated into legal academia.

The interpretation of the project of a European constitution together with the rise of a new form of constitutionalism at the level of the Member States as two aspects of the same ‘post-fascist’ or ‘anti-totalitarian’ constitutional project lends support to Müller’s thesis of the EU as an extra layer of constitutional guarantees. Nevertheless, the question is whether, or to what extent, this is a particularly *German* story.⁵¹ What is left out of the account so far is that not all the Member

⁴⁶ John Erik Fossum and Agustín José Menéndez, *The Constitution’s Gift: A Constitutional Theory for a Democratic European Union* (Rowman & Littlefield Publishers 2011) 18–9.

⁴⁷ Richard Griffiths, *Europe’s First Constitution: The European Political Community, 1952–1954* (Federal Trust for Education and Research 2000).

⁴⁸ Starting with the ECJ’s declaration of direct effect and supremacy of EU law in C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1 and C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585. For a reappraisal of the project of ‘integration through law’, see Daniel Augenstein, *Integration through Law’ Revisited: The Making of the European Polity* (Ashgate 2012).

⁴⁹ Michael A Wilkinson, ‘Political Constitutionalism and the European Union’ (2013) 76 *The Modern Law Review* 191.

⁵⁰ See, however, Michael A Wilkinson, ‘The Reconstitution of Post-War Europe: Liberal Excesses, Democratic Deficiencies’ in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism beyond Liberalism* (Cambridge University Press 2017); Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press forthcoming).

⁵¹ *Cf.* Michael A Wilkinson, ‘On the New German Ideology’ (2020) 197 *iCourts Working Paper Series*.

States of the EU are of the ‘post-fascist’ type. Müller admits as much in that he argues for a kind of ‘British exceptionalism’.⁵² The question, however, is whether there are many more exceptions than Müller allows for. In what follows, I will propose two other ideal types of constitutionalism that influence the EU Member States, neither of which are characterised by a foundational fear of the people: ‘evolutionary constitutionalism’ and ‘post-communist constitutionalism’.

The EU Member States are characterised by different ‘varieties of constitutionalism’ and for that reason they do not relate to the project of European integration in the same way.⁵³ Whereas it might be possible to create a ‘constitutional synthesis’ between the constitutional orders of the Union and the Member States within post-fascist constitutionalism by imagining the EU as an additional layer of constitutional guarantees, that is the case within neither ‘evolutionary constitutionalism’ nor ‘post-communist constitutionalism’. For that reason, the post-war constitutional settlement, comprising the Union and the Member States, is characterised by different sorts of tensions and contradiction depending on what type of constitutionalism is dominant in a Member State – or so it will be argued.

II: Nothing above or besides Parliament

For the post-fascist constitutional imagination, the end of WWII is the watershed moment, the ‘zero hour’ (*Stunde Null*). It is this rupture in time that allows for a new constitutional imagination to be born, a new way of thinking about the constitution of public authority. Not all the Member States of the EU, however, experienced the end of WWII as such a ‘new beginning’. The UK is an obvious example, but it is not the only one. The Scandinavian Member States, Sweden and Denmark, did not experience a total legal and political collapse either and WWII did not lead to a new form of constitutionalism in these countries.⁵⁴ This does not mean that WWII is not a significant event for these countries but merely that it is not interpreted in the same way

⁵² He also includes Norway and Switzerland, among his exceptions, neither of which are Member States of the EU, see Müller, ‘Safeguarding Democracy inside the EU’ (n 15) 11.

⁵³ Signe Rehling Larsen, ‘Varieties of Constitutionalism in the European Union’ [forthcoming] *Modern Law Review*.

⁵⁴ Johan Östling, *Sweden after Nazism: Politics and Culture in the Wake of the Second World War* (Berghahn 2016) 19. Cf. Tony Judt, *Postwar: A History of Europe since 1945* (Vintage Books 2005) 36ff. WWII is not considered a *constitutionally* significant event in the Scandinavia Member States. In Alf Ross’s main work on Danish Constitutional Law *Danske Statsforfatningsret* (third edition, Nyt nordisk forlag 1983), WWII is not even included part that discusses Danish constitutional history. The two ‘revolutionary’ events in Danish constitutional history are the introduction of absolutism in 1660 and the introduction of constitutional monarchy in 1849.

as it is by the ‘constrained democracies’. Because of the lack of a constitutional rupture, the constitution was interpreted as an unbroken tradition and democracy was understood, as it was in the pre-WWII era, in terms of the sovereign will of the state expressed via Crown-in-Parliament. The UK and the Scandinavia Member States belong to a form of ‘evolutionary constitutionalism’. They all understand themselves as exceptions to what happened in the rest of Europe (and for that reason democratically superior to their neighbours).

The UK, Sweden and Denmark had very different experiences during WWII. But for different reasons, none of them experienced a complete legal and political collapse, on which the post-fascist constitutional imagination is founded. The UK came out of WWII as the proud saviour of Europe with its dreams of imperial glory not yet lost. Sweden remained neutral and politically stable, untouched by fascism as an ideology, and under the leadership of the same social democrat, Per Albin Hansson, before, during and after WWII. Known by German soldiers as the ‘cream front’ (*Sabnefront*), Denmark was not severely affected despite its occupation by Nazi Germany. Denmark became a German ‘model protectorate’ and was allowed to retain control of external and internal affairs, at least until 1943.⁵⁵ Throughout most of the war, Danish institutions functioned more or less normally, and relatively few Danes died as a consequence of the war.⁵⁶ Crucially, WWII did not subvert Danish civil society, and after WWII, the Danes prided themselves of the efforts of ‘ordinary people’, importantly fishermen, helping to clandestinely ferry the Danish Jews to Sweden.⁵⁷ Democracy had *conquered* rather than caused fascism, that was the lesson drawn. The story told after WWII in Sweden and Denmark was therefore never that of the ‘excess’ of democracy; quite the contrary.⁵⁸

At the heart of the constitutional imagination of the ‘evolutionary’ democracies is the idea that the sovereign will of the state is expressed via Crown-in-Parliament. Nothing stands above or besides Parliament. It should be noted that from a historical perspective, there is nothing inherently ‘democratic’ about this. Parliamentary government has not always been on the side of

⁵⁵ Samuel Abrahamsen, ‘The Rescue of Denmark’s Jews’ in Leo Goldberger (ed), *The Rescue of the Danish Jews: Moral Courage Under Stress* (New York University Press 1987) 4.

⁵⁶ More than 95 pct. of the Danish Jews survived WWII due to the combined effort of the resistance by the Danish government and civil society. Only 464 Danish Jews ended up in concentration camps and most of them were ultimately saved). See *ibid* 2–3.

⁵⁷ Leo Goldberger, *The Rescue of the Danish Jews: Moral Courage under Stress* (New York University Press 1987).

⁵⁸ Andreas Føllesdal and Marlene Wind, ‘Nordic Reluctance towards Judicial Review under Siege’ (2009) 27 *Nordic Journal of Human Rights* 131, 137.

‘the people’ (whether that is understood as the many, the masses or the poor).⁵⁹ Nevertheless, with the expansion of the franchise to gradually include women, the poor and the young, parliamentary government came to be understood as the authentic expression of democracy. Gradually the view became that the people expressed their sovereign will via Parliament.

This view persists within evolutionary constitutionalism today. Democracy is understood as a procedural framework for decision-making; not a substantive theory for a democratic ‘content’ in the form of fundamental rights or human dignity.⁶⁰ For the Scandinavian legal realists that dominated post-WWII legal academia in Sweden and Denmark, the conservatism, natural law philosophy and human rights thinking that influenced the Christian Democrats⁶¹ was understood as an *impediment* to post-WWII democracy.⁶² Post-WWII Scandinavia is *Social* Democratic rather than *Christian* Democratic, and for the Scandinavian Social Democrats strong individual rights are seen as obstacles to democracy conceived of as majority rule.⁶³ The Social Democratic interpretation of the interwar breakdown does not understand the underlying cause to be the ‘excess of democracy’ but rather the ‘excess of the market’ leading to economic inequality. Democracy should therefore not be constrained but rather protected via social and economic policies that as a minimum could limit the impact of economic crises.⁶⁴

Social Democracy as well as legal realism is based on a belief in the ‘primacy of politics’⁶⁵ over law, and for that reason, there is no call for a constitutional court to monitor democracy.⁶⁶ In

⁵⁹ Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press 2013) 42.

⁶⁰ No one expressed this sentiment clearer and in a less apologetic manner than Alf Ross (n 54) 136, ‘Democracy is a form of will-formation of the state based on the principle of majoritarianism, not a principle for its substance’.

⁶¹ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017).

⁶² Johan Strang, ‘Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law’ (2018) 36 *Nordic Journal of Human Rights* 202, 203. See also Östling (n 54) 205ff.

⁶³ Martin Scheinin, ‘Constitutionalism and Approaches to Rights in the Nordic Countries’ in Joakim Nergelius (ed), *Constitutionalism: New Challenges – European Law from a Nordic Perspective* (Martinus Nijhoff Publishers 2008) 136.

⁶⁴ Johan Strang, ‘The Other Europe?: Scandinavian Intellectuals and the Fragility of Democracy in the Wake of World War II’ (2019) 17 *Journal of Modern European History* 500, 504.

⁶⁵ Sheri Berman, *The Primacy of Politics: Social Democracy and the Making of Europe’s Twentieth Century* (Cambridge University Press 2006).

⁶⁶ In recent years, however, several Scandinavia scholars have expressed their unease about this form of ‘unchecked democracy’ calling for an increase of the power of the judiciary, see Jens Elo Rytter and Marlene Wind, ‘In Need of Juristocracy – The Silence of Denmark in the Development of European Legal Norms Symposium: Nordic Juristocracy’ (2011) 9 *International Journal of Constitutional Law* 470. See also Niclas Berggren, Nils Karlson and Joakim Nergelius, *Makt utan motvikt: om demokrati och konstitutionalism* (City University Press 1999).

the words of the Swedish legal realist, Vilhelm Lundstedt, the idea that the power of the state could be checked by universal and natural rights ‘beyond’ the political, such as property, was as ‘meaningless as the chatter of a parrot’.⁶⁷ Parliament is essentially understood as its own guardian. The idea of judicial review is not a part of evolutionary constitutionalism and is generally understood as a problematic ‘political’ exercise of power by the judiciary. As the Danish legal realist Alf Ross puts it, the judiciary is ‘by its very nature’ subject to the will of Parliament.⁶⁸ The constitution is interpreted not primarily by the courts but by Parliamentary praxis.⁶⁹

Evolutionary constitutionalism is not shaped by a revolutionary event but has rather evolved over centuries by insiders giving strategic concessions to outsiders in order to avoid revolutionary upheavals.⁷⁰ With its ‘uncodified constitution,’ which has evolved with political events over centuries, the UK is the paradigmatic example. However, both the Danish and Swedish constitutions have developed along similar trajectories. The Danish Constitution (*Danmarks Riges Grundlov*) of 1849, that is still in place in a revised form, was, eg, a concession of the King pre-empting a violent uprising, and as a consequence of that the Danish 1848 ‘revolution’⁷¹ was bloodless. There is no clear revolutionary event in which a modern constitution was introduced in Sweden either. In its current form, the Swedish Constitution, *Sveriges Grundlagar*, is composed of four ‘fundamental laws’: the ‘Instrument of Government’ (*Regeringsformen*) of 1975; the ‘Freedom of the Press Act’ (*Tryckfrihetsförordningen*) of 1949; the ‘Fundamental Law on Freedom of Expression’ (*Yttrandefrihetsgrundlagen*) of 1992; and the ‘Act of Succession’ (*Successionsordningen*) of 1810.

⁶⁷ Strang (n 62) 206.

⁶⁸ Ross (n 54) 131.

⁶⁹ For example, the Danish Supreme Court has only declared an act of Parliament unconstitutional on one occasion. The Danish Supreme Court, 1999.841 H - *The Tvind case* [1999]. Moreover, the Danish Political institutions, rather than the Supreme Court, defines Denmark’s ‘constitutional identity’, see Helle Krunke, ‘Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature’ in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 121ff.

⁷⁰ Bruce Ackerman discussing different paths to constitutionalism has named this the ‘insider’ model. See ‘Three Paths to Constitutionalism – and the Crisis of the European Union’ (2015) 45 *British Journal of Political Science* 705.

⁷¹ There is no consensus among Danish historians of whether the events of 1848 should be interpreted as a peaceful transition or a revolution, see Claus Møller Jørgensen, ‘Året 1848 og overgangen fra enevælde til folkestyre’ <<https://danmarkshistorien.dk/leksikon-og-kilder/vis/materiale/1848/>> accessed 27 April 2020.

Denmark and Sweden, in contrast to the UK, have codified constitutions in the form of ‘fundamental laws’ or ‘basic laws’ (*Grundlov/Grundlagar*). Nevertheless, these legal texts have been relatively unimportant for the political development of the Scandinavian Member States.⁷² Within the evolutionary constitutional imagination, the ‘real’ or ‘positive constitution’ of the state is not identical to the written constitution.⁷³ The ‘real’ constitution of the state is understood as a political rather than a legal creature, which evolves with the political and societal developments and constitutional conventions.⁷⁴ It is a ‘living being’ that is slowly transformed without the written constitution necessarily changing. With regard to the United Kingdom, Walter Bagehot famously argued that the British monarchical constitution had been transformed into a ‘disguised republic’.⁷⁵ Within evolutionary constitutionalism, the constitution can be fundamentally transformed without a single constitutional law necessarily being repealed or amended.

In contrast to both post-fascist and revolutionary constitutionalism, the formal written constitution is not necessarily a means of introducing a new system of government. The amendment to the Swedish *Regeringsform* (‘the Form of Government’) of 1975 was seen not so much as the introduction of a new system of government but more as a codification of the constitutional praxis that evolved without any formal change to the constitution.⁷⁶ The schism between the formal written constitution and the real constitution had become so great that it was deemed necessary to ‘modernise’ the constitution and the period between 1922 and 1975 is now known as the ‘constitution-less’ period.⁷⁷ The constitutional amendment was in this sense an

⁷² Olof Petersson, ‘Constitutional History’ in Jon Pierre (ed), *The Oxford Handbook of Swedish Politics* (Oxford University Press 2015).

⁷³ This is clearly expressed by Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) 38. In the introduction to Danish constitutional law currently used at the University of Copenhagen, this is expressed in the following manner: ‘constitutional law is not exclusively concerned with *grundloven* [the Danish Basic Law] as a text. This formal criteria must be supplemented by a material, ie, substantive, criteria according to which constitutional law [*forfatningsretten*] is concerned with the ‘constitution’, that is, the fundamental legal structure, the legal system as a skeleton, or political jurisprudence [*politisk ret*]’, see Henrik Zahle, *Danske forfatningsret*, vol 1: *Interstitutioner og reguleringer*, 2: *Regering, forvaltning og dom* (Christian Ejlers’ forlag 2007) 28 my translation.

⁷⁴ Petersson (n 72) 95. For Dicey’s discussion of constitutional conventions, see Dicey (n 73) ch XIV. See also Zahle (n 73) 29.

⁷⁵ Walter Bagehot, *Bagehot: The English Constitution* (Paul Smith and Raymond Geuss eds, Cambridge University Press 2001) 183 n 6.

⁷⁶ Petersson (n 72) 97. Following Jon Elster, ‘Legislatures as Constituent Assemblies’ in Joakim Nergelius (ed), *Constitutionalism: New Challenges – European Law from a Nordic Perspective* (Brill Nijhoff 2008) 49, The Swedish Constitution of 1974 is an exception to the general rule that constitutions are not adopted in the absence of crisis.

⁷⁷ Petersson (n 72) 98.

attempt to close the gap between the formal and the real constitution of Sweden, rather than a revolutionary event starting a new era.

In the United Kingdom, there have been calls for a constitutional modernization in the form of a written constitution since the end of WWII, and since the 1970s the need for reform has been understood as even more pressing.⁷⁸ However, this has not come about; at least not in the form of the drafting and ratification of a formal written British Constitution. Nevertheless, through its membership of the EU, Britain *has* undergone a process of profound constitutional transformation. Without any ‘revolutionary’ event, the UK has undergone an incremental modernization over the four decades of its membership in the EU and in this way, it has received something akin to a ‘written’ constitution.⁷⁹ Membership of the EU has led to the introduction of a system of judicial review, a fundamental distinction between ordinary legislation and ‘constitutional statutes’, the adoption of something akin to a Bill of Rights, and the introduction of a Supreme Court. Moreover, it has created the foundations for both the devolution of governmental powers from Westminster to the ‘devolved nations’ of the UK and the cross-border arrangement between Northern Ireland and the Republic of Ireland.⁸⁰ EU membership, in the words of the European Union Select Committee of the House of Lords, ‘has been, in effect, part of the glue holding the United Kingdom together since 1997’.⁸¹

European integration has been a way for British elites to solve the impending crisis and ‘conceptual sclerosis’ of the British constitution without any significant involvement of the public and without any revolutionary event.⁸² This process of ‘modernization’, however, cannot easily be reconciled with the constitutional ideology of evolutionary constitutionalism, namely parliamentary sovereignty. Being an EU Member State means governing oneself as a ‘constrained democracy’. It means that, at least for the duration of membership, there is something *above* Parliament, namely, EU law. European integration, somewhat paradoxically, has allowed for the perpetuation of ‘insider constitutionalism’ in the UK, and for that reason it has indirectly allowed for the perpetuation of a constitutional project whose core ideology, the sovereignty of parliament, cannot easily be reconciled with EU law.

⁷⁸ See, eg, Nevil Johnson, *In Search of the Constitution: Reflections on State and Society in Britain* (Pergamon Press 1977); Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978).

⁷⁹ Martin Loughlin, ‘The British Constitution: Thoughts on the Cause of the Present Discontents’ (2018) 16 *New Zealand Journal of Public and International Law* 4; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019).

⁸⁰ Loughlin (n 79) 12ff.

⁸¹ See Bogdanor (n 79) 267–8.

⁸² Loughlin (n 79) 5.

The ‘evolutionary democracies’ of the UK and Scandinavia have a radically different constitutional relationship to the project of European integration than that of the post-fascist Member States. Yet EU law is no less central to the constitutional systems in these countries. Rather, European integration has stabilised these regimes via a process of modernization. They are, however, not the only exception to the post-WWII constitutional project of constrained democracy.

III: The Return to Europe

The constitutional projects and regimes of the former communist Central and Eastern European Member States do not belong to the project of post-fascist constitutionalism and constrained democracy, despite the fact that they share many of its characteristics. Like post-fascist constitutionalism and unlike evolutionary constitutionalism, post-communist constitutionalism is founded on a rupture in time, a ‘new beginning’. The fall of the Berlin Wall marks the symbolic end of post-war history and the end of the ‘short twentieth century’.⁸³ Moreover, the idea of Europe is central to the post-communist constitutional project. Post-communist constitutionalism has an internal and intimate relationship to the project of European integration, but it has unique features that warrant its treatment as a separate form of constitutionalism. As is the case for the evolutionary democracies, the post-communist Member States’ constitutional relationship to the project of European integration is rife with tensions and contradictions.

From the very beginning, becoming part of ‘Europe’ was central to the constitutional project of the former communist states in Eastern Europe. The central political banner under which the transition to democracy was conducted was the idea of the ‘return to Europe’. A central aspect of this ‘return’ was membership in the European Convention on Human Rights (ECHR) and the EU.⁸⁴ ‘Europe’ came to symbolise the end of authoritarianism, or even totalitarianism, and the pathway to democracy and human rights. As is the case for the post-fascist Member States, and in sharp contrast to the evolutionary democracies, ‘Europe’ is one of the most important ‘constitutional myths’ for post-communist constitutionalism.

Nevertheless, for the post-communist Member States, the EU is not part of a project of ‘constrained’ or ‘militant democracy’. The EU is not seen as an extra layer of counter-majoritarian institutions created in order to combat ‘hyper-democracy’. The Central and Eastern European

⁸³ Eric J Hobsbawm, *Age of Extremes: The Short Twentieth Century, 1914–1991* (Michael Joseph 1994).

⁸⁴ Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012); Jacques Rupnik and Jan Zielonka, ‘Introduction: The State of Democracy 20 Years on: Domestic and External Factors’ (2013) 27 East European Politics and Societies and Cultures.

Member States did not draw the same lesson from WWII as the post-fascist states had done. Authoritarianism and totalitarianism were not understood as a product of an ‘excess of democracy’ leading to the collapse of the legal and political order. Rather, Nazism and later Communism were perceived as something imposed by a foreign imperial power. Irrespective of the historical realities, communism and the communists are ‘them,’ not ‘us’. Post-communist constitutionalism is not founded on a ‘fear of the people’. Rather, post-communist constitutionalism is founded on a tale of victimhood.⁸⁵

Nor is European integration understood as way to combat nationalism and the inherent problems of the nation-state and sovereign power as it is within post-fascist constitutionalism. On the contrary, for the post-communist Member States, the ‘return to Europe’ entails the promise of creating sovereign nation-states in Eastern Europe. Becoming part of Europe was understood as a way of restoring the pre-communist regimes and traditions. 1989 transitions to democracy were described as acts of restoration or ‘rectifying revolutions’.⁸⁶ It was like turning back the clock to the glorious time before the Soviet and Nazi invasions, erasing all traces of foreign occupation. The ‘East’ had been ‘abducted’⁸⁷; now it could return to its ‘native Europe’.⁸⁸ Becoming a part of the EU and the ECHR was in this way a part of the project of ‘reconstituting’ sovereign nation-states in Central and Eastern Europe.

⁸⁵ That ‘victimhood’ is a constitutional ‘myth’ does of course not mean that the peoples of the Eastern Europe did not suffer or that they were in fact not invaded, in some cases more than once (Timothy Snyder, *Bloodlands: Europe between Hitler and Stalin* (Basic Books 2010)). The point is merely that the construction of political identity is built on a complete exclusion of all forms of collaboration and complicity in past atrocities. As demonstrated by Jelena Subotić, *Yellow Star, Red Star: Holocaust Remembrance after Communism* (Cornell University Press 2019) 205ff, this has recently manifested itself in the policies on ‘Holocaust remembrance’. A 2018 Polish Law outlaws all discussions of Polish complicity in the Holocaust. From a historical perspective, it is undisputable that various political and social groups collaborated with both the Nazis and the Communists in order to further the own aims, or strand of nationalism, see, eg, Timothy Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus, 1569–1999* (Yale University Press 2003). Moreover, in the immediate post-war years, communism represented economic modernization not dictatorship for many people in both Western and Eastern Europe (Gilbert (n 39) 12). ‘The attraction of Communism was real’, Judt (n 54) 88 writes.

⁸⁶ Jürgen Habermas, ‘What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left’ (1990) I/183 *New Left Review* 3.

⁸⁷ Milan Kundera, ‘Un Occident kidnappé: ou la tragédie de l’Europe centrale’ (1983) 27 *Le Débat* 3. See also Tony Judt, ‘The Past Is Another Country: Myth and Memory in Post-War Europe’ in Jan-Werner Müller (ed), *Memory and Power in Post-War Europe: Studies in the Presence of the Past* (Cambridge University Press 2002).

⁸⁸ Adam Michnik, *Letters from Prison and Other Essays* (University of California Press 1985) 150. See also Jirí Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Ashgate 2007).

From a historical perspective, the tale of a ‘restoration’ or ‘return’ to the regimes and traditions of pre-communist era nation-states is somewhat dubious. The narrative informing the political discourse of the ‘return to Europe’ belongs to the world of ‘memory’ rather than history; a world structured by myths rather than facts.⁸⁹ What the post-communist Member States aspired to return to was not historical reality but rather a world constructed by the myths of ‘national memory’; the continuation of proud histories dating back many centuries that had been abrogated by the invasion of hostile empires, both the Nazis and the Communists.

In contrast to the core Western European states of the EU that overwhelmingly were failed or declining empires when they embarked on the project of European integration, several of the Central and Eastern European states that emerged after the fall of Communism *had* been proper ‘nation-states’ before the Nazi and Communist occupations. That being said, the experience of being ‘nation-states’ in Central and Eastern Europe to which these countries aspired to return was a temporary and fragile one.⁹⁰ This period of Central and Eastern European nation-states lasted for about two decades: from the collapse of the European land-empires after WWI – the Austro-Hungarian empire, the Ottoman Empire, the German Empire, and the Russian Empire – to the annexations of these young nation-states by the imperial powers of the Soviet Union and the Third Reich.⁹¹ In this period, authoritarianism, not constitutional democracy, was the dominant form of government in the Central and Eastern European states. The ‘return to Europe’ as the restoration of a long tradition of nation-states governed as constitutional democracies is historically more or less fictitious. Nevertheless, it is one of the most important myths that informed the reconstitution of Central and Eastern Europe after the fall of Communism.

Within post-communist constitutionalism, democracy is not conceived of as ‘militant democracy’ nor is the EU seen as a constitutional self-binding. During Nazi and Communist rule, ‘the people’, understood as ‘the nation’, had been deprived of sovereignty to the detriment of democracy. The ‘return to Europe’ was thus overwhelmingly understood as a path to a form of regime and an international system that post-fascist constitutionalism, including the project of European integration, aspired to overcome: the system of sovereign nation-states characterised by internal and external self-determination.⁹² For that reason, the Central and Eastern European

⁸⁹ Timothy Snyder, ‘Memory of Sovereignty and Sovereignty over Memory: Poland, Lithuania and Ukraine, 1939–1999’ in Jan-Werner Müller (ed), *Memory and Power in Post-War Europe* (Cambridge University Press 2002); Judt (n 87).

⁹⁰ See, eg, Robert Gerwarth, *The Vanquished: Why the First World War Failed to End, 1917–1923* (Allen Lane 2016).

⁹¹ Timothy Snyder, ‘Integration and Disintegration: Europe, Ukraine, and the World’ (2015) 74 *Slavic Review* 695.

⁹² Anneli Albi, ‘Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and Candidate Countries?’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003).

states, as a rule, constituted themselves as ‘closed’ to the outside world without the constitutional possibility of ceding sovereign power to organizations beyond the state. In order to accede to the EU, they therefore had to amend their constitutions.⁹³

In this way, the constitutional relationship of post-communist constitutionalism to the project of European integration is characterised by a fundamental contradiction. European integration is understood as the all-important means to the realization of the domestic constitutional projects. Yet the constitutional order of the EU contradicts the constitutional projects of post-communist constitutionalism. As long as a Member State is part of the EU, something stands above the ‘sovereign nation’, namely, EU law. By acceding to the EU, the former communist satellite states became ‘Member States’ rather than fully independent ‘nation-states’.⁹⁴ For that reason, the EU is not merely understood as a path to democracy but also a threat to democracy within post-communist constitutionalism. The EU with its demands of supremacy and direct effect of its laws, even against the constitutional norms of the Member States, is within post-communist constitutionalism looked upon with suspicion as a potential new form of empire.⁹⁵ For that reason, the EU cannot be conceived of as a form of transnational ‘militant democracy’ within post-communist constitutionalism.

Conclusion

The rise of authoritarianism in Poland and Hungary is the constitutional threat that the EU was created to protect the Member States from. For that reason, the Union must repress the ‘anti-constitutional behaviour’ in order to save the Member States, and the citizens of the Union, from the ‘dark side’ of democracy: authoritarianism, fascism, totalitarianism, and their inherent tendency towards mass-killing⁹⁶. This is the heart of the argument that the EU is a form of transnational ‘militant democracy’, advanced most consistently by Jan-Werner Müller.⁹⁷ Like Ulysses who made his men bind him to the mast while they sailed past the Sirens, so have the Member States constrained themselves, not merely via domestic constitutions, but equally at a

⁹³ Estonia’s constitution was not formally amended but ‘supplemented’ by an independent constitutional act, see Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (2005) 19, 111.

⁹⁴ Christopher J Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2012).

⁹⁵ For an account of the EU as a form of empire, see Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press 2006).

⁹⁶ Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge University Press 2005).

⁹⁷ See especially Müller, ‘The EU as a Militant Democracy, Or: Are There Limits to Constitutional Mutations Within EU Member States?’ (n 16); Müller, ‘Safeguarding Democracy inside the EU’ (n 15).

transnational level via European integration, encompassing both the EU and the ECHR. Following this argument, the EU is an additional layer of constitutional guarantees of liberal democracy. The Member States looked to the EU in order to entrench a specific constitutional model, to provide themselves with 'rigid constitutions'. For that reason, the EU has political, if not legal, authority to intervene in Poland and Hungary to save them from themselves.

That the dominant post-WWII constitutional project in Western Europe encompasses both the domestic constitutional orders and the project of European integration has still not been fully incorporated into constitutional scholarship. This chapter has demonstrated that the dominant post-WWII constitutional project in Western Europe, 'post-fascist constitutionalism', encompasses both the domestic constitutional projects and the project of a 'European constitution'. Post-fascist constitutionalism is founded on a fear of the people and seeks to constrain political and revolutionary power. As such, this chapter supports the thesis that the EU is a form of transnational militant democracy.

Nevertheless, the chapter also demonstrates that post-fascist constitutionalism is not dominant in all the Member States. At least two other forms of constitutionalism influence the EU Member States: 'evolutionary constitutionalism' and 'post-communist constitutionalism', neither of which are founded on a fear of the people or political power. Evolutionary constitutionalism dominates the UK and the Scandinavian Member States. Here, democracy is understood in political terms as expressed by the supreme will of parliament. The constitution is understood as interpreted primarily by political institutions rather than courts. Parliament is its own guardian. For that reason, there is little acceptance of the possibility of transnational institutions claiming supremacy over domestic constitutions in the name of a set of constitutional values. For the Scandinavian social democrats and legal realists that shaped Danish and Swedish post-WWII constitutionalism, natural law and human rights were understood as *impediments* to democracy rather than expressions of 'democratic values'.

Nevertheless, at least for the duration of EU membership, something stands above the will of parliament, namely, EU law. By being Member States in the EU, the evolutionary democracies have undergone a process of constitutional 'modernization' that have brought them broadly, but not unproblematically, in line with the core Member States of the EU. Through EU membership, judicial review has to a large extent been introduced in these Member States together with a Bill of Rights. Via EU membership, the UK and the Scandinavian Member States govern themselves as 'constrained democracies'. Nevertheless, it would be a mistake to think of this as 'externally imposed' on the evolutionary democracies. Rather, the constitutional modernization, perhaps especially in the UK, has been a means of solving domestic problems, such as the question

of Northern Ireland and the relationship between the devolved nations. EU membership has allowed the UK to introduce a new constitutional order and as such provided a solution to the call for a new British constitution that has been demanded since the 1970s. As is the case for the post-fascist Member States, the evolutionary Member States have an internal and intimate constitutional relationship to the project of European integration, albeit of a different kind.

The post-communist Member States do not belong to the project of post-fascist communist constitutionalism either, nor do they understand the EU as a form of transnational militant democracy. For the post-communist Member States, 'Europe' plays an as important role as it does for the post-fascist Member States. The transition to democracy after the fall of communism was achieved under the banner of the 'return to Europe'. This meant simultaneously membership in European institutions and a return to traditions and constitutional orders that are supposed to have existed before the 'East' was kidnapped by the Soviet Union: a system of sovereign nation-states with internal and external self-determination. This project, however, is internally contradictory because membership of the EU is meant to check the 'excesses' of national sovereignty, eg, by fundamental rights, demands for sound public finances, and competition law. In this way, the EU plays an uneasy role within post-communist constitutionalism. It is simultaneously the path to democracy and national self-determination and a threat to democracy by imposing checks on the sovereign will of these states. The post-communist Member States did not join the project of European integration to make a 'Ulysses pact'. In contrast to the post-fascist Member States, they are not afraid of their own peoples. For that reason, they cannot understand the EU as an extra layer of constitutional guarantees.

The Member States of the EU are not all of the same 'type' and for that reason the EU is characterised by a fundamental constitutional heterogeneity and a constitutional asymmetry. Only some of the Member States belong to the same post-fascist constitutional project as that of the Union. The constitutional heterogeneity and constitutional asymmetry present the Union with a fundamental problem that the recent constitutional developments in Poland and Hungary, extreme as they are, are merely an example of.

Author(s): Signe Rehling Larsen
Title: The European Union as 'Militant Democracy'?
iCourts Working Paper Series, No. 232, 2021

Publication date: 7/January/2021

URL: <http://jura.ku.dk/icourts/working-papers/>

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iCourts Working Paper Series
ISSN: 2246-4891

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