Is Supranational Governance a challenge to Liberal Constitutionalism?

Gráinne de Búrca*

Abstract: Does supranational governance present a challenge to liberal constitutionalism? More particularly, has the EU's supranational form of governance fueled the rise of illiberal authoritarianism and undermined liberal constitutionalism? The article begins by addressing two related empirical questions associated with this larger query: first, whether the Brexit vote reflected a rise in authoritarianism and a turn against liberal constitutionalism; and second whether the Euroscepticism to which the process of European integration has given rise has also contributed to the growth of the illiberal far-right across the EU and to the weakening of support for liberal constitutionalism. The third part addresses a broader and more conceptual question about the relationship between supranational governance and liberal constitutionalism, namely whether there is something either inherent or contingent in the structure and process of European integration and in the project of European supranational governance, which has created a challenge to liberal constitutionalism.

The European Union was founded in the 1950s as an experiment in postwar regional integration, in part to help through economic integration to rebuild national economies damaged by World War II, and in part to ward off, by means of closer legal and political integration of states, the threat of totalitarianism and Soviet expansion. For a number of decades the experiment in European integration made considerable progress towards these goals, deepening economic, legal and political integration at the same time as expanding to include many of the countries of Central and Eastern Europe (CEEC). The project of eastward expansion also meant that the EU came to be viewed not just as a project of economic and political integration of Western Europe, but also one of democratization and democracy-promotion.

The imposition of a form of political conditionality on the process of accession to the EU had begun in the 1970s and 80s when Spain, Portugal and Greece were admitted following periods of domestic dictatorship. [1] This process was expanded and formalized in the 1990s with the adoption by the EU heads of state in the European Council of the "Copenhagen criteria", prior to the opening of accession negotiations with the CEEC. [2] These criteria are a set of requirements which commit all states seeking to join the EU to respect the principles on which it is founded, namely "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law", and they are now enshrined in Article 49 and Article 6(1) of the Treaty on European Union (TEU). Further, the Treaty on European Union since 1997 has included a procedure, known as

---

*NYU Law School.

[1] Frank Schimmelpfennig and Hanno Scholz "Legacies and Leverage: EU Political Conditionality and Democracy Promotion in Historical Perspective" (2010) 62 Europe-Asia Studies 443

[2] See the Conclusions of the European Council of 21-22 June 1993, para 7, http://www.europarl.europa.eu/enlargement_new/europeancouncil/pdf/cop_en.pdf

the Article 7 sanction mechanism, which provides for the possible suspension of voting rights of an EU member state which seriously and persistently breaches these principles.

The EU as it stands today, in other words, seems to be designed at least in part to protect and promote democracy and liberal constitutionalism, rather than to undermine or weaken it. Why then do we need to pose the question whether supranational governance poses a challenge to liberal constitutionalism? A first answer is that the EU, particularly since the time of the Maastricht Treaty in 1993 which heralded the move from an 'economic community' to a more ambitious political union with a single currency, has experienced a series of ongoing challenges to its legitimacy, including recurrent allegations of a 'democratic deficit'. Secondly, the EU over the past decade has been roiled by a series of even sharper crises including the Euro crisis and the refugee crisis, leading to a set of challenges which go well beyond the democratic deficit critique. Amongst them is the rise within many member states of Eurosceptical political movements, in some cases accompanied by a growth in support for illiberal authoritarian government, as seen most strikingly in Poland and Hungary.

Further, the 'Brexit' vote of a majority of the UK population in 2016 to leave the European Union has presented another major problem for the EU. The apparent similarities between the wider move against liberal constitutionalism described by the symposium editors in their introduction,[3] and some of the causes and manifestations of the Brexit vote in the UK, raise the question whether the vote itself can be understood as part of the move described by the editors away from liberal constitutionalism and towards increasingly authoritarian rule.

In what follows, three questions are addressed. The first is whether the Brexit vote can indeed be understood as part of the move away from liberal constitutionalism, or whether this claim overstates the similarity between the UK vote to leave the EU and the erosion of constitutional democracy in other states. The second is whether the European Union's project of regional integration may be partly responsible for the rise of authoritarianism and the decline in support for liberal constitutionalism within several of the EU's member states. The third and final question is whether the EU form of supranational governance in itself presents a challenge to liberal constitutionalism, as that notion is presented by the symposium editors.[4]

1 Did the Brexit vote reflect a decline in support for liberal constitutionalism?

On one interpretation, the vote of a majority of the population of the UK to leave the EU has little to do with a rejection of liberal constitutionalism. The strongly Eurosceptic sentiment which underpinned much of the 'leave' vote– a sentiment which has been prominent in the UK since it first joined the EEC in 1973, fluctuating at times but rising in recent years[5] – was sceptical of the EU and of the benefits of European integration, but not necessarily sceptical of Britain's traditional

---

[3] Tom Ginsburg, Aziz Huq, Mila Versteeg "The Coming Demise of Liberal Constitutionalism?", in this journal issue.
[4] The editors have described liberal constitutionalism as entailing: a written constitution including an enumeration of individual rights; the existence of rights-based judicial review; a heightened threshold for constitutional amendment; a commitment to persisting democratic elections; and a commitment to the rule of law, understood as ensuring that administrative and adjudicative functions that operate autonomously from, and potentially limit, powerful factions or leaders.
[5] R. Mortimore in **"**Polling history: 40 years of British views on 'in or out' of Europe"

democratic system. The strongest two factors which appear to have led those voting against EU membership to do so were specific concerns over immigration, and a more general desire to 'regain control', including control of the economy, of borders and of lawmaking.[6]   Indeed, a popular referendum is certainly at least one dimension of democracy in practice, albeit one which can be in tension with elements of representative democracy or with minority rights and other constitutional guarantees. And the design of the Brexit referendum has been criticized on account of its failure to build in safeguards such as a supermajority requirement or a 'double-lock threshold' to reflect also the role of the devolved regions in the UK.[7] Nevertheless, the concerns over immigration and the desire for greater national control which were reflected in the British vote to leave the EU do not necessarily imply a rejection of liberal constitutionalism or a vote for illiberal authoritarianism.

Indeed, the Brexit vote could reasonably be understood as the almost inevitable consequence of the immense gamble of putting to a popular vote (on perhaps any number of occasions over the past 30 years) the question of UK membership of the EU. Despite the shock with which the result of the vote was greeted, it was in many respects a predictable outcome given how continuously contested and difficult the UK's relationship with the EU has been ever since joining. The UK initially sought EU membership for largely pragmatic economic reasons rather than any commitment to being part of a European political unity.[8] Throughout its more than 40-year membership, Britain never subscribed to or supported the vision of European integration accepted by many if not most other member states. On the contrary, the UK adopted a pragmatic and often *ad hoc* approach to its EU membership, with numerous opt-outs and special treatment sought over the years. While other Member States expressed reservations at various times about aspects of EU policy, and sought occasional opt-outs for particular interests and issues, the UK nonetheless remained quite exceptional if not exceptionalist in its attitude towards the EU, and the attitude of its government in general largely reflected public opinion. Britain sought and received special treatment in relation to the so-called EU budget rebate,[9] and it adopted a pragmatic, case-by-case approach to the introduction of new areas of EU policy. The UK secured opt-outs on a range of issues on which it was unwilling to countenance closer integration, notably from economic and monetary union (EMU) and Justice and Home Affairs at the time of the Maastricht Treaty, with other shorter-lived or less successful attempts seen in the Social Protocol attached to the Maastricht

---

[6] See http://www.britishelectionstudy.com/bes-resources/brexit-britain-british-election-study-insights-from-the-post-eu-referendum-wave-of-the-bes-internet-panel/#.WMwSGDvyvic and M Goodwin and O Heath, "The 2016 Referendum, Brexit and the Left Behind: An Aggregate-level Analysis of the Result" (2016) 87 Political Quarterly 323.

[7] A. Tatham "'The Art of Falling Apart?' Constitutional Conundrums Surrounding a Potential Brexit" , CSF - SSSUP Working Paper Series 2/2015, http://www.europeanrights.eu/public/commenti/Bronzini17-tatham_wp_final.pdf and K. Rogoff "Britain's Democratic Failure" June 24, 2016 https://www.project-syndicate.org/commentary/brexit-democratic-failure-for-uk-by-kenneth-rogoff-2016-06

[8] N. Campos and F. Coricelli "Why did Britain join the EU? A New Insight from Economic History" 3 February 2015, http://voxeu.org/article/britain-s-eu-membership-new-insight-economic-history

[9] See the European Parliament's Briefing 2016: "The UK Rebate on the EU Budget: An explanation of the abatement and other correction mechanisms" http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577973/EPRS_BRI(2016)577973_EN.pdf

Treaty[10] and the more recent Protocol on the Charter of Fundamental Rights attached to the Lisbon Treaty.[11]

Euroscepticism in the UK, in other words, has long pre-dated the current wave of populism sweeping the democratic world, and it has expressed itself for the most part not as a rejection of liberal democratic values but as something that could even be presented as the opposite: a refusal to be 'ruled from abroad', as voters understood it, and a rejection of the primacy of 'continental' and unresponsive European supranational law over domestic constitutional law and domestic democratic institutions. On this reading, despite the similarity in the salience of the issues of immigration, economic insecurity and nationalism, the Brexit vote to leave the EU might perhaps not so easily be categorized together with the various political movements within other European states and in the United States which seem to challenge core aspects of constitutional democracy and to advance illiberal populism. Despite the anti-system flavor of the referendum, the apparent wish of many of those who voted for Brexit could be said to have been to reject the European Union's role in the UK, rather than to replace or undermine aspects of the British democratic and constitutional system.

Yet at the same time, this first interpretation of the Brexit referendum overlooks various features of the vote and particularly the nature of the issues that fanned the flames of the longstanding latent Euroscepticism that eventually led to a majority vote in favor of withdrawal from the EU. Certain aspects of the vote and its underlying causes resonate clearly with what the symposium editors have called the 'right-leaning populist explosion' across Europe and Asia.[12] While the Brexit debate in the UK did not generally entail calls or proposals to repudiate liberal norms of tolerance, to restrict press freedom or to undermine the rule of law, nonetheless certain dimensions of the vote to leave – and perhaps particularly the dimensions that tipped the balance this time towards a 'no' vote - suggest that important elements of the illiberal populism evident elsewhere in Europe and beyond were present also in the UK debate and in the size of the vote to leave.

In the first place, various analyses of the British vote post-referendum indicate that the issue of immigration and the prevalence of anti-immigrant sentiment played a very significant role in the vote.[13] While concern over immigration is not necessarily illiberal, widespread anti-immigrant sentiment during the Brexit campaign erupted regularly into xenophobic discourse and racism, as was widely reported in the British media at the time. Further, and according to police records, the period following the referendum vote showed a sharp rise in hate crimes directed at migrants and

---

[10] See e.g. B. Towers "Two Speed Ahead: Social Europe and the UK after Maastricht" (1992) 23 Industrial Relations Journal 83 and G Falkner "The Maastricht Protocol on Social Policy: On Theory and Practice" (1996) 6 Journal of European Social Policy 1.

[11] C Barnard "The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?" in S. Griller and J. Ziller (eds), The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty (Springer, 2008)

[12] See n.3 above.

[13] K.Swales "Understanding the Leave Vote', (NatCen Social Research, 2016), p. 14 http://natcen.ac.uk/media/1319222/natcen_brexplanations-report-final-web2.pdf and H. Clarke, M.Goodwin and P Whiteley "Why Britain Voted for Brexit: An Individual-Level Analysis of the 2016 Vote" (2016)

refugees.[14] In the second place, a clear correlation between anti-EU sentiment and attachment to authoritarian values was identified in a number of post-referendum studies of the Brexit vote. In particular, it seems that 66% of those who identified themselves as having 'authoritarian values' on the authoritarian-libertarian scale voted to leave the EU.[15] Attachment to these authoritarian values were revealed in responses to a range of questions such as those concerning how children should be raised and attitudes towards the death penalty, but also in responses indicating a preference for order and authority over greater personal freedom.   Thirdly, in the aftermath of the vote to leave the EU, a more vocally illiberal element has been present in the public debate. There were extraordinary verbal attacks by the popular tabloid press on the judiciary, with headlines proclaiming the judges of the High Court to be 'enemies of the people' following the *Miller* decision which declared that a decision to trigger Article 50 of the Treaty on European Union which would begin the countdown to withdrawal required a parliamentary vote.[16] Further, there has been intense pressure to effectively entrench the result of the (non-binding) referendum vote and to treat any debate or discussion of the merits of the vote as a betrayal of the people's voice.[17] Fourthly, one of the sources of opposition to the EU amongst an important category pro-Brexit voters was the role of the European Court of Justice and its rulings on the EU Charter of Fundamental Rights.[18] This objection to European adjudication of issues raising human rights claims in the UK, and its prominence in the Brexit debate, extended also to the rulings of the European Court of Human Rights in Strasbourg, which although not formally part of the European Union system is closely linked to it. Thus Theresa May - in her capacity as then Home Secretary in April 2016 - called for UK withdrawal from the European Convention on Human Rights, and despite mixed messages from the British government on this subject since that time, the question of withdrawal from the ECHR, repeal of the UK Human Rights Act, and rejection of the EU

---

[14] See Jon Burnett "Racist Violence and the Brexit State", Institute of Race Relations, 2017. For media reports, see http://www.independent.co.uk/news/uk/crime/brexit-hate-crimes-racism-eu-referendum-vote-attacks-increase-police-figures-official-a7358866.html   and https://www.theguardian.com/politics/2016/jun/29/frenzy-hatred-brexit-racism-abuse-referendum-celebratory-lasting-damage

[15] See K.Swales "Understanding the Leave Vote', (NatCen Social Research, 2016), p. http://natcen.ac.uk/media/1319222/natcen_brexplanations-report-final-web2.pdf. See also Eric Kaufmann, http://blogs.lse.ac.uk/politicsandpolicy/personal-values-brexit-vote/.   Political values in the UK have for some decades been measured by social scientists on a libertarian-authoritarian scale as well as a left-right scale, (see www.politicalcompass.org) and it seems that the libertarian-authoritarian cleavage was much more significant in the Brexit vote than the left-right cleavage.

[16] The Daily Mail, 3rd November 2016 "Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis. The case was R(Miller) v Secretary of State for Exiting the European Union, judgment of the High Court of 3rd November 2016, https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/.   The judgment of the Supreme Court on appeal was given on January 24, 2017. https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf

[17]   See Anatole Kaletsky "Tony Blair's Democratic Insurrection" February 24, 2017, https://www.project-syndicate.org/commentary/tony-blair-anti-brexit-speech-by-anatole-kaletsky-2017-02

[18] An influential blog article published in February 2016 by Marina Wheeler, a senior lawyer and the spouse of Boris Johnson, the then London Mayor who led the Brexit campaign, argued that the power of the Court of Justice had been extended too far by the EU Charter of Fundamental Rights: see "Cavalier with our Constitution: A Charter too Far" https://ukhumanrightsblog.com/2016/02/09/cavalier-with-our-constitution-a-charter-too-far/

Charter of Fundamental Rights and the jurisdiction of the ECJ have been treated as closely related in the Brexit and post-Brexit debate. [19]

Hence the Brexit vote, while on a first analysis may not appear to have much in common with the spread of illiberal authoritarianism in countries such as Poland and Hungary, does share a number of relevant features, including (i) a strong anti-immigration and anti-immigrant dimension, (ii) an increasingly publicly expressed intolerance (fueled by the tabloid media) towards dissent or disagreement with the voice of the "people" as taken to be expressed by the June 2016 vote, (iii) an adherence to authoritarian values by a majority of Brexit voters, and (iv) a rejection of human rights adjudication by European courts.   The British political system did not move towards becoming an illiberal authoritarian regime in the aftermath of the Brexit vote, but many of the elements which have come to prominence in other states and which have fueled the rise of illiberal regimes in those other countries were present also in the UK, with the vote revealing a very divided society sharply split between those on the authoritarian and those on the liberal side of the political spectrum.   The risk recently articulated by several political science scholars that the discourse, policies and preferences of the vocal far-right (including their populist illiberalism) is likely to strongly influence the programs and actions of mainstream and centrist parties, is clearly present in the post-Brexit UK.[20]

These elements in the Brexit debate, however, do not necessarily establish that the European Union presents a challenge to liberal constitutionalism, even if they indicate that a significant part of the opposition to the EU in the United Kingdom was illiberal in nature, involving a strong reaction against migration and migrants, against rights adjudication by European judges, and identification of the Brexit majority vote as the true voice of the people.   The question whether the process of European integration has generated such reactions elsewhere in the EU is explored in the next section.

2. Has EU integration played a part in the rise in support for illiberal authoritarian parties across member states and a decline in support for liberal constitutionalism?

It is certainly clear that the process of European integration has given rise to political and social movements opposed to the European Union and to the project of integration, a phenomenon which

---

19   See   https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum.   and   https://ukstrasbourgspotlight.wordpress.com/2017/03/10/is-the-uk-going-to-withdraw-from-the-echr-what-about-the-human-rights-act/.   For an analysis by the UK Parliamentary Joint Committee on Human Rights, see "The Human Rights Implications of Brexit" 5th Report of Session 2016-17 (19th December 2016), HL Paper 88, HC 695.

20   C. Mudde, *On Extremism and Democracy in Europe* (2016), chap 27 "As Europe looks fearfully outside, its liberal democracy is under attack from within", has warned that democracy in Europe is under threat from the liberal elite, who are choosing to adapt their programs and policies (on issues such as migration, refugees and multiculturalism) to the agenda of the far-right in order to win voters.

is commonly known as Euroscepticism.[21] One empirical question arising from this fact is whether the growth of Euroscepticism in response to European integration has fueled the decline in support for liberal constitutionalism and the rise of illiberal authoritarianism.

This is a complex question, and one which cannot be answered with any degree of accuracy without careful empirical analysis of a range of countries over time.   For present purposes, I will simply identify and describe a set of distinct phenomena which bear on the question, and consider some of the possible relationships between them.   There are at least three movements or sets of developments across various states of the European Union which seem relevant to the question.   The first is the steady growth of Euroscepticism over several decades, the second is the gradual rise of the far-right across Europe, and the third is the more general turn in many European countries (including EU states) against what has been described as global neo-liberal capitalism.

The first of these, the rise of Euroscepticism, has been the subject of intensive study and analysis since the mid-1990s, when it initially began to manifest in the aftermath of the Maastricht Treaty and the move from the European Economic Community to the European Union. The opposition which began to grow was, in a sense, a challenge to the elite consensus in favor of European integration which had prevailed since the 1950s, together with the assumption of a popular "permissive consensus" accompanying this elite support.[22] With the introduction of economic and monetary union, a common foreign and security policy, and an aspiration towards political union in the Maastricht treaty in 1993, political opposition towards the EU began to develop in earnest.[23] Since that time, Euroscepticism – and particularly what has been termed 'hard' Euroscepticism entailing opposition to the very idea of European integration, rather than 'soft' Euroscepticism entailing objection to some of the EU's policies and direction – has continued to rise steadily.[24] This Euroscepticism has not been the domain exclusively of the right or the far-right, however. On the contrary, there has always been a strand of Euroscepticism on the left.[25] Nevertheless, left-Euroscepticism has been a less prominent strand than that of the Eurosceptical right, and unlike right-wing Euroscepticism which has generally opposed the project of European integration, left-Euroscepticism has broadly been in favor of reform of the EU rather than outright opposition to its existence.[26]

However, with the two major crises which hit the EU from 2007 onwards – first the Euro and banking crisis, followed by the refugee and migrant crisis, Euroscepticism has grown more steeply

---

21 For an early collection of essays on Eurosceptical thought, see M. Holmes, (ed), *The Euroseptical Reader* (Palgrave, 1996)

22   See Ian Down and Carole Wilson "From Permissive Consensus to Constraining Dissensus: A Polarizing Union?" (2008) 43 Acta Politica 26.

23 For an important early paper see Paul Taggart, "A Touchstone of Dissent: Euroscepticism in Contemporary Western European Party Systems" (1998) 33 European Journal of Political Research 363 – 88

24 See Aleks Szczerbiak and Paul Taggart "Opposing Europe: Party Systems and Opposition to the Union, the Euro and Europeanisation" Sussex European Institute Working Paper No 36 of 2002. For a challenge to the hard/soft classification, see P Kopecky and C Mudde "Two Sides of Euroscepticism" (2002) 3 European Union Politics 297.

25   Maurits J Meijers "Radical Right and Radical Left Euroscepticism: A Dynamic Phenomenon" (2017), Jacques Delors Institute Berlin Policy Paper No 191.

26 Erika J Van Elsas "United against a Common Foe? The Nature and Origins of Euroscepticism amongst left-wing and right-wing citizens" (2016) 39 West European Politics 1181.

and in particular the harder variety which opposes European integration *per se* rather than seeking reform of the EU. The issues that appear most regularly to underpin Euroscepticism today are an overall objection to the dilution of national sovereignty, and a belief that freer transnational economic exchange in general and immigration in particular are exacerbating economic insecurity and cultural disruption. At the same time, it seems that the issue of support for (or opposition to) European integration emerged, like globalism versus nationalism, as a new and distinct social cleavage which has not easily been internalized or prioritized by traditional political parties whose core programs did not adapt to reflect its salience.[27] New parties, on the other hand, arose rapidly in response to this emerging societal cleavage and adopted strong and sometimes extreme stances on it, and hence have attracted voters who were dissatisfied by the failure of traditional and mainstream parties to reflect their views on the issue.[28]

The second development has been the gradual rise of the far-right movement and far-right political parties across Europe. This resurgence, which has been taking place over a number decades, has also generated an extensive academic literature, much of which seeks to understand how a political movement which was banished to the fringes after the defeat of Nazism following the second world war has re-emerged considerably strengthened in many European states, and what the factors are which have led to its re-emergence.[29] Theories include the successful reframing of the far-right which took place through the marriage of fervent nationalism presented as authentic civic values, [30] with populist hostility against the establishment and anti-immigrant sentiment, as well as the poaching by the far-right of the economic policies of the social democrat left, including a shift towards embracing redistributive welfare policies (albeit for citizens only) and against policies of austerity.[31]

The third relevant trend is the turn against what has been termed neoliberal capitalism.[32] Unlike the other two trends described above, this development began as a clearly left-wing movement,

---

[27] L Hooghe and G Marks, "Cleavage Theory meets Europe's crises: Lipset, Rokkan and the Transnational Cleavage" (2017) Journal of European Public Policy 1350

[28] See for an analysis of the 2014 European Parliament elections in particular, when Eurosceptical parties won significant support: O Trieb "The Voter says No but nobody listens: Causes and Consequences of the Eurosceptic Vote in the 2014 European Parliament elections" (2014) 21 JEPP 1541.

[29] For a few samples see Roger Eatwell "The Rebirth of the Extreme Right in Europe" (2000) 53 Parliamentary Affairs 407, John Veugelers "A Challenge for Political Sociology: The Rise of Far-Right Parties in Contemporary Western Europe" (1999) 47 Current Sociology 78, Jens Rydren "Is Extreme Right-wing Populism Contagious? Explaining the Emergence of a New Party Family" (2005) 44 European Journal of Political Research 213 and Cas Mudde "Three Decades of Populist Rights Parties in Europe: So What?" (2012) 52 European Journal of Political Research 1. Mudde warned at the effect the far-right parties would have on the political spectrum, and predicted that they would not be destined to remain in opposition but that they would increasingly influence the policy agenda.

30 See Daphne Halikiopoulou, Steven Mock and Sofia Vasilopoulou "The civic zeitgeist: nationalism and liberal values in the European radical right" (2012) 19 Nations and Nationalism 107

[31] On the recent borrowing by far-right parties of the economic welfarist and anti-austerity policies of the left see A Sheehy "The Rise of the Far Right" February 11, 201, http://harvardpolitics.com/world/rise-of-far-right/ and Bogan Bugaric "Europe's Nationalist Threat" , May 18, 2018 http://prospect.org/article/europes-nationalist-threat. On the relationship between economic insecurity and the rise of far-right parties, see Tim Vlandas and Daphne Halikiopoulou "Why far right parties do well at times of crisis: the role of labour market institutions" ETUI Working Paper 2016.07, and Daphne Halikiopoulou, "Why are far-right parties increasing their Support across Europe? A note on the French Election" http://www.huffingtonpost.co.uk/daphne-halikiopoulou/french-election-far-right_b_16140574.html

[32] See David Harvey, A Brief History of Neoliberalism (2007)

spurred by intellectual critiques of capitalism and the global economic order from writers such as Noam Chomsky,[33] Susan George,[34] Naomi Klein,[35] Noreena Hertz,[36] as well as former Washington insiders such as Joseph Stiglitz.[37] The accompanying anti-globalization movement saw street protests against the World Trade Organization meeting in Seattle in 1999 spread to various parts of the world, including to Europe where organizations like ATTAC[38] and the European Social Forum were established.[39] However, with the onset of the global financial crisis and the Euro crisis, the backlash against the policies of austerity promoted by international organizations such as the International Monetary Fund and the EU itself saw critiques of the global economic order spread well beyond their origins on the left. As already noted, opposition to austerity policies in various European states has more recently come from all sides of the political spectrum and not just from the left. Right-wing and far-right parties in countries including France, the Czech Republic, Hungary, Poland and Slovakia have adopted anti-globalist and economically nationalist policies which reject austerity and promote statist economic policies centered on welfare. A relationship between economic insecurity and a rejection of globalism, including freer trade and open borders (and including rejection of the EU), has been suggested by a number of studies,[40] even though cultural factors are also clearly relevant to the rise in nationalist sentiment in the EU and elsewhere, and to the rejection of internationalism.[41] Nevertheless, even if the Euro crisis helped to fuel support for extreme right-wing parties, it seems clear that the resurgence and growth of these parties significantly pre-dated the economic crisis in the EU, and that public hostility immigration was a more salient factor than economic disruption and austerity.[42]

How should the relationship between these three sets of developments be understood, when seeking to address the question whether European integration has fueled the rise of illiberal authoritarianism? It seems clear that Euroscepticism has been a feature of politics in many European states, most obviously since the time of the Maastricht Treaty in 1993, and that opposition to the EU has been growing steadily in many member states for over two decades, rising through the more recent period of the refugee crisis and economic crisis. However, it would not

---

[33] N. Chomsky, *Profit Over People: Neoliberalism and Global Order* (1999)

[34] S. George, *A Short History of Neoliberalism* (1999) https://www.tni.org/en/article/short-history-neoliberalism

[35] N. Klein, *This Changes Everything: Capitalism vs Climate* (2014).

[36] N. Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (2001)

[37] J. Stiglitz, *Globalization and its Discontents* (2002)

[38] www.attac.org. ATTAC describes itself as "an international organization involved in the alter-globalization movement. We oppose neo-liberal globalization and develop social, ecological, and democratic alternatives so as to guarantee fundamental rights for all." It is best known for its advocacy of a so-called Tobin tax on international financial movements.

[39] See E. Féron "Anti-Globalization Movements and the European Agenda" (2004) 17 European Journal of Social Science Research 119.

[40] B. Burgoon "Inequality and anti-globalization backlash by Political Parties" GINI Discussion paper 14/2011, http://www.gini-research.org/system/uploads/267/original/DP_14_-_Burgoon.pdf?1322478852, Anabel Kuntz, Eldad Davidov and Moshe Semyonov "The dynamic relations between economic conditions and anti-immigrant sentiment: A natural experiment in times of the European economic crisis" (2017) International Journal of Comparative Sociology. Also Vlandis and Halikiopoulou, (2016) n 31 above.

[41] R Ingleheart and P Norris, "Trump, Brexit and the Rise of Populism: Economic have-nots and Cultural Backlash" Harvard Kennedy School (2016) RWP16-026

[42] M Goodwin "Europe's Far Right: Don't Blame the Eurozone Crisis", Chatham House Royal Institute of International Affairs (2012), https://www.chathamhouse.org/media/comment/view/185343.

be correct to infer that opposition to the EU, or Euroscepticism, provides the main explanation - or even a dominant explanation - for the rise and revival of the far-right across Europe. Any easy inference of this kind is challenged by the evidence that the resurgence of the right in Europe has been a gradual trend unfolding over more than three decades, with origins and causes well before the rise of Euroscepticism or opposition to the EU's form of supranational governance had emerged.[43] At the same time, it is undeniable that far-right parties have exploited and benefited from the fact that mainstream parties across the European continent have been overwhelmingly supportive of European integration, and that the growing nationalism-globalism and national-European cleavages were not reflected adequately in the programs or policies of most of the traditional parties. Along these lines, Renee Buhr has argued that extremist parties benefited from a social backlash against European integration in the post-Maastricht period, at a stage when virtually all mainstream parties supported European integration.[44] In offering themselves as parties which provided a voice for concerns about EU integration, these parties of the extreme right (and some on the left which opposed EU membership or EU policies) benefited electorally from the pro-integration consensus of the mainstream parties. Further, the growing critique of neoliberal capitalism, which originated on the left of the political spectrum but spread to the right in particular after the global financial crisis, provided further grist to far-right parties which combine opposition to the EU and its single-market policies with economic and cultural nationalism. Hence the later and stronger backlash after 2009, in the wake of the Euro crisis and the broader economic crisis, against the market-liberalization and austerity policies of the EU brought further support for far-right parties which also espoused and promoted populist illiberalism. A final point worth making is one which was raised by Peter Mair in 2006 when he suggested that Euroscepticism was something more than opposition to or scepticism towards the European Union and its policies, but might be a form or species of a more general trend which he called polity-scepticism.[45] By this he meant that Euroscepticism was not so much an objection to the EU as a form of regional integration, but actually seemed to be part of a broader democratic malaise manifesting itself in a growing lack of political engagement by citizens, a disenchantment with politics and representative democracy, and a lack of electoral or party engagement.

To conclude, while there is clearly a relationship between opposition to the EU – Euroscepticism - and a growth in support for far-right parties which promote or espouse authoritarian illiberalism, it would be overstating the evidence to suggest that European integration is responsible for the resurgence of such parties, and that supranational governance is thus proving to be a challenge to liberal constitutionalism. Nevertheless, Euroscepticism, together with a critique of global capitalism and economic neoliberalism (which the EU is considered by at least a significant portion of its citizens to exemplify), and a more general disaffection with the political system which has

---

[43] See R Eatwell "The rebirth of the 'extreme right' in Western Europe?" (2000) 53 Parliamentary Affairs 407 and
 C Mudde "Three Decades of Populist Radical Right Parties in Western Europe" (2013) 52 European Journal of Political Research 1.

[44] R Buhr "Seizing the Opportunity: Euroscepticism and Extremist Party Success in the Post-Maastricht Era" (2012) 47 Government and Opposition 544.

[45] P. Mair "Polity Scepticism, Party Failings and the Challenge to European Democracy" Uhlenbeck Lecture (2006), https://www.tcd.ie/Political_Science/undergraduate/module-outlines/ss/political-parties/PolP/MairUhlenbeckLecture06.pdf

been directed against the EU as well as against mainstream domestic politics, have helped authoritarian and illiberal parties to strengthen and expand.

Quite apart from the question of whether opposition to or scepticism towards the EU has fueled the rise in support for illiberal authoritarianism and the far-right, however, is the more general question whether there is something in the project and structure of European integration itself that poses a challenge to liberal constitutionalism.

3. Is the project of supranational European integration a challenge to liberal constitutionalism?

Has European integration undermined liberal constitutionalism? Is there something about the project of supranational governance established by the EU which in itself poses a challenge to liberal constitutionalism, understood in the terms described by the symposium editors?[46] To answer this question requires reflection on what the relationship of the EU, considered as a form of supranational governance, is to liberal constitutionalism.

At least in its earliest form, when a draft treaty establishing a European Political Community was drawn up in 1952,[47] the project of European integration arguably resembled a continent-wide experiment in liberal constitutionalism. Under the terms of the draft treaty there were to be political decision-making bodies modelled on national federal systems; a Bill of Rights in the shape of the recently drafted European Convention on Human Rights was to be integrated into the European political community; and the European Court of Human Rights in Strasbourg was to be given jurisdiction over disputes arising under the new treaty. This was an early federal vision for an integrated European continent with a liberal democratic constitution and system of government. As is well known, however, that vision did not survive the rejection of the European Defence Treaty by France in 1953, and with it the draft European Political Community also disappeared.[48]

As a consequence of the failed experiment with the European Defence Community and draft Political Community, the European Economic Community which was established some years later by the Treaty of Rome was far from the fully-fledged political community that had earlier been envisaged. The 1957 Treaty of Rome establishing a European Economic Community (EEC) was deliberately circumscribed in its scope and ambition, being limited largely to the establishment of a common market, in part to avoid the fate that had befallen the earlier attempts at European integration. Nevertheless, even in the circumscribed form in which it was created by the 1957 EEC treaty, the European Economic Community reflected some of the embryonic elements of a liberal democratic political system. The EEC Treaty included provision for a parliamentary assembly, which although not initially to be directly elected, contained a provision envisaging the

---

[46] See n. 3 above.
[47] See Richard T. Griffiths, Europe's First Constitution: The European Political Community 1952–54 (2005) and G de Búrca, "The Road not Taken: the EU as a Global Human Rights Actor" (2011) 105 AJIL 649.
[48] R Pastor-Castro "The Quai d'Orsay and the European Defence Community Crisis of 1954" (2006) 91 History: Journal of the Historical Association 306.

introduction of direct elections at a later date.[49] Nevertheless, the new supranational organs of governance - the Commission and the Council of Ministers -, and the division of powers between them, did not amount to the kind of politically accountable and representative government to be found within most of the European Union's member states at the time. Further, while a reasonably strong Court of Justice was created to adjudicate on disputes under the treaty, there was no mention of human rights, and despite the provision for judicial review of acts of the European Community, access to judicial review for individuals was fairly limited through restrictive locus standi provisions.[50] By comparison with the earlier draft European Political Community treaty, any express reference to human rights or to the European Convention on Human Rights was omitted from the EEC Treaty.

Over the decades which followed, in a set of developments that is by now well known, the European parliament gradually became a directly elected body and eventually gained significant lawmaking powers in conjunction with the Council of Ministers,[51] Around the same time the European Court of Justice (ECJ), after initial hesitation in a number of cases which unsuccessfully tried to introduce ideas of human rights from the German legal order into EU law,[52] declared that fundamental rights were part of EU law as unwritten general principles of law, and this precipitated a period of gradual integration of human rights provisions into the EU treaties and through ECJ case law.[53] Almost forty years after the creation of the European Economic, Coal and Steel and Atomic Energy communities, the Maastricht Treaty transformed the European Communities into the European Union. This was a Union with its own currency, with a powerful law-making Parliament, and a Union which introduced a form of European citizenship for all member state nationals.[54] The new Treaty on European Union introduced by the Maastricht Treaty contained prominent references to the European Convention on Human Rights and to the general principles of EU law. In other words, even while the language of statehood continued to be consciously avoided,[55] the EU began to emerge as a real political union and to resemble a system of liberal constitutionalism on a European scale.

A debate on whether the European Union had a constitution, or could be considered as a constitutional order, which until then had been the preserve of a few academic lawyers, began in

---

[49] For an account of the influence of federal ideas on the early period of European integration, see S Pistone, *The Union of European Federalists: From the Foundation to the Decision on Direct Election of the European Parliament (1946-74)* (2008).

[50] See e.g. J. Vining and E Stein "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context" (1976) 70 AJIL 219

[51] R Corbett, F. Jacobs and D Neville, *The European Parliament* (2016).

[52] See for discussion Manfred A Dauses "The Protection of Fundamental Rights in the Community Legal Order" (1985) 10 European Law Review 398.

[53] For discussion of this development by the Court, see G de Búrca, "The Road Not Taken", n 47 above.

[54] The Maastricht Treaty introduced Article 8 TEU, which (since the coming into force of the Lisbon Treaty in 2010) has now been renumbered as Article 20 of the Treaty on the Functioning of the European Union, which provides that "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union".

[55] For a debate on the pros and cons of a vision of EU 'statehood', see G Mancini "Europe: The Case for Statehood" (1998) 4 European Law Journal 29 and J H H Weiler "Europe: The Case against the Case for Statehood" (1998) 4 European Law Journal 43.

earnest after the Maastricht treaty,[56] and continued apace until the decision of the heads of state and government of the EU to establish in 2004 a Convention tasked with the drafting of a Treaty establishing a Constitution for Europe.[57] The drafting of this Treaty establishing a Constitution for Europe proved in retrospect to be the high point of European constitutionalism thus far, and the rejection of the Treaty by popular referendum in the Netherlands and France in 2005 signalled the end of the explicit constitutional vision for the EU.[58] Such a defeat for the Treaty by way of a popular vote in two of the founding states of the EU meant that the formal EU constitutional project was abandoned and the treaty remained unratified. Nevertheless, after a number of years of 'reflection' and discussion amongst the EU heads of state and government, the bulk of the draft constitutional treaty, albeit shorn of the symbolic constitutional provisions that were taken to have been offensive to the people of France and the Netherlands, was enacted into law as the Lisbon Treaty in 2009.[59]

While academic and public debate as to whether the EU had or needed a constitution abated for some time after the failure of the Constitutional treaty, one of the underlying questions from that earlier debate remained particularly salient: was the European Union in fact a constitutional order? One prominent strand of scholarly literature following the Maastricht Treaty centered around a debate about whether or not the EU has a 'demos'. The gist of the 'no demos' argument was that since the European Union did not itself have a demos, a sufficiently unified people, it lacked the preconditions for genuine democratic legitimacy as a polity.[60] This view was contested, and various competing theories of European Union democracy – including the idea that the EU is best considered as a 'demoi-cracy' – were advanced.[61] And yet, despite the ongoing debate about the EU's democratic legitimacy and democratic deficit, [62] it seemed by the time of the enactment of

---

[56] See J.C. Piris, "Does the European have a Constitution? Does it Need one?" Jean Monnet Working Paper no. 5/2000, http://www.jeanmonnetprogram.org/archive/papers/00/000501.html, and N. Walker "European Constitutionalism in the State Constitutional Tradition" EUI Working Paper 2006/12, http://cadmus.eui.eu/handle/1814/6248

[57] https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf

[58] See R Streinz, "The European Constitution after the Failure of the Constitutional Treaty" (2008) 63 Zeitschrift für öffentliches Recht 159

[59] See Jan Wouters, Luc Verheij, Philipp Kiiver (eds) *European Constitutionalism Beyond Lisbon* (2009) and G de Búrca, "Reflections on the EU's path from the Constitutional Treaty to the Lisbon Treaty" Fordham Law Legal Studies Research Paper No. 1124586.

[60] J.H.H.Weiler "Does Europe Need a Constitution?: Demos, Telos and the Maastricht Decision" (1995) 1 European Law Journal 219.

[61] V Schmidt "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'" (2013) 61 Political Studies 2; K. Nicolaidis "The Idea of European Demoicracy" in J. Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012).

[62] For one of the classic debates on the EU's 'democratic deficit', see Andreas Føllesdal and Simon Hix "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik". (2006) 44 Journal of Common Market Studies 533-562; Giandomenico Majone "Europe's Democratic Deficit: A Question of Standards" and Andrew Moravcsik "The Myth of the Democratic Deficit" (2008) Intereconomics: Journal of European Public Policy 331-340. For some more recent contributions, see Antoine Vauchez, *Democratizing Europe* (Palgrave, 2016) and Richard Bellamy and Sandra Kröger "The Role of National Parliaments and Parties in the EU's System of Governance" (2014) 67 Parliamentary Affairs 437. Recently too the debate on the EU's 'democratic deficit' has moved beyond the realm of academic scholarship and into the mainstream media: J. Rankin "Is the EU Undemocratic?", The Guardian, 13 June 2016, https://www.theguardian.com/world/2016/jun/13/is-the-eu-undemocratic-referendum-reality-check; "How to

the Lisbon Treaty that the EU had come to include most of the other main elements of a liberal constitutional system. It has a written constitution-like set of treaties, including a Charter of Fundamental Rights. The European Court of Justice conducts rights-based judicial review, and the European Parliament is directly elected. The Treaties include a commitment to the rule of law (including a 'rule of law' mechanism for disciplining states),[63] and power is distributed across the various institutions in such a way as would appear to prevent any one institution from dominating or concentrating power. Nevertheless, despite parliamentary elections, a powerful European Parliament, democratically elected representatives in the Council of Ministers, a legally enshrined principle of transparency, a strong EU court, and various layers of legal and constitutional rights protection, the EU still lacks real responsiveness to the preferences of its citizens.

Hence as far as its democratic credentials are concerned, there is an ongoing debate about the quality of democracy in the EU, focusing particularly on whether there is a European people, and on the lack of adequate responsiveness to citizens within the EU system of governance. At the same time, however, and despite this debate about its democratic responsiveness, the European Union's political system nonetheless includes and embodies many of the key features of liberal constitutionalism. Indeed the EU formally insists, under Articles 2, 7 and 49 of the Treaty on European Union, on a commitment on the part of all of its member states to human rights, democracy and the rule of law, and has wrestled in recent years with the question of how it should tackle democratic backsliding in Hungary and Poland. In other words, despite contestation over the quality of democracy in the European Union, the EU in the main is constructed as, and contains the main elements of, a liberal constitutional political system. Why then pose the question whether the structure and functioning of European supranational governance poses a challenge to liberal constitutionalism? If the EU is founded on the values of democracy, human rights and the rule of law, and seeks to condition accession to the EU on adherence to these values, how can it pose a risk to them?

One main reason is the risk that, whatever the strength and quality of its own constitutional features and institutional structures, the functioning of the EU may nonetheless undermine rather than support or enhance the democratic constitutional systems of member states.[64] There are a number of different if related dimensions of this risk. A first is the impact to date of the articulation by the European Court of Justice of a broad and fairly uncompromising principle of supremacy of European Union law over national law. A second is the related issue of national identity, and more specifically the question whether European integration has undermined important aspects of national constitutional identity. A third is the general trend towards 'executive dominance' in the EU, and its exacerbation by the technocratic and managerial workings of the EU supranational institutions. Finally, there is the impact of the EU's prioritization of its project of economic

---

address the EU's Democratic Deficit", The Economist 23 March, 2017 https://www.economist.com/news/special-report/21719196-institutions-need-reform-how-address-eus-democratic-deficit; and Amanda Taub, "The EU is Democratic: It just doesn't Feel that Way", New York Times, June 29, 2016, https://www.nytimes.com/2016/06/30/world/europe/the-eu-is-democratic-it-just-doesnt-feel-that-way.html?_r=0

[63] See Article 7 of the Treaty on European Union, and the Commission Communication on an EU Framework to Strengthen the Rule of Law COM(2014) 158

[64] See recently D. Grimm, *The Constitution of European Democracy* (2017)

liberalization over other domestic and transnational goals, and particularly its impact on the functioning of national social democracy.

Beginning with the principle of the supremacy, the idea of the primacy of EU law over national law was first introduced by the Court of Justice in the early 1960s,[65] and gradually took hold across the EU.[66] From as early as 1970, the Court insisted on the supremacy of EU law over all provisions of national law of whatever rank, including provisions of the national constitution.[67] Various aspects of the supremacy principle were challenged from the outset, with particular concern being expressed over the ECJ's assertion that any binding and directly effective provision of EU law – whatever its content –must in the interests of uniformity of EU law take precedence over any provision of national constitutional law, even over basic constitutional rights. This claim has generated controversy and push-back from domestic constitutional courts ever since the first 'Solange' judgment of the German Bundesverfassungsgericht in 1974.[68] In that ruling the German Constitutional Court declared that the part of the Constitution dealing with basic rights was an inalienable essential feature of German constitutional law and that given the state of the EU at the time (when it was still the European Economic Community with fewer developed features of liberal constitutionalism, lacking a directly elected parliament or an entrenched bill of rights), the guarantees of basic rights in the German constitution would prevail over EU law in the event of conflict.[69] And even though, as described above, the EU has developed significantly since that time and currently has a powerful directly-elected Parliament as well as a binding Charter of Fundamental Rights, the controversy over the ECJ's claim that European Union law must prevail over domestic constitutional rights has continued, and a series of robust rulings have been given by a range of national constitutional courts, including the *Bundesverfassungsgericht*, articulating limits to the operation of the principle of supremacy of EU law. Cases such as the *Melloni* reference to the ECJ from the Spanish Constitutional Court involving a conflict between the provisions of the EU Arrest Warrant the right to a fair trial in the Spanish Constitution,[70] and the *Taricco* reference from the Italian Constitutional Court involving a conflict between the principle of legality in Italian constitutional law and EU VAT law demonstrate that the kinds of concerns expressed in the first *Solange* case retain their significance.[71] In other words, national courts and other constituencies are concerned that EU law may undermine domestic constitutional law, by failing to respect the specificity or importance of particular rights and protections guaranteed as part of national constitutional law.

Secondly and somewhat relatedly, there is the question of whether European integration has weakened or undermined the national constitutional identity of EU member states. Liberal

---

[65] The foundational trio of cases introducing and articulating the scope of the supremacy of EU law over domestic law are cases 6/64, *Costa v Enel* [1964] ECR 585, 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125 and 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

[66] K. Alter, *Establishing the Supremacy of EU law* (2001).

[67] Case 11/70, *Internationale Handelsgesellschaft,* n 65 above.

68 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540

[69] Id at 550.

[70] Case C–399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

[71] Case C-105/14, *Taricco* EU:C:2015:555

constitutionalism has until now been embedded within the nation state, establishing a framework for the functioning of a healthy democratic political system, and the constitution has generally embodied elements of national identity. The EU, however, is not a nation state, and although it has effectively established a continent-wide system of liberal constitutionalism, its democratic system is relatively weak and non-contestatory, and its identity is complex, contested and 'polyphonous'.[72] How has this system of EU governance affected national constitutional identities? Political and popular concern about the process of European integration undermining or weakening national identity, including national constitutional identity, resulted in the addition in 2010 of a new provision by the Lisbon Treaty (and previously by the unratified Constitutional Treaty) to the Treaty on European Union (TEU). Article 4(2) of the TEU now provides for the first time that the EU "shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". This provision has already generated a voluminous academic literature, with many applauding the move to provide treaty-based recognition and protection for national constitutional identities.[73] Others, however, have noted the paradoxical risk that this provision may be invoked by governments such as Hungary which are deliberately undermining liberal constitutional safeguards within their own political systems, and using the new provision in Article 4(2) to ward off attempts by the EU or the ECJ to prevent them from doing so.[74] Hence the impact of the EU on national constitutional identity, insofar as the question is whether it is likely to undermine liberal constitutionalism rather than to bolster or support it, seems not to be a straightforwardly negative one.

A third aspect of the concern that the EU is posing a challenge to domestic constitutional democracy relates to the problem of executive dominance. The suggestion that there may be a trade-off between democracy and transnational or global governance was made in a different context in 1971 by Karl Kaiser.[75] While transnational cooperation and interdependence – including in the EU context - has been a strongly positive force in all sorts of ways, the question is whether such interdependence, even if it has reduced war and increased human welfare in many ways, might also be linked with a weakening in the quality of existing state-based democratic governance. In the EU context, it has been argued that the process of integration has given rise to

---

[72] See J. Pelabay, K. Nicolaidis and J. Lacroix "Echoes and Polyphony: In Praise of Europe's Narrative Identity", in J. Lacroix and K. Nicolaidis (ed), *European Stories: Intellectual Debates on Europe in National Contexts* (2011)

[73] A Von Bogdandy "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty" (2011) 48 CMLRev 1417.

[74] See G. Halmai "National(ist) constitutional identity: Hungary's road to abuse Constitutional Pluralism" EUI Working Paper Law 2017/08. More generally, see T Konstantinides "'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 Cambridge Yearbook of European Legal Studies 195, and A. Saiz Arnaiz and C. Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (2013). For a distinction between national identity and constitutional identity, see E. Cloots "National Identity, Constitutional Identity and Sovereignty in the EU" (2016) Netherlands Journal of Legal Philosophy 82

[75] Karl Kaiser "Transnational Relations as a Threat to the Democratic Process" (1971) 25 International Organization 706. For a more recent discussion of some of the tensions between international legal governance and democracy, see Joseph Weiler "The Geology of International Law" (2004) 64 ZaöRV 547. For the opposite argument that multilateral and international institutions may enhance rather than undermine domestic democracy, see R. Keohane, S. Macedo and A. Moravcsik "Democracy-enhancing Multilateralism" (2009) 63 International Organization 1.

the gradual dominance of the executive branches, and has weakened the role, cogency and effectiveness of domestic democratic mechanisms and systems.[76] Some have described the phenomenon more sharply as 'collusive delegation' by national governments to transnational bodies and organizations, enabling governments and executives to work collectively at European and international level to achieve their goals in ways that deliberately bypass national democratic institutions, and increasing concern that European (and global) governance institutions may be weakening or undermining domestic democratic systems.[77] It might even be argued that moral hazard is built into the establishment of many international institutions, in that they allow or encourage domestic policy-makers to bypass domestic democratic institutions, and dis-incentivize domestic democratic bodies from robust engagement with policies which are perceived to be within the purview of transnational or foreign policy actors.[78]

A fourth strand of the critique that the EU is undermining domestic constitutional democracy has been articulated for some years since the Maastricht Treaty, in particular by a group of prominent German scholars including Fritz Scharpf, Claus Offe, Wolfgang Streeck and Christian Joerges, who focus on the way in which the EU treaties have promoted a particular ordoliberal vision.[79] They argue that the EU's promotion of transnational economic integration has prioritized 'negative' integration, the dismantling of regulatory barriers to interstate trade, over positive integration to pursue welfare goals and protect social rights, and that this set of priorities has effectively been written into the EU treaties in a way that is difficult to change and that overrides key domestic institutions and choices. A central aspect of their concern is that the EU lacks the institutional and social resources to pursue an active and adequate Europe-wide social policy, and yet through its deregulatory and monetary policies has weakened the capacity of national social democracies to fulfil their goals, and undermined the functioning of those democracies. After the onset of the Euro crisis in 2009, the expansion of technocratic governance and the imposition of austerity policies by the EU and the International Monetary Fund, which have had such profoundly negative social effects on debtor countries and particularly on Greece, added powerful grist and a new dimension to these critiques.[80] The fact that fundamental economic rules – whether free movement and competition rules, or excessive deficit provisions – are written into the EU treaties and become effectively obligatory for Member States means that the space for domestic politics

---

[76] See e.g. Deirdre Curtin "Challenging Executive Dominance in European Democracy" (2014) 77 Modern Law Review 1.

[77] See the claim of Klaus Dieter Wolf in "The New Raison d'État as a Problem for Democracy in World Society", (1999) 5 European Journal of International Relations 333, applied to the EU by Mattias Koenig-Archibugi in "International Governance as New Raison d'Etat: The Case of the EU CFSP" (2004) 10 European Journal of International Relations 147

[78] I am grateful to Aziz Huq for this point.

[79] See e.g. F. Scharpf "The Assymetry of European Integration, or Why the EU cannot be a 'Social Market Democracy' KFG Working Paper no 6/2009, https://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_6.pdf, C. Offe "The European Model of "Social" Capitalism: Can It Survive European Integration?" (2003) 11 Journal of Political Philosophy 437, C. Joerges, "Rechtsstadt and Social Europe: How a Classical Tension Resurfaces in the European Integration process" (2010) 9 Comparative Sociology 65. See also S Lehndorff, *A Triumph of Failed Ideas: European Models of Capitalism in the Crisis* (2012).

[80] See W. Streeck "Markets and People: Democratic Capitalism and European Integration" (2012) 73 New Left Review 63, and the more developed arguments in his book *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014, 2017).

and contestation over such issues is more or less closed. While this concern may seem to be more about the impact of EU economic integration goals on domestic welfare policies, rather than its impact on liberal constitutionalism, the fact that social rights are written into the constitutions of some member states, or that the welfare state or social democracy is an important element of the constitutional system of certain member states (as in the German constitution's guarantee of a democratic and social federal state) brings the two issues closer together.

4. Conclusions

This article began by reflecting on the relationship between the European Union's system of supranational governance, the rise of illiberal populism and authoritarianism, and the decline of liberal constitutionalism.   Having considered whether the Brexit vote – which has been widely seen as a kind of populist revolt against a sovereignty-constraining EU – was a part of this trend, I concluded that while certain elements underpinning the vote to leave the EU reflected illiberal or authoritarian tendencies, the Brexit decision overall cannot be said to represent a move against liberal constitutionalism or in favor of illiberal authoritarianism. Similarly, although the spread of Euroscepticism to which the deepening and expansion of European integration gave rise has benefited extreme right-wing movements and parties across Europe, the re-emergence and growth of the far-right in various European states had begun well before strong anti-EU sentiment became prevalent. Nevertheless, as elaborated in the previous section, even though the EU is itself now in many respects firmly committed to liberal constitutionalism and to promoting the spread of democracy and constitutionalism, the functioning of EU supranational governance has challenged and arguably weakened national constitutional institutions and norms in various ways. In particular, the lack of responsiveness of EU governance institutions to citizens, the judicial declaration of unconditional primacy of all EU laws over national constitutional rights, the growth of executive dominance and technocratic governance and the bypassing of domestic parliamentary and democratic institutions, as well as the weakening of state-based social democracy through the EU's prioritization of deregulatory and economically neoliberal policies (highlighted even more prominently during the management of the Eurocrisis) have been ongoing sources of concern.

Are these challenges to liberal constitutionalism intrinsic to the process of EU supranational governance, and an inevitable consequence of the project of transnational integration?   I suggest that they are not inherent in the project of regional or supranational integration, but are contingent although currently prominent features of the kind of governance system which has developed in the European Union. However, the substantial range of challenges described above points to the need for a set of reforms to which the EU has been resistant to date.

As far as the challenge of unconditional and judicially-determined EU supremacy over domestic constitutional rights is concerned, a great deal has already been written about constitutional pluralism in the EU and the ability of national constitutional courts not to follow the rulings of the European Court of Justice when they are considered to threaten or undermine fundamental

provisions of the domestic constitutional order.[81] At the same time, the development of greater trust between the European Court of Justice and domestic constitutional courts would help in handling those cases in which an apparent conflict between EU law and national constitutional rights are at stake, and could encourage appropriate deference on the part of the ECJ in those cases in which an important national constitutional right is genuinely at issue rather than being instrumentally invoked to avoid the application of EU law for other reasons. But there is no reason why the principle of supremacy of EU law should in itself constitute a challenge liberal constitutionalism at the national level.

As far as enhancement of the responsiveness and democratic nature of the EU and countering the tendency towards executive dominance is concerned, most of the official reform proposals that have been contemplated in recent years have centered on further strengthening of the role of the European Parliament, or in some cases minor enhancement of the role of national parliaments in the EU process. But such reforms are highly unlikely to address the entrenched problems of the unresponsiveness of EU governance institutions,[82] or to take sufficiently seriously the Lisbon Treaty's newly articulated commitment to EU democratic principles.[83]   The EU institutions and member state governments have been notably ambivalent about more innovative proposals for involving civil society in European governance and deepening the democratic responsiveness of the EU, despite the range of interesting and ambitious suggestions which have been made in recent years.[84] A willingness to undertake such reforms necessarily entails some risk, given the growth of popular opposition to the EU in recent years, and given how EU political leaders have come to fear the use of devices such as popular referenda. On the other hand, the development of direct, deliberative and grassroots forms of engagement are crucial to build genuine democratic support for the EU project and to enable real participation on the part of the governed in the shape of European Union governance. Such initiatives should not be considered as alternatives to but as supplements to the existing elements of representative democracy within the EU. A process of reform needs to go beyond top-down or superficial forms of consultation or consent-seeking based on already-completed proposals drawn up by pre-selected groups, and needs to be genuinely open to novel and even challenging ideas. Importantly, as others have pointed out, such democratic engagement and reform should not be undertaken merely in order to bolster the legitimacy and acceptability of previously taken steps of European integration.[85]   A willingness to engage in deeper democratic consultation and reform would also mean the EU confronting the third of the

---

[81] For book-length treatments see K. Jaclic, *Constitutional Pluralism in the EU* (2014) and J. Komarek and M Avbelj (eds), *Constitutional Pluralism in the EU and Beyond* (2012)

[82] See e.g. G Smith "Transnational Democratic Innovation in the European Union: Flirting with Deliberative and Plebiscitary Design" (2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2299603 ; U. Liebert "Remedying the Limits of Representative and Direct Democracy: Deliberative Strategies for Citizen Participation in the EU" (European Parliament, 2012)
http://www.europarl.europa.eu/document/activities/cont/201210/20121011ATT53444/20121011ATT53444EN.pdf;
R. Kies and P. Nanz, *Is Europe Listening to US? Successes and Failures of EU Citizen Consultations* (2013)

[83] See in particular Articles 10-12 of the Treaty on European Union.

[84] See R. Youngs, *The EU Beyond the Crisis: The Unavoidable Challenge of Legitimacy* , Carnegie Europe, (2013) S. Hennette, T. Piketty, G. Sacriste and A. Vauchez "For a Treaty Democratising Euro-area Governance" (2017) https://www.socialeurope.eu/treaty-democratizing-euro-area-governance-t-dem Democratizing the Eurozone?, and A Vauchez, *Democratizing Europe* (2017)

[85] R Youngs, n 84 above.

challenges articulated above, namely the increasingly widespread opposition to the EU's prioritization of economic integration over social goals, and more generally to the sense that the policies of austerity pursued in the management of the Euro-crisis have undermined social democracy and other domestic welfare and constitutional commitments.

In short, the project of supranational European integration clearly carries risks to the functioning of liberal constitutional democracy at the national level, and has posed challenges to aspects of domestic liberal constitutionalism and to the healthy functioning of democracy that liberal constitutionalism is designed to protect. Yet none of these challenges is inevitable to a project of continent-wide integration and supranational governance. However, the kinds of reforms which would need to be undertaken in order to create a system of EU supranational governance which supports and enhances domestic constitutional democracies in the pursuit of a set of shared, continent-wide goals which have been the subject of genuine democratic deliberation and agreement, have not yet been undertaken or even seriously contemplated by the EU and its member governments. Unless and until they are prepared to do so, the popular discontent and disaffection which has fueled not just the spread of Euroscepticism but also illiberal and authoritarian political forces in many EU member states is likely to continue to grow.